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WHAT: Free public briefings (approximately 3 hours) to present:

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4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, June 14, 2011
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

2 CFR Part 780

22 CFR Part 208

RIN 0412–AA67

Implementation of OMB Guidance on Government-Wide Debarment and Suspension (Non-procurement)

AGENCY: U.S. Agency for International Development.

ACTION: Final Rule.

SUMMARY: The U.S. Agency for International Development (USAID) is removing its regulation implementing the Government-wide common rule on debarment and suspension (non-procurement), currently located in Part 208 of Title 22 of the Code of Federal Regulations (CFR), and issuing a new regulation to adopt the Office of Management and Budget (OMB) guidance at 2 CFR part 180. This regulatory action implements the OMB's initiative to streamline and consolidate into one title of the CFR all Federal regulations on debarment and suspension. These changes constitute an administrative simplification that would make no substantive change in USAID policy or procedures for debarment and suspension.

DATES: This final rule is effective on August 12, 2011 without further action. Submit comments by July 13, 2011 on any unintended changes this action makes in USAID policies and procedures for debarment and suspension. All comments on unintended changes will be considered and, if warranted, USAID will revise the rule.

ADDRESSES: You may submit comments, identified by RIN 0412–AA67 in the subject line to Ms. M. E. Yearwood, USAID—M/OAA/P, SA–44, 867B, 1300 Pennsylvania Ave., NW., Washington, DC 20523, e-mail *myearwood@usaid.gov,* fax (202) 567–4695

FOR FURTHER INFORMATION CONTACT: Melita E. Yearwood, Procurement Analyst, Office of Acquisition and Assistance, Policy Division at (202) 567–4672.

SUPPLEMENTARY INFORMATION:

Background

When it established Title 2 of the CFR as the new central location for OMB guidance and agency implementing regulations concerning grants and agreements [69 FR 26276, May 11, 2004], OMB announced its intention to replace common rules with OMB guidance that agencies could adopt in brief regulations. OMB began that process by proposing [70 FR 51863, August 31, 2005] and finalizing [71 FR 66431, November 15, 2006] Government-wide guidance on non-procurement suspension and debarment in 2 CFR part 180.

The guidance requires each agency to replace the common rule on debarment and suspension requirements that the agency previously issued in its own CFR title with a brief regulation in 2 CFR adopting the Government-wide policies and procedures. One advantage of this approach is that it reduces the total volume of drug-free workplace regulations. A second advantage is that it collocates OMB's guidance and all of the agencies' implementing regulations in 2 CFR.

OMB published interim final guidance in the Federal Register on August 31, 2005 [70 FR 51863]. The August 2005 **Federal Register** Notice stated that the substantive content of the interim final guidelines was intended to conform with the substance of the Federal agencies' most recent update to the common rule [68 FR 66534, November 26, 2003].

The Current Regulatory Actions

As the OMB guidance requires, USAID is taking two regulatory actions. First, we are removing the debarment and suspension common rule from 22 CFR Part 208. Second, to replace the common rule, we are issuing a brief regulation in 2 CFR Part 180 to adopt the Government-wide policies and procedures in the OMB guidance.

Invitation to Comment

Taken together, these regulatory actions are solely an administrative simplification and are not intended to make any substantive change in policies or procedures. In soliciting comments on these actions, we therefore are not seeking to revisit substantive issues that were resolved during the development of the final common rule in 2003. We are inviting comments specifically on any unintended changes in substantive content that the new part in 2 CFR would make relative to the common rule at 22 CFR part 208.

Administrative Procedure Act

Under the Administrative Procedure Act (5 U.S.C. 553), agencies generally propose a regulation and offer interested parties the opportunity to comment before it becomes effective. However, as described in the "Background" section of this preamble, the policies and procedures in this regulation have been proposed for comment two times—one time by Federal agencies as a common rule in 2003 and a second time by OMB as guidance in 2006—and adopted each time after resolution of the comments received.

This direct final rule is solely an administrative simplification that would make no substantive change in USAID's policy or procedures for debarment and suspension. We therefore believe that the rule is noncontroversial and do not expect to receive adverse comments, although we are inviting comments on any unintended substantive change this rule makes.

Accordingly, we find that the solicitation of public comments on this direct final rule is unnecessary and that "good cause" exists under 5 U.S.C. 553(b)(B) and 553(d) to make this rule effective on August 12, 2011 without further action, unless we receive adverse comment by July 13, 2011. If any comment on unintended changes is received, it will be considered and, if warranted, we will publish a timely revision of the rule.

Executive Order 12866

OMB has determined this rule to be not significant for purposes of E.O. 12866.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This proposed regulatory action will not have a significant adverse impact on a substantial number of small entities.

Unfunded Mandates Act of 1995 (Sec. 202 Pub. L. 104–4)

This proposed regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of $100 million or more in any one year.

Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Federalism (Executive Order 13132)

This proposed regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects

2 CFR Part 780

Administrative practice and procedure, Debarment and suspension, Grant programs, Grants administration, Reporting and recordkeeping requirements, Government procurement.

22 CFR Part 208

Administrative practice and procedure, Debarment and suspension, Grant programs, Grants administration, Reporting and recordkeeping requirements, Government procurement.

Accordingly, for the reasons set forth in the preamble, and under the authority of 5 U.S.C. 301, the USAID amends the Code of Federal Regulations, Title 2, Subtitle B, by establishing Chapter VII, consisting of part 780 and to read as follows:

■ 1. Chapter VII, consisting of part 780 is added to Title 2 to read as follows:

CHAPTER VII—AGENCY FOR INTERNATIONAL DEVELOPMENT

PART 780—NONPROCUREMENT DEBARMENT AND SUSPENSION

Sec.
780.10 What does this part do?
780.20 Does this part apply to me?
780.30 What policies and procedures must I follow?

Subpart A—General

780.137 Who in the Agency for International Development may grant an exception to let an excluded person participate in a covered transaction?

Subpart B—Covered Transactions

780.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

Subpart C—Responsibilities of Participants Regarding Transactions

780.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions

780.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

Subparts E–H—[Reserved]

Subpart I—Definitions

780.930 Debarring Official (Agency for International Development supplement to government-wide definition at 2 CFR 180.930).
780.1010 Suspending Official (Agency for International Development supplement to government-wide definition at 2 CFR 180.1010).

Subpart J—[Reserved]

Authority: Sec. 2455, Pub. L. 103–355, 108 Stat. 3327; E.O. 12549, 3 CFR, 1986 Comp., p. 189; E.O. 12689, 3 CFR, 1989 Comp., p. 235.

§ 780.10 What does this part do?

This part adopts the Office of Management and Budget (OMB) guidance in subparts A through I of 2 CFR part 180, as supplemented by this part, as the USAID policies and procedures for non-procurement debarment and suspension. It thereby gives regulatory effect for USAID to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" (3 CFR 1986 Comp., p. 189); Executive Order 12689, "Debarment and Suspension" (3 CFR 1989 Comp., p. 235); and section 2455 of the Federal Acquisition Streamlining Act of 1994, Public Law 103–355 (31 U.S.C. 6101 note).

§ 780.20 Does this part apply to me?

This part and, through this part, pertinent portions of the OMB guidance in subparts A through I of 2 CFR part 180 (see table at 2 CFR 180.100(b)) apply to you if you are a—

(a) Participant or principal in a "covered transaction" (see subpart B of 2 CFR part 180 and the definition of "non-procurement transaction" at 2 CFR 180.970);

(b) Respondent in a USAID suspension or debarment action;

(c) USAID debarment or suspension official; and

(d) USAID grants officer, agreements officer, or other official authorized to enter into any type of non-procurement transaction that is a covered transaction.

§ 780.30 What policies and procedures must I follow?

The USAID policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in subparts A through I of 2 CFR part 180 and any supplemental policies and procedures set forth in this part.

Subpart A—General

§ 780.137 Who in USAID may grant an exception to let an excluded person participate in a covered transaction?

The Director, Office of Acquisition and Assistance or designee, may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Director, Office of Acquisition and Assistance or designee grants an exception, the exception must be in writing and state the reason(s) for deviating from the government-wide policy in Executive Order 12549.

Subpart B—Covered Transactions

§ 780.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

In addition to the contracts covered under 2 CFR 180.220(b) of the OMB guidance, this part applies to any contract, regardless of tier, that is awarded by a contractor, subcontractor, supplier, consultant, or its agent or representative in any transaction, if the contract is to be funded or provided by the USAID under a covered non-procurement transaction and the amount of the contract is expected to equal or exceed $25,000. This extends the coverage of the USAID non-procurement suspension and debarment requirements to all lower tiers of subcontracts under covered non-procurement transactions, as permitted under the OMB guidance at 2 CFR 180.220(c) (see optional lower tier coverage in the figure in the appendix to 2 CFR part 180).

Subpart C—Responsibilities of Participants Regarding Transactions

§ 780.332 What requirements must I pass down to persons at lower tiers with whom I intend to do business?

You, as a participant, must include a term or condition in lower-tier transactions requiring lower-tier participants to comply with subpart C of the OMB guidance in 2 CFR part 180, as supplemented by this subpart.

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions

§ 780.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

To communicate to a participant the requirements described in 2 CFR 180.435 of the OMB guidance, you must include a term or condition in the transaction that requires the participant's compliance with subpart C of 2 CFR part 180, and supplemented by subpart C of this part, and requires the participant to include a similar term or condition in lower-tier covered transactions.

Subparts E–H—[Reserved]

Subpart I—Definitions

§ 780.930 Debarring Official (Agency for International Development supplement to government-wide definition at 2 CFR 180.930).

The Debarring Official for USAID is the Director of the Office of Acquisition and Assistance.

§ 780.1010 Suspending Official (Agency for International Development supplement to government-wide definition at 2 CFR 180.1010).

The Suspending Official for USAID is the Director of the Office of Acquisition and Assistance.

Subpart J—[Reserved]

■ 2. Title 22, chapter II is amended by removing part 208.

Dated: March 24, 2011.

M.E. Yearwood,

Acquisitions and Assistance Policy Analyst, USAID.

[FR Doc. 2011–14242 Filed 6–10–11; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0453]

RIN 1625–AA00

Safety Zone, Barrier Testing Operations, Chicago Sanitary and Ship Canal, Romeoville, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the Chicago Sanitary and Ship Canal (CSSC) near Romeoville, IL. This temporary final rule is intended to restrict all vessels from transiting the navigable waters of the CSSC. This safety zone is necessary to protect the waters, waterway users, and vessels from the hazards associated with U.S. Army Corps of Engineers (USACE) temporary simultaneous operation of dispersal barrier IIA and IIB.

DATES: This rule is effective on June 10, 2011. This rule will remain in effect until 5 p.m. on June 21, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0453 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0453 in the "Keyword" box, and then clicking "search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, contact or e-mail BM1 Adam Kraft, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Adam.D.Kraft@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because waiting for a notice and comment period to run would be impracticable and contrary to the public interest in that it would inhibit the Coast Guard's ability to protect the public from the hazards associated with the U.S. Army Corps of Engineers' simultaneous operation of electric barriers IIA and IIB.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the reasons discussed in the preceding paragraph, a 30-day notice period would be impractical and contrary to the public interest.

Background and Purpose

In 2007, the Department of the Interior through the Fish and Wildlife Service listed the Asian Carp and the Silver Carp as Injurious Wildlife Species. Based upon testing conducted by the USACE, the Asian carp is presently migrating toward the Great Lakes through the CSSC and connected tributaries. Scientists are concerned that if these aquatic nuisance species reach the Great Lakes in sufficient numbers they might devastate the Great Lakes commercial and sport fishing industries.

The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act of 1996, authorized the USACE to conduct a demonstration project to identify an environmentally sound method for preventing and reducing the dispersal of non-indigenous aquatic nuisance species through the CSSC. The USACE selected an electric barrier because it is a non-lethal deterrent with a proven history, which does not overtly interfere with navigation in the canal.

A demonstration dispersal barrier (Barrier I) was constructed and has been in operation since April 2002. It is located approximately 30 miles from Lake Michigan and creates an electric field in the water by pulsing low voltage DC current through steel cables secured to the bottom of the canal. A second barrier (Barrier IIA) was constructed 800 to 1300 feet downstream of the Barrier I. Barrier IIA is currently operating at two volts per inch, 15 Hertz and 6.5ms. Construction on Barrier IIB has been completed. Operational and safety testing was conducted in February 2011 and is being analyzed. The completion

of Barrier IIB will allow for maintenance operations without the need for the use of other aquatic nuisance species countermeasures. As part of its ongoing operation of these electrical barriers, the USACE intends on simultaneously operating Barrier IIA and IIB, daily from 7 a.m. to 11 a.m. and from 1 p.m. to 5 p.m. on June 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, and 21st, 2011.

Discussion of Rule

This rule places a safety zone that will encompass all waters of the CSSC located between mile marker 296.1 (approximately 958 feet south of Romeo Road Bridge) and mile marker 296.7 (aerial pipeline located approximately 2,693 feet northeast of Romeo Road Bridge).

The Coast Guard has deemed this safety zone necessary to protect the waterways, waterway users, and vessels from hazards associated with the USACE's temporary simultaneous operation of dispersal barrier IIA and IIB. This safety zone will be enforced daily from 7 a.m. to 11 a.m. and from 1 p.m. to 5 p.m. on June 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, and 21st, 2011.

During the enforcement period, Entry into, transiting, mooring, laying-up or anchoring within the enforced area of this safety zone by any person or vessel is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor on a portion of the CSSC between the hours of 7 a.m. and 11 a.m. and from 1 p.m. to 5 p.m. on June 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, and 21st, 2011.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule will only be enforced while unsafe conditions exist. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of The Port, Sector Lake Michigan, or his or her designated representative to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast to Mariners that the regulation is in effect.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a safety zone and is therefore categorically excluded under paragraph 34(g) of the Instruction. A final environmental analysis check list and categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0453 to read as follows:

§ 165.T09–0453 Safety Zone, Barrier Testing Operations, Chicago Sanitary and Ship Canal, Romeoville, IL.

(a) *Location.* The safety zone will encompass all U.S. navigable waters of the Chicago Sanitary and Ship Canal from Mile Marker 296.1 to Mile Marker 296.7 [DATUM: NAD 83].

(b) *Effective and enforcement periods.* This rule is effective on June 10, 2011 and will remain in effect until 5 p.m. on June 21, 2011. This rule will be enforced daily from 7 a.m. to 11 a.m. and from 1 p.m. to 5 p.m. on June 10, 11, 13, 14, 15, 16, 17, 18, 20, and 21.

(3) *Regulations.* (i) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

(ii) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

(iii) The "designated representative" of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Sector Lake Michigan, to act on his or her behalf. The designated representative of the Captain of the Port, Sector Lake Michigan, will be aboard a Coast Guard, Coast Guard Auxiliary, or other designated vessel or will be on shore and will communicate with vessels via VHF channel 16 radio, loudhailer, or by phone. The Captain of the Port, Sector Lake Michigan, or his or her designated representative may be contacted via VHF channel 16 radio or the Coast Guard Sector Lake Michigan Command Center at 414–747–7182.

(iv) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Sector Lake Michigan, or his or her designated representative to obtain permission to do so.

(v) Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

Dated: June 3, 2011.

L. Barndt,

Captain, U.S. Coast Guard, Commander, U.S. Coast Guard Sector Lake Michigan.

[FR Doc. 2011–14625 Filed 6–9–11; 11:15 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 268 and 271

[EPA–HQ–RCRA–2008–0332; FRL–9318–4]

RIN 2050–AG65

Land Disposal Restrictions: Revision of the Treatment Standards for Carbamate Wastes

AGENCY: Environmental Protection Agency.

ACTION: Direct Final Rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is issuing a Direct Final Rule to revise the Land Disposal Restrictions (LDR) treatment standards for hazardous wastes from the production of carbamates and carbamate commercial chemical products, off-specification or manufacturing chemical intermediates and container residues that become hazardous wastes when they are discarded or intended to be discarded. Currently, under the LDR program, most carbamate wastes must meet numeric concentration limits before they can be land disposed. However, the lack of readily available analytical standards makes it difficult to measure whether the numeric LDR concentration limits have been met. Therefore, we are providing as an alternative standard the use of the best demonstrated available technologies (BDAT) for treating these wastes. In addition, this action removes carbamate Regulated Constituents from the table of Universal Treatment Standards.

DATES: This Direct Final rule will be effective August 12, 2011 without further notice, unless EPA receives adverse written comment by July 13, 2011. If adverse comments are received, EPA will publish a timely withdrawal in

the **Federal Register** informing the public that the specific amendments in this Direct Final Rule for which the Agency received adverse comments will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2008–0332, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov* and *jackson.mary@epa.gov.* Attention Docket ID No. EPA–HQ–RCRA–2008–0332.
- *Fax:* 202–566–9744. Attention Docket ID No. EPA–HQ–RCRA–2008–0332.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–RCRA–2008–0332. Please include a total of 2 copies.
- *Hand Delivery:* Please deliver 2 copies to the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–RCRA–2008–0332. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the HQ–Docket Center, Docket ID No. EPA–HQ–RCRA–2008–0332, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Mary Jackson, Office of Resource Conservation and Recovery, (MC: 5304P), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. She can also be reached by telephone on 703–308–8453 or by e-mail at *jackson.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why is EPA using a Direct Final Rule?

EPA is publishing this rule as a Direct Final Rule because we view this action as noncontroversial and we anticipate no adverse comments. In addition, we also are choosing to issue a Direct Final Rule because waste management facilities treating carbamate wastes can potentially face curtailment of operations. That is, if they cannot demonstrate waste and treatment residual concentrations meet numerical LDR treatment standards through analytical testing, these facilities can potentially be left with no other choice than to stop treating carbamate wastes. This can be a particular problem when waste management facilities treat hazardous wastes that exhibit the characteristic of ignitability, reactivity, corrosivity, or toxicity. Without an analytical standard, they cannot reliably determine which carbamate regulated constituents are present in the characteristic waste. In addition, without a way to demonstrate waste and treatment residual carbamate concentrations through analytical testing, they cannot certify that all carbamate regulated constituents reasonably expected to be present at the point of generation of such characteristic waste, have been treated to meet all applicable treatment standards (typically numeric concentration limits appearing in the Universal Treatment Standards table found in 268.48).

Based on information we have collected and on previous LDR rulemakings pertaining to carbamate wastes, which raised identical issues and did not generate adverse comment, we do not believe that there will be adverse comments on this action. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as a proposed rule should we receive adverse comments on this action. We will not institute a second proposal or allow for another comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If we receive adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that those specific amendments in this Direct Final Rule for which the Agency received adverse comment will not take effect, and the reason for such withdrawal. We would address all public comments in any subsequent final rule based on the proposed rule being concurrently published today.

If we do not receive adverse comment, the rule will take effect on August 12, 2011. Section 3010 (b) of RCRA states that rules implementing subtitle C of RCRA normally take effect six months after promulgation, but that EPA may provide for a shorter effective date for rules with which the regulated community does not need six months to come into compliance. This is such a rule, as the regulated community is able immediately to treat carbamate wastes using the designated methods of treatment.

B. Does this action apply to me?

This action applies to generators and treatment, storage and disposal facilities (TSDFs) managing EPA hazardous waste codes:

K156	Organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates, and decantates) from the production of carbamates and carbamoyl oximes.
K157	Wastewaters (including scrubber waters, condenser waters, washwaters, and separation waters) from the production of carbamates and carbamoyl oximes.
K158	Bag house dusts and filter/separation solids from the production of carbamates and carbamoyl oximes.
K159	Organics from the treatment of thiocarbamate wastes.
K161	Purification solids (including filtration, evaporation, and centrifugation solids), baghouse dust and floor sweepings from the production of dithiocarbamate acids and their salts.
P127	Carbofuran
P128	Mexacarbate
P185	Tirpate
P188	Physostigmine salicylate
P189	Carbosulfan
P190	Metolcarb
P191	Dimetilan
P192	Isolan
P194	Oxamyl
P196	Manganese dimethyldithiocarbamate
P197	Formparanate
P198	Formetanate hydrochloride
P199	Methiocarb
P201	Promecarb
P202	m-Cumenyl methylcarbamate
P203	Aldicarb sulfone
P204	Physostigmine
P205	Ziram
U271	Benomyl
U278	Bendiocarb
U279	Carbaryl
U280	Barban
U364	Bendiocarb phenol
U367	Carbofuran phenol
U372	Carbendazim
U373	Propham
U387	Prosulfocarb
U389	Triallate
U394	A221310
U395	Diethylene glycol, dicarbamate
U404	Triethylamine
U409	Thiophanate-methyl
U410	Thiodicarb
U411	Propoxur

It also applies to generators and TSDFs of ignitable, corrosive, reactive and toxic hazardous wastes that are reasonably expected to contain one or more of the carbamate constituents listed above as underlying hazardous constituents at the point of the waste's generation.

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I. Summary of This Action

We are taking direct final action to provide alternative LDR treatment standards for hazardous wastes from the production of carbamates and carbamate commercial chemical products, off-specification or manufacturing chemical intermediates and container residues that become hazardous waste when they are discarded or intended to be discarded. The current LDR treatment standards for these wastes are set as numeric concentration limits that must be achieved before the waste is land disposed (see 40 CFR 268.40). Today's Direct Final Rule amends the existing treatment standards by allowing carbamate wastewaters to be treated using combustion, chemical oxidation, biodegradation or carbon adsorption (CMBST, CHOXD, BIODG or CARBN; see descriptions in the table found at 40 CFR 268.42); and allowing carbamate nonwastewaters to be treated by combustion ((CMBST); see description in the table at 40 CFR 268.42) as legally permissible alternatives to the numeric concentration limits. In addition, today's Direct Final Rule removes carbamates from the Table of Universal Treatment Standards (UTS) (40 CFR 268.48), thus eliminating the obligation to treat carbamate regulated constituents to meet numeric concentration limits in order to comply with rules requiring the treatment of underlying hazardous constituents ((UHCs), see 268.40(a)(2)(i)) that are reasonably expected to be present in a waste which exhibits a hazardous waste characteristic at the point of the waste's generation.

II. Background

Under sections 3004(d) through (g) of the Resource Conservation and Recovery Act (RCRA), the land disposal of hazardous wastes is prohibited unless the wastes meet the treatment standards, as generated, or are treated to meet the treatment standards established by EPA, or otherwise meet those standards. Section 3004(m) of RCRA requires EPA to set numeric concentration limits or methods of treatment that substantially diminish the hazardous waste's toxicity or substantially reduce the likelihood of hazardous constituents migrating from the waste such that short-term and long-term threats to human health and the environment posed by the waste's land

disposal are minimized. EPA interprets this language to authorize treatment standards based on the performance of the best demonstrated available technology(ies) (BDAT) for treating hazardous wastes. This interpretation was upheld by the DC Circuit Court of Appeals in *Hazardous Waste Treatment Council* v. *EPA,* 886 F.2d 355 (DC Cir. 1989).

EPA promulgated the LDR "Phase III" final rule on April 8, 1996 that established treatment standards for 64 listed hazardous wastes associated with the production of a number of carbamates (61 FR 15583). These treatment standards were based on data for similar wastes for which EPA promulgated UTS in1994 (59 FR 47982) and on analytical detection limits compiled from sampling and analysis reports prepared to support the proposed listing of carbamate wastes as hazardous wastes on February 9, 1995. The treatment standards are expressed as numeric concentration limits that have to be met before land disposal can occur. All the carbamate waste constituents were added to the UTS table found at 40 CFR 268.48. EPA promulgated numeric treatment standards for these carbamate wastes in 1994 (59 FR 47982), and again in 1996 (61 FR 15583), because performance using BDAT for these wastes resulted in concentration levels that could be measured in the waste residue (and thus became the numeric treatment standard), or because after BDAT treatment, the carbamate constituent(s) could no longer be detected in the treatment residue (and thus the detection limit was set by EPA as the numeric treatment standard).

After promulgation of the Phase III rule on April 8 1996, but shortly before the treatment standards took effect on July 8, 1996, several companies in the waste management industry contacted EPA, reporting that analytical standards were not readily available for some of the carbamate constituents. An analytical standard is a standard reference material that is used to calibrate analytical instruments in order to confirm detection and quantification of a particular constituent. The Agency was unaware of the lack of analytical standards because the treatment standards were primarily based on analytical detection limits. We confirmed that analytical standards were not readily available for these carbamate constituents and realized that the waste management industry was unintentionally left in an unacceptable compliance situation: they were required to certify compliance with numeric LDR treatment standards, but commercial laboratories were not able to perform the necessary analyses for some of the newly regulated carbamate constituents. Thus, it was impossible to reliably document whether the LDR treatment standards were achieved for some carbamate wastes.

The problem was complicated when the LDR rules that pertain to meeting the treatment standards for UHCs in hazardous wastes exhibiting the characteristic of ignitability, corrosivity, reactivity, and/or toxicity were promulgated. Specifically, for characteristic wastes (or waste that at point of generation exhibited a characteristic, but that have been treated so that they no longer do so), all UHCs reasonably expected to be present in the waste at the point of generation must meet the numeric concentration limits in the 268.48 UTS table. Because of the lack of analytical standards for some of the carbamate constituents, it was impossible to identify in all cases the UHCs reasonably expected to be present in the characteristic waste at the point of generation. Likewise, treatment facilities and regulatory agencies were unable to monitor compliance with numeric LDR treatment standards for UHC carbamates.

As a result, EPA promulgated an emergency rule in 1996 (61 FR 43924, August 26, 1996) to establish temporary alternative treatment standards for several carbamate waste constituents for a one-year period, which we believed would provide sufficient time for analytical standards to be developed. The temporary alternative standards promulgated on August 26, 1996, provided the waste industry with the option of meeting the original numerical concentration limits or treating the waste by required methods of BDAT treatment: combustion for nonwastewaters, and combustion, chemical oxidation, biodegradation or carbon adsorption for wastewaters. The numeric treatment standard concentration limits were based upon the performance of these BDAT technologies, so we asserted that they would be adequate to meet the LDR treatment requirements, while avoiding the analytical problems associated with some of the carbamate constituents.

However, analytical standards were not developed as we expected during the year. Thus, in August, 1997, EPA promulgated a second emergency Direct Final Rule that extended the alternative treatment standards for one additional year (62 FR 45568, August 28, 1997). At the end of that year, the analytic problems remained unsolved so in September, 1998, we promulgated a final rule that established technology(ies) as alternative LDR treatment standards for seven carbamate wastes for which there were no analytical standards. (The rule also removed the treatment standard for one carbamate constituent (o-phhenylenediamine, because it was not able to be analyzed reliably by available analytical methods), reinstated the LDR treatment standards expressed as numerical concentration limits for 32 carbamate constituents, and provided six months for the regulated community to arrange for analysis of the 32 waste constituents that were reinstated in that rule (63 FR 47410)).

In late 2007, we also became aware of the lack of an analytical standard for yet another carbamate isomer, m-cumenyl methylcarbamate (see e-mail record from Nancy Paddock, Environmental Engineering Specialist, Veolia ES Technical Solutions to Jan Young, EPA, in RCRA Docket No. HQ–RCRA–2008–0332). An analytical standard once existed for this carbamate isomer, but it is now generally unavailable, and is too costly to specially produce. Moreover, the Agency speculates that this constituent may be phased out of production and it is neither economical nor technically feasible to continue to make an analytical standard for a constituent that soon may no longer be produced.

Given our history of promulgating alternative treatment methods for specific carbamate wastes over the years and their projected phasing out, we are convinced that the lack of analytical standards with which to calibrate analytical instruments will continue to be an endemic problem. Therefore, the Agency believes it appropriate to promulgate additional rules and provide certainty to the regulated community, and thus, are extending the alternative BDAT treatment methods to all carbamate hazardous wastes and waste constituents in today's rule. These alternative standards will apply to soil contaminated with these wastes as well. If there is no analytical standard available, then the Agency would consider that constituent "non-analyzable" and the provisions of 268.49(c)(3) would apply to the soil.

It should be noted that some of the K-listed carbamate wastes have numeric treatment standards for constituents which are not carbamates. For example, there is a numeric standard for benzene in K156 (see 268.40). Those treatment standards are unaffected by today's action. Nor is EPA reconsidering or otherwise reopening those standards for public comment.

III. What are the alternative treatment standards?

This Direct Final Rule establishes alternative BDAT treatment standards for carbamate wastes. Because the alternative treatment standards are expressed as specified technologies, they eliminate the need for analytical testing to measure compliance with the existing numeric concentration limits for the carbamate waste constituents (*i.e.* carbamates). However, we are retaining the numeric concentration limits for carbamates in the 268.40 Treatment Standard Table because allowing both specified treatment methods and numeric concentration limits provides maximum flexibility in the choice of treatment for these wastes. Thus, any treatment technology that is not considered impermissible dilution may be used to treat carbamate wastes to achieve the numeric treatment standards. We do not believe that there are many treatment technologies other than the ones we are promulgating as alternative treatment standards that are available for treatment of these wastes, but we are retaining the option of meeting the numeric standards should new treatment technologies be developed and/or analytical standards become available.

The alternative treatment standards promulgated today are: combustion ((CMBST), see description in the table 40 CFR 268.42) for nonwastewaters; and, combustion, chemical oxidation, biodegradation or carbon adsorption ((CMBST, CHOXD, BIODG or CARBN), see description in the table found at 40 CFR 268.42) for wastewaters. Because the numerical concentration limits were based upon these BDATs for treatment of carbamate wastes, we believe that they fully satisfy the core requirement of the LDR program that hazardous wastes be effectively treated to minimize short and long-term threats to human health and the environment before they are land disposed. This is the same justification for EPA's prior actions establishing these methods of treatment as alternative treatment standards for certain of the carbamate wastes, and has not been challenged or otherwise disputed.

IV. Why are we removing carbamates from the Universal Treatment standards?

Underlying hazardous constituents are defined in 268.40(a)(2)(i) as any constituent listed in Section 268.48, Table UTS—Universal Treatment Standards, except fluoride, selenium, sulfides, vanadium, and zinc, which can reasonably be expected to be present at the point of generation of the hazardous waste at a concentration above the constituent-specific UTS treatment standards. Hazardous waste constituents that are UHCs must be treated to meet the concentration limits specified in the UTS table. For hazardous wastes that are ignitable, corrosive, reactive, and/or toxic (*i.e.,* wastes that exhibit a characteristic of hazardous waste) or wastes that at point of generation exhibit a characteristic, but that have been treated so that they no longer exhibit the characteristic, all UHCs reasonably expected to be present in the waste at the point of generation must be treated to meet the numeric concentration limits in the UTS table.

Because of the current lack of analytical standards, it is not possible to definitely determine whether carbamate constituents are reasonably expected to be present in a characteristic waste at the point of generation. Likewise, treatment facilities and regulatory agencies are unable to monitor compliance with the UTS for these constituents. To prevent situations where the generator may not realize that his characteristic waste contains carbamates as UHCs or where the treatment facility cannot certify compliance with the UTS for carbamate wastes, it is necessary to remove the carbamate constituents from the UTS table. However, because BDATs for organic wastes are generally the same as those promulgated in today's rule as alternative treatment standards for carbamate hazardous wastes, we believe that treatment of other organic wastes, if they are present in the characteristic waste, will adequately treat the carbamate constituents in the wastes.

We are also making a conforming change to the UTS table by removing footnote 6 for several hazardous waste constituents. Footnote 6 refers to the status of certain wastes during the period of August 26, 1996 to March 4, 1998, which obviously no longer applies.

V. State Authority

A. How are states authorized under RCRA?

Under section 3006 of RCRA, EPA may authorize qualified states to administer their own hazardous waste programs in lieu of the Federal program within the state. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. The standards and requirements for state authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that state. The Federal requirements no longer applied in the authorized state, and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent Federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new Federal requirements did not take effect in an authorized state until the state adopted the Federal requirements as state law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA-related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

Authorized states are required to modify their programs only when EPA enacts Federal requirements that are more stringent or broader in scope than existing Federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the Federal program (see also 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt Federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous Federal regulations.

B. How does this rule affect state authorization?

Today's rule is promulgated pursuant to HSWA authority and is neither more nor less stringent. Because RCRA section 3009 allows states to be more stringent, they do not have to adopt this provision. Today's addition of alternate treatment standards for carbamate wastes is promulgated pursuant to RCRA section 3004(m), a HSWA provision. Therefore, we are adding this rule to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization

status. The land disposal restrictions for carbamate wastes are promulgated pursuant to RCRA section 3004(g) and (m), also HSWA provisions. Table 2 in 40 CFR 271.1(j) is modified to indicate that these requirements are self-implementing.

States may apply for final authorization for the HSWA provisions in 40 CFR 271.1(j), as discussed below. Until the States receive authorization for these HSWA provisions, EPA would implement them. The procedures and schedule for final authorization of State program modifications are described in 40 CFR 271.21.

Section 271.21(e)(2) of EPA's State authorization regulations (40 CFR part 271) requires that States with final authorization to modify their programs to reflect Federal program changes and submit the modifications to EPA for approval. The deadline by which the States would need to modify their programs to adopt this regulation is determined by the date of promulgation of a final rule in accordance with section 271.21(e)(2). Once EPA approves the modification, the State requirements would become RCRA Subtitle C requirements.

States with authorized RCRA programs already may have regulations similar to those in this final rule. These State regulations have not been assessed against the Federal regulations finalized today. Thus, a State would not be authorized to implement these regulations as RCRA requirements until State program modifications are submitted to EPA and approved, pursuant to 40 CFR 271.21. Of course, States with existing regulations that are similar to those promulgated today may continue to administer and enforce their regulations as a matter of State law. In implementing the HSWA requirements, EPA will work with the States under agreements to avoid duplication of effort.

VI. Statutory and Executive Order Reviews

As explained above, this action augments existing LDRs by establishing alternative treatment standards expressed as technologies that may be used to treat the carbamate hazardous waste under the LDR program. For that reason, this action:

- Is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132: Federalism (64 FR 43255, August 10, 1999);
- Does not have Tribal implications as specified by Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), because, as the rule does not make any substantive changes, it will not impose substantial direct costs on Tribal governments or preempt Tribal law;
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045: Protection of Children from Environmental Health and Safety Risks (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001);
- Does not involve technical standards; thus the requirements of § 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply; and
- Does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations under Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994) because it does not affect the level of protection provided to human health or the environment.

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as (1) a small business that is primarily engaged in hazardous waste treatment and disposal as defined by NAICS code 562211 with annual receipts of less than 12.5 million dollars (based on Small Business Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This rule will not have a significant economic impact on a substantial number of small entities because its merely establishes alternative treatment standards expressed as technologies that may be used to treat the carbamate hazardous waste under the LDR program. These carbamate hazardous wastes already are subject to numeric treatment standards under the LDR program, and thus, this rule will have no new impacts. Therefore, we hereby certify that this rule will not add any new regulatory requirements to small entities, and does not require a regulatory flexibility analysis.

B. Congressional Review Act

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

List of Subjects

40 CFR Part 268

Environmental protection, Hazardous waste, Land disposal restrictions.

40 CFR Part 271

Environmental protection, Hazardous waste.

Dated: June 7, 2011.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 268—LAND DISPOSAL RESTRICTIONS

■ 1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

■ 2. Section 268.40, the Table of Treatment Standards in paragraph (b) is amended by revising the entries for "K156", "K157", "K158", "K159", "K161", "P127", "P128", P185", "P188", "P189", "P190", "P191", "P192", "P194h", "P196", "P197", "P198", "P199", "P201", "P202", "P203", "P204", "P205", "U271", "U278", "U279", "U280", "U364", "U367", "U372", "U373", "U387", "U389", "U394". "U395", "U404", "U409", "U410", and "U411" to read as follows:

TREATMENT STANDARDS FOR HAZARDOUS WASTES

[Note: NA means not applicable]

Waste code	Waste description and treatment/Regulatory subcategory [1]	Regulated hazardous constituent		Wastewaters concentration [3] in mg/L; or technology code [4]	Nonwastewaters concentration [5] in mg/kg unless noted as "mg/L TCLP"; or technology code [4]
		Common name	CAS [2] number		
*	* *	*	*	*	*
K156	Organic waste (including heavy ends, still bottoms, light ends, spent solvents, filtrates, and decantates) from the production of carbamates and carbamoyl oximes.	Acetonitrile	75–05–8	5.6	1.8
		Acetophenone	98–86–2	0.010	9.7
		Aniline	62–53–3	0.81	14
		Benomyl [10]	17804–35–2	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Benzene	71–43–2	0.14	10
		Carbaryl [10]	63–25–2	0.006; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
		Carbenzadim [10]	10605–21–7	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Carbofuran [10]	1563–66–2	0.006; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
		Carbosulfan [10]	55285–14–8	0.028; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Chlorobenzene	108–90–7	0.057	6.0
		Chloroform	67–66–3	0.046	6.0
		o-Dichlorobenzene	95–50–1	0.088	6.0
		Methomyl [10]	16752–77–5	0.028; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
		Methylene chloride	75–09–2	0.089	30
		Methyl ethyl ketone	78–93–3	0.28	36
		Naphthalene	91–20–3	0.059	5.6
		Phenol	108–95–2	0.039	6.2
		Pyridine	110–86–1	0.014	16
		Toluene	108–88–3	0.080	10
		Triethylamine	121–44–8	0.081; or CMBST, CHOXD, BIODG or CARBN	1.5; or CMBST
K157	Wastewaters (including scrubber waters, condenser waters, washwaters, and separation waters) from the production of carbamates and carbamoyl oximes.	Carbon tetrachloride	56–23–5	0.057	6.0
		Chloroform	67–66–3	0.046	6.0
		Chloromethane	74–87–3	0.19	30
		Methomyl [10]	16752–77–5	0.028; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
		Methylene chloride	75–09–2	0.089	30
		Methylethyl ketone	78–93–3	0.28	36
		Pyridine	110–86–1	0.014	16
		Triethylamine	121–44–8	0.081 or CMBST, CHOXD, BIODG or CARBN	1.5; or CMBST
K158	Bag house dusts and filter/separation solids from the production of carbamates and carbamoyl oximes.	Benzene	71–43–2	0.14	10

TREATMENT STANDARDS FOR HAZARDOUS WASTES—Continued

[Note: NA means not applicable]

Waste code	Waste description and treatment/Regulatory subcategory [1]	Regulated hazardous constituent		Wastewaters concentration [3] in mg/L; or technology code [4]	Nonwastewaters concentration [5] in mg/kg unless noted as "mg/L TCLP"; or technology code [4]
		Common name	CAS [2] number		
		Carbenzadim [10]	10605–21–7	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Carbofuran [10]	1563–66–2	0.006; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
		Carbosulfan [10]	55285–14–8	0.028; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Chloroform	67–66–3	0.046	6.0
		Methylene chloride	75–09–2	0.089	30
		Phenol	108–95–2	0.039	6.2
K159	Organics from the treatment of thiocarbamate wastes.	Benzene	71–43–2	0.14	10
		Butylate [10]	2008–41–5	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		EPTC (Eptam) [10]	759–94–4	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Molinate [10]	2212–67–1	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Pebulate [10]	1114–71–2	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
		Vernolate [10]	1929–77–7	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
K161	Purification solids (including filtration, evaporation, and centrifugation solids), baghouse dust and floor sweepings from the production of dithiocarbamate acids and their salts.	Antimony	7440–36–0	1.9	1.15 mg/L TCLP
		Arsenic	7440–38–2	1.4	5.0 mg/L TCLP
		Carbon disulfide	75–15–0	3.8	4.8 mg/L TCLP
		Dithiocarbamates (total) [10].	NA	0.028; or CMBST, CHOXD, BIODG or CARBN	28; or CMBST
		Lead	7439–92–1	0.69	0.75 mg/L TCLP
		Nickel	7440–02–0	3.98	11.0 mg/L TCLP
		Selenium	7782–49–2	0.82	5.7 mg/L TCLP
*	* *	*	*	*	*
P127	Carbofuran [10]	Carbofuran	1563–66–2	0.006; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
P128	Mexacarbate [10]	Mexacarbate	315–18–4	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P185	Tirpate [10]	Tirpate	26419–73–8	0.056; or CMBST, CHOXD, BIODG or CARBN	0.28; or CMBST
P188	Physostigmine salicylate [10]	Physostigmine salicylate.	57–64–7	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P189	Carbosulfan [10]	Carbosulfan	55285–14–8	0.028; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P190	Metolcarb [10]	Metolcarb	1129–41–5	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P191	Dimetilan [10]	Dimetilan	644–64–4	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST

TREATMENT STANDARDS FOR HAZARDOUS WASTES—Continued

[Note: NA means not applicable]

Waste code	Waste description and treatment/Regulatory subcategory [1]	Regulated hazardous constituent		Wastewaters concentration [3] in mg/L; or technology code [4]	Nonwastewaters concentration [5] in mg/kg unless noted as "mg/L TCLP"; or technology code [4]
		Common name	CAS [2] number		
P192	Isolan [10]	Isolan	119–38–0	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P194	Oxamyl [10]	Oxamyl	23135–22–0	0.056; or CMBST, CHOXD, BIODG or CARBN	0.28; or CMBST
P196	Manganese dimethyldithio-carbamate [10]	Dithiocarbamates (total).	NA	0.028; or CMBST, CHOXD, BIODG or CARBN	28; or CMBST
P197	Formparanate [10]	Formparante	17702–57–7	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P198	Formetanate hydrochloride [10]	Formetanate hydrochloride.	23422–53–9	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P199	Methiocarb [10]	Methiocarb	2032–65–7	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P201	Promecarb [10]	Promecarb	2631–37–0	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P202	m-Cumenyl methylcarbamate [10]	m-Cumenyl methylcarbamate.	64–00–6	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P203	Aldicarb sulfone [10]	Aldicarb sulfone	1646–88–4	0.056; or CMBST, CHOXD, BIODG or CARBN	0.28; or CMBST
P204	Physostigmine [10]	Physostigmine	57–47–6	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
P205	Ziram [10]	Dithiocarbamates (total).	NA	0.028; or CMBST, CHOXD, BIODG or CARBN	28; or CMBST
*	*	*	*	*	*
U271	Benomyl [10]	Benomyl	17804–35–2	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U278	Bendiocarb [10]	Bendiocarb	22781–23–3	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U279	Carbaryl [10]	Carbaryl	63–25–2	0.006; or CMBST, CHOXD, BIODG or CARBN	0.14; or CMBST
U280	Barban [10]	Barban	101–27–9	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
*	*	*	*	*	*
U364	Bendiocarb phenol [10]	Bendiocarb phenol	22961–82–6	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U367	Carbofuran phenol [10]	Carbofuran phenol	1563–38–8	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U372	Carbendazim [10]	Carbendazim	10605–21–7	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U373	Propham [10]	Propham	122–42–9	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U387	Prosulfocarb [10]	Prosulfocarb	52888–80–9	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U389	Triallate [10]	Triallate	2303–17–5	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST

TREATMENT STANDARDS FOR HAZARDOUS WASTES—Continued

[Note: NA means not applicable]

Waste code	Waste description and treatment/Regulatory subcategory [1]	Regulated hazardous constituent		Wastewaters concentration [3] in mg/L; or technology code [4]	Nonwastewaters concentration [5] in mg/kg unless noted as "mg/L TCLP"; or technology code [4]
		Common name	CAS [2] number		
U394	A2213 [10]	A2213	30558–43–1	0.042; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U395	Diethylene glycol, dicarbamate [10]	Diethylene glycol, dicarbamate.	5952–26–1	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U404	Triethylamine [10]	Triethylamine	121–44–8	0.081; or CMBST, CHOXD, BIODG or CARBN	1.5; or CMBST
U409	Thiophanate-methyl [10]	Thiophanate-methyl	23564–05–8	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U410	Thiodicarb [10]	Thiodicarb	59669–26–0	0.019; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST
U411	Propoxur [10]	Propoxur	114–26–1	0.056; or CMBST, CHOXD, BIODG or CARBN	1.4; or CMBST

FOOTNOTES TO TREATMENT STANDARD TABLE 268.40

[1] The waste descriptions provided in this table do not replace waste descriptions in 40 CFR 261. Descriptions of Treatment/Regulatory Subcategories are provided, as needed, to distinguish between applicability of different standards.

[2] CAS means Chemical Abstract Services. When the waste code and/or regulated constituents are described as a combination of a chemical with its salts and/or esters, the CAS number is given for the parent compound only.

[3] Concentration standards for wastewaters are expressed in mg/L and are based on analysis of composite samples.

[4] All treatment standards expressed as a Technology Code or combination of Technology Codes are explained in detail in 40 CFR 268.42 Table 1—Technology Codes and Descriptions of Technology-Based Standards.

[5] Except for Metals (EP or TCLP) and Cyanides (Total and Amenable) the nonwastewater treatment standards expressed as a concentration were established, in part, based upon incineration in units operated in accordance with the technical requirements of 40 CFR Part 264 Subpart O or Part 265 Subpart O, or based upon combustion in fuel substitution units operating in accordance with applicable technical requirements. A facility may comply with these treatment standards according to provisions in 40 CFR 268.40(d). All concentration standards for nonwastewaters are based on analysis of grab samples.

* * * * * * *

[10] The treatment standard for this waste may be satisfied by either meeting the constituent concentrations in this table or by treating the waste by the specified technologies: combustion, as defined by the technology code CMBST at § 268.42 Table 1 of this Part for nonwastewaters; and biodegradation as defined by the technology code BIODG, carbon adsorption as defined by the technology code CARBN, chemical oxidation as defined by the technology code CHOXD, or combustion as defined as technology code CMBST at § 268.42 Table 1 of this Part, for wastewaters.

* * * * * * *

■ 3. Section 268.48, the Table of UTS—Universal Treatment Standards is amended by

■ a. Removing the entries for Aldicarb sulfone, Barban, Bendiocarb, Benomyl, Butylate, Carbaryl, Carbenzadim, Carbofuran, Carbofuran phenol, Carbosulfan, m-Cumenyl methylcarbamate, Dithiocarbamates (total), EPTC (Eptam), Formetanate hydrochloride, Methiocarb, Methomyl, Metolcarb, Mexacarbate, Molinate, Oxamyl, Pebulate, Physostigmine, Physostigmine salicylate, Promecarb, Propham, Propoxur, Prosulfocarb, Thiodicarb, Thiophanate-methyl, Triallate, Triethylamin, and Vemolate; and

■ b. Removing and reserving footnote 6.

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

■ 4. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 9602; 33 U.S.C. 1321 and 1361.

Subpart A—Requirements for Final Authorization

■ 5. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by promulgation date in the **Federal Register**, and by adding the following entry to Table 2 in chronological order by effective date in the **Federal Register**, to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	Federal Register reference	Effective date
* *	* *	* *	*
June 13, 2011	Land Disposal Restrictions: Revision of the Treatment Standards for Carbamate Hazardous Wastes.	76 FR [Insert page number]	8/12/11.
* *	* *	* *	*

* * * * *

TABLE 2—SELF-IMPLEMENTING PROVISIONS OF THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Effective date	Self-implementing provision	RCRA citation	Federal Register reference
* *	* *	* *	*
August 12, 2011	Land Disposal Restrictions: Revision of the Treatment Standards for Carbamate Hazardous Wastes.	3004(m)	76 FR [Insert Page Numbers]
* *	* *	* *	*

* * * * *

[FR Doc. 2011–14594 Filed 6–10–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 0808041026–1295–02]

RIN 0648–AX09

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation and Maintenance of the Neptune Liquefied Natural Gas Facility off Massachusetts

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

ACTION: Final rule.

SUMMARY: NMFS, upon application from Neptune LNG LLC (Neptune), is issuing regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the unintentional taking of marine mammals, by harassment, incidental to port commissioning and operations, including maintenance and repair activities, at the Neptune Deepwater Port (the Port) in Massachusetts Bay for the period of July 2011 through July 2016. These regulations, which allow for the issuance of Letters of Authorization (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from July 11, 2011, through August 10, 2016.

ADDRESSES: A copy of Neptune's application may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East West Highway, Silver Spring, MD 20910, calling the contact listed under **FOR FURTHER INFORMATION CONTACT**, or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this final rule may also be viewed, by appointment, during regular business hours at the above address.

The Final Environmental Impact Statement (Final EIS) on the Neptune Deepwater Port License Application authored by the Maritime Administration (MARAD) and U.S. Coast Guard (USCG) is available for viewing at *http://www.regulations.gov* by entering the search words "Neptune LNG."

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, ext 156.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

Summary of Request

On December 14, 2009, NMFS received an application from Neptune for the taking, by harassment, of marine mammals incidental to port commissioning and operations, including maintenance and repair activities, at its Neptune Deepwater Port (Port) facility in Massachusetts Bay. NMFS reviewed Neptune's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, Neptune modified its application and submitted a revised application on March 11, 2010. The March 11, 2010, application was the one made available for public comment and considered by NMFS for these regulations.

Neptune submitted its first complete application to NMFS on December 27, 2007, for the take of small numbers of marine mammals, by harassment, incidental to the construction phase of the Neptune LNG Port Facility. In June 2008, NMFS issued a 1-year Incidental Harassment Authorization (IHA) to Neptune for the construction of the Port (73 FR 33400, June 12, 2008). This authorization expired on June 30, 2009. NMFS issued a second 1-year IHA to Neptune for the completion of construction and beginning of Port operations on June 26, 2009 (74 FR 31926, July 6, 2009), which expired on June 30, 2010.

On July 12, 2010, NMFS issued a third IHA to Neptune based on the request in its March 11, 2010, application (75 FR 41440, July 16, 2010). This latest IHA is effective through July 11, 2011. During the period of this third IHA, Neptune conducted limited port operations.

During the effective period of this final rule (July 2011–July 2016), Neptune intends to continue port operations (including commissioning of its second shuttle regasification vessel [SRV]) and conduct maintenance and repairs, as needed. The Neptune Port is located approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 260 ft (79 m) in depth. The purpose of the Port is to import liquefied natural gas (LNG) into the New England region. Take of marine mammals may occur during port operations from thruster use during maneuvering of the SRVs while docking and undocking, occasional weathervaning (turning of a vessel at anchor from one direction to another under the influence of wind or currents) at the Port, and during thruster use of dynamic positioning (DP) maintenance vessels should a major repair be necessary. Neptune requested authorization to take 12 marine mammal species by Level B harassment. The species are: North Atlantic right whale; humpback whale; fin whale; sei whale; minke whale; long-finned pilot whale; Atlantic white-sided dolphin; harbor porpoise; common dolphin; Risso's dolphin; bottlenose dolphin; and harbor seal. In the 2009 and 2010 IHAs, NMFS also authorized take of killer whales and gray seals. NMFS has determined that it would be appropriate in this final rule to authorize take, by Level B harassment only, incidental to operations and maintenance activities of these two species as well. In this final rule, NMFS has authorized the take, by Level B harassment, of all 14 marine mammal species listed here.

Description of the Specified Activity

On March 23, 2007, Neptune received a license from MARAD to own, construct, and operate a deepwater port. The Port, which is located in Massachusetts Bay, consists of a submerged buoy system to dock specifically designed LNG carriers approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 260 ft (79 m) in depth. The two buoys are separated from one another by a distance of approximately 2.1 mi (3.4 km). The locations of the Neptune Port and the associated pipeline are shown in Figure 2–1 in Neptune's application (see **ADDRESSES**).

All construction of the Neptune Port was completed in November 2009. The first SRV was commissioned in February–March 2010. Between July 2011 and July 2016, (the time period for these regulations), Neptune plans to continue Port operations (including commissioning of its second SRV) and also plans to conduct any necessary maintenance and repairs of the Port facility.

Neptune will be capable of mooring LNG SRVs with a capacity of approximately 183,113 cubic yards (yd^3; 140,000 cubic meters (m^3)) of LNG. Up to two SRVs will temporarily moor at the Port by means of a submerged unloading buoy system. Two separate buoys will allow natural gas to be delivered in a continuous flow, without interruption, by having a brief overlap between arriving and departing SRVs. The annual average throughput capacity will be around 500 million standard cubic feet per day (mmscfd) with an initial throughput of 400 mmscfd and a peak capacity of approximately 750 mmscfd of LNG.

The SRVs will be equipped to store, transport, and vaporize LNG and to odorize, meter and send out natural gas by means of two 16-in (40.6-cm) flexible risers and one 24-in (61-cm) subsea flowline. These risers and flowline will lead to a 24-in (61-cm) gas transmission pipeline connecting the deepwater port to the existing 30-in (76.2-cm) Algonquin Hubline^{SM} (Hubline^{SM}) located approximately 9 mi (14.5 km) west of the Neptune deepwater port location. The Port will have an expected operating life of approximately 25 years. Figure 1–1 of Neptune's application shows an isometric view of the Port (see **ADDRESSES**). A detailed overview of Port operations and maintenance and repair activities, as well as the types of sounds those activities produce, was provided in the proposed rule (75 FR 80260, December 21, 2010). No changes have been made to the proposed operations or maintenance and repair activities.

Description of Marine Mammals in the Area of the Specified Activity

Massachusetts Bay (as well as the entire Atlantic Ocean) hosts a diverse assemblage of marine mammals, including: The North Atlantic right whale; blue whale; fin whale; sei whale; minke whale; humpback whale; killer whale; long-finned pilot whale; sperm whale; Atlantic white-beaked dolphin; Atlantic white-sided dolphin; bottlenose dolphin; common dolphin; harbor porpoise; Risso's dolphin; striped dolphin; gray seal; harbor seal; harp seal; and hooded seal. Table 3–1 in Neptune's application outlines the marine mammal species that occur in Massachusetts Bay and the likelihood of occurrence of each species. Of the species listed here, the North Atlantic right, blue, fin, sei, humpback, and sperm whales are all listed as endangered under the Endangered Species Act (ESA) and as depleted under the MMPA. The northern coastal stock of bottlenose dolphins is considered depleted under the MMPA. Certain stocks or populations of killer whales are listed as endangered under the ESA or depleted under the MMPA; however, none of those stocks or populations occurs in the activity area.

Of these species, 14 are expected to occur in the area of Neptune's operations. These species include: The North Atlantic right, humpback, fin, sei, minke, killer, and long-finned pilot whales; Atlantic white-sided, common, Risso's, and bottlenose dolphins; harbor porpoise; and harbor and gray seals. Neptune used information from the Cetacean and Turtle Assessment Program (CETAP; 1982) and the U.S. Navy's Marine Resource Assessment (MRA) for the Northeast Operating Areas (DoN, 2005; available on the Internet at: *https://*

portal.navfac.navy.mil/portal/page/portal/navfac/navfac_ww_pp/navfac_hq_pp/navfac_environmental/mra) to estimate densities of the species in the area. Nonetheless, NMFS used the data on cetacean distribution within Massachusetts Bay, such as those published by NOAA's National Centers for Coastal Ocean Science (NCCOS; 2006), to determine density estimates of several species of marine mammals in the vicinity of the project area. The explanation for those derivations and the actual density estimates are described later in this document (see the "Estimated Take by Incidental Harassment" section).

The proposed rule contains a discussion of 17 marine mammal species that are not considered further in the analysis because of their rarity in the Massachusetts Bay area (blue whale, sperm whale, harp seal, hooded seal, ringed seal, northern bottlenose whale, Cuvier's beaked whale, Sowerby's beaked whale, Blainville's beaked whale, Gervais' beaked whale, True's beaked whale, beluga whale, pantropical spotted dolphin, false killer whale, pygmy sperm whale, striped dolphin, and Atlantic white-beaked dolphin). The proposed rule also contains brief summaries on several commonly sighted marine mammal species distribution and abundance in the vicinity of the action area. The "Description of Marine Mammals in the Area of the Specified Activity" has not changed from the proposed rule. Please refer to the proposed rule (75 FR 80260, December 21, 2010) for the complete discussion.

Additionally, information on those species that may be impacted by this activity is provided in Neptune's application and sections 3.2.3 and 3.2.5 in the MARAD/USCG Final EIS on the Neptune LNG proposal (see **ADDRESSES**). Please refer to those documents for more information on these species. Also, general information on these marine mammal species can also be found in the 2009 NMFS U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment Report (SAR; Waring *et al.,* 2009) and the 2010 Draft NMFS Atlantic and Gulf of Mexico Marine Mammal SAR (Waring *et al.,* in prep.), which are available on the Internet at: *http://www.nefsc.noaa.gov/publications/tm/tm213/* and *http://www.nmfs.noaa.gov/pr/sars/draft.htm,* respectively.

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data, Southall *et al.* (2007) designate "functional hearing groups" for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by Au *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, 14 marine mammal species (12 cetacean and two pinniped species) are likely to occur in the Neptune Port area. Of the 12 cetacean species likely to occur in Neptune's project area, five are classified as low frequency cetaceans (*i.e.,* North Atlantic right, humpback, fin, minke, and sei whales), six are classified as mid-frequency cetaceans (*i.e.,* killer and pilot whales and bottlenose, common, Risso's, and Atlantic white-sided dolphins), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise) (Southall *et al.,* 2007).

Potential Effects of the Specified Activity on Marine Mammals

With respect to the MMPA, NMFS' effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment, including an identification of the number and types of take that could occur by Level B harassment) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities that would be affected in the Massachusetts Bay area, so this determination is inapplicable for this rulemaking); and (4) to prescribe requirements pertaining to monitoring and reporting.

Potential effects of Neptune's proposed port operations and maintenance/repair activities would most likely be acoustic in nature. LNG port operations and maintenance/repair activities introduce sound into the marine environment. Potential acoustic effects on marine mammals relate to sound produced by thrusters during maneuvering of the SRVs while docking and undocking, occasional weathervaning at the port, and during thruster use of DP maintenance vessels should a major repair be necessary. The potential effects of sound from the activities associated with the Neptune Port might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.,* 1995). However, for reasons discussed in the proposed rule, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities.

In the "Potential Effects of Specified Activities on Marine Mammals" section of the proposed rule, NMFS included a qualitative discussion of the different ways that port operations and repair and maintenance activities may potentially affect marine mammals. Marine mammals may experience masking and behavioral disturbance. The information contained in the "Potential Effects of Specified Activities on Marine Mammals" section from the proposed rule has not changed. Please refer to the proposed rule for the full discussion (75 FR 80260, December 21, 2010).

Anticipated Effects on Habitat

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by the Port operations and maintenance/repair activities. However, other potential impacts from physical disturbance are also possible. Major repairs to the Neptune port and pipeline may affect marine mammal habitat in several ways: cause disturbance of the seafloor; increase turbidity slightly; and generate additional underwater sound in the area. These underwater sound levels will cause some species to temporarily disperse from or avoid repair areas, but they are expected to return shortly after the repair is completed. Operation of the Port will result in long-term, continued disturbance of the seafloor, regular withdrawal of seawater, and generation of underwater sound. The proposed rule contained a full discussion of the potential impacts to marine mammal habitat and prey species in the project area. No changes have been made to that discussion. Please refer to the proposed rule for the full discussion of potential impacts to marine mammal habitat (75 FR 80260, December 21, 2010). NMFS has determined that Neptune's proposed port operations and maintenance/repair activities are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

Neptune proposed several mitigation measures in the application (see **ADDRESSES**). After a review of these measures, NMFS determined that some additional measures should also be implemented in order to effect the least practicable adverse impact on the species or stock and its habitat. Both sets of measures are discussed next.

Mitigation Measures in Neptune's Application

Neptune submitted a "Marine Mammal Detection, Monitoring, and Response Plan for the Operations Phase" (the Plan) as part of its MMPA application (Appendix D of the application; see **ADDRESSES**). The measures, which include safety zones and vessel speed reductions, are fully described in the Plan and summarized here. Some slight changes have been made in this final rule (from what appears in the Plan) based on public comments or for clarification purposes. An explanation of the changes is contained in the "Comments and Responses" section found later in this document.

The 500-yd (457 m) safety zone for North Atlantic right whales is based on the approach regulation found at 50 CFR 224.103. The 100 yd (91 m) safety zone for other marine mammal species was taken from measures included in the 2007 Biological Opinion completed by NMFS' Northeast Regional Office. Any maintenance and/or repairs needed shall be scheduled in advance during the May 1 to November 30 seasonal window, whenever possible, so that disturbance to North Atlantic right whales will be largely avoided. If the repair cannot be scheduled during this time frame, additional mitigation measures are required in these regulations and described in part (2) of this section.

(1) Mitigation Measures for Major Repairs (May 1 to November 30)

(A) During repairs, if a marine mammal is detected within 0.6 mi (1 km) of the repair vessel (or acoustically), the vessel superintendent or on-deck supervisor will be notified immediately. The vessel's crew will be put on a heightened state of alert. The marine mammal will be monitored constantly to determine if it is moving toward the repair area.

(B) Repair vessels will cease any movement in the area if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) from the operating repair vessel. Repair vessels will cease any movement in the area if a right whale is sighted within or approaching to a distance of 500 yd (457 m) from the operating vessel. Vessels transiting the repair area, such as pipe haul barge tugs, will also be required to maintain these separation distances.

(C) Repair vessels will cease all sound emitting activities if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) or if a right whale is sighted within or approaching to a distance of 500 yd (457 m), from the operating repair vessel. The back-calculated source level, based on the most conservative cylindrical model of acoustic energy spreading, is estimated to be 139 dB re 1 μPa.

(D) Repair activities may resume after the marine mammal is positively reconfirmed outside the established zones (either 500 yd (457 m) or 100 yd (91 m), depending upon species) or if the marine mammal has not been re-sighted in the established zones for 30 minutes.

(E) While under way, all repair vessels will remain 500 yd (457 m) away from right whales and 100 yd (91 m) away from all other marine mammals, unless constrained by human safety concerns or navigational constraints.

(F) All repair vessels 300 gross tons or greater will maintain a speed of 10 knots (18.5 km/hr) or less. Vessels less than 300 gross tons carrying supplies or crew between the shore and the repair site will contact the Mandatory Ship Reporting System, the USCG, or the protected species observers (PSOs) at the repair site before leaving shore for reports of recent right whale sightings or active Dynamic Management Areas (DMAs) and, consistent with navigation safety, restrict speeds to 10 knots (18.5 km/hr) or less within 5 mi (8 km) of any recent sighting location and within any existing DMA.

(G) Vessels transiting through the Cape Cod Canal and Cape Cod Bay (CCB) between January 1 and May 15 will reduce speeds to 10 knots (18.5 km/hr) or less, follow the recommended routes charted by NOAA to reduce interactions between right whales and shipping traffic, and avoid aggregations of right whales in the eastern portion of CCB.

(2) Additional Port and Pipeline Major Repair Measures (December 1 to April 30)

If unplanned/emergency repair activities cannot be conducted between May 1 and November 30, Neptune is required to implement the following additional mitigation measures:

(A) If on-board PSOs do not have at least 0.6-mi (1-km) visibility, they shall call for a shutdown of repair activities. If dive operations are in progress, then they shall be halted and divers brought on board until visibility is adequate to see a 0.6-mi (1-km) range. At the time of shutdown, the use of thrusters must be minimized to the lowest level needed to maintain personnel safety. If there are potential safety problems due to the shutdown, the captain will decide what operations can safely be shut down and will document such activities in the data log.

(B) Prior to leaving the dock to begin transit, the barge will contact one of the

PSOs on watch to receive an update of sightings within the visual observation area (within 0.6 mi (1 km) of the Port). If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel will hold for 30 minutes and again seek clearance to leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release and will grant clearance if no North Atlantic right whales have been sighted in the last 30 minutes in the visual observation area. [Similar requirements from the acoustic monitoring system is required and discussed part (4) of this subsection.]

(C) Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels who will have responsibilities for watching for marine mammals. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in the LOA, sighting log requirements, and procedures for reporting injured or dead marine mammals. These designated crew members will be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew members will sign into a bridge log book upon the start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch will be recorded in the log book. Any whale sightings within 3,281 ft (1,000 m) of the vessel will result in a high alert and slow speed of 4 knots (7.4 km/hr) or less. A sighting within 2,461 ft (750 m) will result in idle speed and/or ceasing all movement.

(D) The material barges and tugs used for repair work shall transit from the operations dock to the work sites during daylight hours, when possible, provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug will be 5 knots (9.3 km/hr).

(E) Consistent with navigation safety, all repair vessels must maintain a speed of 10 knots (18.5 km/hr) or less during daylight hours. All vessels will operate at 5 knots (9.3 km/hr) or less at all times within 3.1 mi (5 km) of the repair area.

(3) Speed Restrictions in Seasonal Management Areas (SMAs)

Repair vessels and SRVs will transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' regulations at 50 CFR 224.105 that implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

- CCB SMA from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42° 12′ N. latitude;
- Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30′ N. 69°45′ W.; thence to 42°30′ N. 70°30′ W.; thence to 42°12′ N. 70°30′ W.; thence to 42°12′ N. 70°12′ W.; thence to 42°04′56.5″ N. 70°12′ W.; thence along mean high water line and inshore limits of COLREGS limit to a latitude of 41°40′ N.; thence due east to 41°41′ N. 69°45′ W.; thence back to starting point; and
- Great South Channel (GSC) SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

42°30′ N. 69°45′ W.
41°40′ N. 69°45′ W.
41°00′ N. 69°05′ W.
42°09′ N. 67°08′24″ W.
42°30′ N. 67°27′ W.
42°30′ N. 69°45′ W.

(4) Additional Mitigation Measures

(A) When approaching and departing from the Neptune Port, SRVs shall use the Boston Traffic Separation Scheme (TSS) starting and ending at the entrance to the GSC. Upon entering the TSS, the SRV shall go into a "heightened awareness" mode of operation, which is outlined in great detail in the Plan (see Neptune's application).

(B) In the event that a whale is visually observed within 0.6 mi (1 km) of the Port or a confirmed acoustic detection is reported on either of the two auto-detection buoys (ABs; more information on the acoustic devices is contained in the "Monitoring and Reporting" section later in this document) closest to the Port, departing SRVs shall delay their departure from the Port, unless extraordinary circumstances, defined in the Plan, require that the departure is not delayed. The departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 0.6 mi (1 km) from the Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the Port or visually within 0.6 mi (1 km) from Neptune.

(C) SRVs that are approaching or departing from the Port and are within the Area to be Avoided (ATBA) surrounding Neptune shall remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) away from all other visually detected whales unless extraordinary circumstances, as defined in Section 1.2 of the Plan in Neptune's application, require that the vessel stay its course. The ATBA is defined in 33 CFR 150.940. It is the largest area of the Port marked on nautical charts, and it is enforceable by the USCG in accordance with the 33 CFR 150.900 regulations. The Vessel Master shall designate at least one lookout to be exclusively and continuously monitoring for the presence of marine mammals at all times while the SRV is approaching or departing Neptune.

(D) Neptune will ensure that other vessels providing support to Neptune operations during regasification activities that are approaching or departing from the Port and are within the ATBA shall be operated so as to remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) from all other visually detected whales.

Additional Mitigation Measures Required by NMFS

In addition to the mitigation measures in Neptune's application, NMFS has required the following measures in these regulations in order to ensure the least practicable adverse impact on the affected species or stocks:

(1) Neptune must immediately suspend any repair and maintenance or operations activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the LNG facility activities. Upon finding a dead or injured marine mammal, Neptune must contact NMFS, the Northeast Stranding and Disentanglement Program, and the USCG. NMFS will review the documentation submitted by the PSO and attempt to attribute a cause of death. Activities will not resume until review and approval has been given by NMFS.

(2) PSOs will direct a moving vessel to slow to idle if a baleen whale is seen less than 0.6 mi (1 km) from the vessel.

(3) Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures described above, including the adaptive management component (see the "Adaptive Management" section later in this document), provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must, where applicable, set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Neptune proposed both visual and acoustic monitoring programs in the Plan contained in the application. Summaries of those plans, as well as the proposed reporting, are contained here.

Passive Acoustic Monitoring

Neptune LNG will deploy and maintain a passive acoustic detection network along a portion of the TSS and in the vicinity of Neptune. This network will consist of autonomous recording units (ARUs) and near-real-time ABs. To develop, implement, collect, and analyze the acoustic data obtained from deployment of the ARUs and ABs, as well as to prepare reports and maintain the passive acoustic detection network, Neptune LNG has engaged the Cornell University Bioacoustic Research Program (BRP) in Ithaca, New York, and the Woods Hole Oceanographic Institution (WHOI) in Woods Hole, Massachusetts.

During June 2008, an array of 19 passive seafloor ARUs was deployed by BRP for Neptune. The layout of the array centered on the terminal site and was used to monitor the noise environment in Massachusetts Bay in the vicinity of Neptune during construction of the Port and associated pipeline lateral. The ARUs were not designed to provide real-time or near-real-time information about vocalizing whales. Rather, archival noise data collected from the ARU array were used for the purpose of understanding the seasonal occurrences and overall distributions of whales (primarily North Atlantic right whales) within approximately 11.5 mi (18.5 km) of the Neptune Port. Neptune LNG will maintain these ARUs in the same configuration for a period of 5 years during operation of the Neptune Port in order to monitor the actual acoustic output of port operations and to alert NOAA to any unanticipated effects of port operations, such as large scale abandonment by marine mammals of the area. To further assist in evaluations of Neptune's acoustic output, source levels associated with DP of SRVs at the buoys will be estimated using empirical measurements collected from the passive detection network. If it is determined that this network is insufficient to collect the data, then source levels shall be collected from a platform as close as practicable to thrusters while in use.

In addition to the ARUs, Neptune LNG has deployed 10 ABs within the Separation Zone of the TSS for the operational life of the Port. The purpose of the AB array is to detect the presence of vocalizing North Atlantic right whales. Each AB has an average detection range of 5.8 mi (9.3 km) from the AB, although detection ranges will vary based on ambient underwater conditions. The AB system will be the primary detection mechanism that alerts the SRV Master to the occurrence of right whales in the TSS and triggers heightened SRV awareness. The configurations of the ARU array and AB network (see Figure 3 in the Plan in Neptune's application) were based upon configurations developed and recommended by NOAA personnel.

Each AB deployed in the TSS will continuously screen the low-frequency acoustic environment (less than 1,000 Hz) for right whale contact calls occurring within an approximately 5.8-mi (9.3-km) radius from each buoy (the ABs' detection range) and rank detections on a scale from 1 to 10. Each AB shall transmit up to 10 clips with ratings 6–10 in near-real-time via Iridium satellite link to the BRP server Web site every 20 minutes during periods of heightened awareness (otherwise AB detections are transmitted at a rate of 5 clips per 6 hours). This 20-minute transmission schedule was determined by consideration of a combination of factors including the tendency of right whale calls to occur in clusters (leading to a sampling logic of listening for other calls rather than transmitting immediately upon detection of a possible call) and the amount of battery power required to complete a satellite transmission. Additional details on the protocol can be found in Neptune's application.

Additional passive acoustic monitoring shall be required, on a case-by-case basis, during both planned and emergency repair activities in order to better detect right whales in the area of repair work and to collect additional data on the noise levels produced during repair and maintenance activities. Neptune shall work with NOAA (NMFS and SBNMS) to evaluate when to install real-time passive acoustic detection buoys to provide early warnings for potential occurrence of right whales in the vicinity of the repair area. The number of passive acoustic detection buoys installed around the activity site, if deemed necessary, shall be commensurate with the type and spatial extent of maintenance/repair work required but must be sufficient to detect vocalizing right whales within the 120-dB impact zone. In addition, Neptune shall provide NMFS with empirically measured source level data for all sources of noise associated with LNG port maintenance and repair activities. Measurements shall be carefully planned and coordinated with noise-producing activities and shall be collected from the passive detection network.

Visual Monitoring

(1) Maintenance and Repair Activities

During maintenance- and repair-related activities, Neptune LNG shall employ qualified PSOs on each vessel that has a DP system. All PSOs must

receive training and be approved in advance by NOAA after a review of their qualifications. Qualifications for these PSOs shall include direct field experience on a marine mammal observation vessel and/or aerial surveys in the Atlantic Ocean/Gulf of Mexico. Two PSOs are on-duty at all times. Each vessel typically has four PSOs on-board at all times. The PSOs (one primary and one secondary) are responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary PSO shall act as the identification specialist, and the secondary PSO will serve as data recorder and will assist with identification. Both PSOs shall have responsibility for monitoring for the presence of marine mammals.

The PSOs shall monitor the area where maintenance and repair work is conducted using the naked eye, hand-held binoculars, and/or power binoculars (*e.g,* Big Eyes). Two PSOs are on-duty 24 hours/day and switch between primary and secondary duties (as described in the previous paragraph) about every 40–60 minutes. During nighttime watches, PSOs are equipped with night vision devices. All sightings must be recorded on marine mammal field sighting logs.

(2) Operations

While an SRV is navigating within the designated TSS, three people have lookout duties on or near the bridge of the ship including the SRV Master, the Officer-of-the-Watch, and the Helmsman on watch. In addition to standard watch procedures, while the SRV is within the ATBA and/or while actively engaging in the use of thrusters, an additional lookout shall be designated to exclusively and continuously monitor for marine mammals. Once the SRV is moored and regasification activities have begun, the vessel is no longer considered to be in "heightened awareness" status. However, when regasification activities conclude and the SRV prepares to depart from Neptune, the Master shall once again ensure that the responsibilities as defined in the Plan are carried out. All sightings of marine mammals by the designated lookout, individuals posted to navigational lookout duties, and/or any other crew member while the SRV is within the TSS, in transit to the ATBA, within the ATBA, and/or when actively engaging in the use of thrusters shall be immediately reported to the Officer-of-the-Watch who shall then alert the Master.

Reporting Measures

Since the Neptune Port is within the Mandatory Ship Reporting Area (MSRA), all SRVs transiting to and from Neptune shall report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA shall report their activities to WHALESNORTH. Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system.

For major repair work associated with the pipeline lateral or other port components, Neptune LNG shall notify the appropriate NOAA personnel as soon as practicable after it is determined that repair work must be conducted. During maintenance and repair of the pipeline lateral or other port components, weekly status reports must be provided to NOAA. The weekly report must include data collected for each distinct marine mammal species observed in the project area during the period of the repair activity. The weekly reports shall include the following:

- The location, time, and nature of the pipeline lateral repair activities;
- Whether the DP system was operated and, if so, the number of thrusters used and the time and duration of DP operation;
- Marine mammals observed in the area (number, species, age group, and initial behavior);
- The distance of observed marine mammals from the repair activities;
- Observed marine mammal behaviors during the sighting;
- Whether any mitigation measures were implemented;
- Weather conditions (sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, *etc.*);
- Condition of the marine mammal observation (visibility and glare); and
- Details of passive acoustic detections and any action taken in response to those detections.

For minor repairs and maintenance activities, the following protocols will be followed:

- All vessel crew members will be trained in marine mammal identification and avoidance procedures;
- Repair vessels will notify designated NOAA personnel when and where the repair/maintenance work is to take place along with a tentative schedule and description of the work, as soon as practicable after it is determined that repair work must be conducted;
- Vessel crews will record/document any marine mammal sighting(s) during the work period; and
- At the conclusion of the repair/maintenance work, a report will be delivered to designated NOAA personnel describing any marine mammal sightings, the type of work taking place when the sighting occurred, and any avoidance actions taken during the repair/maintenance work.

During all phases of project repair/maintenance activities and operation, sightings of any injured or dead marine mammals will be reported immediately to the USCG, NMFS, and the Northeast Stranding and Disentanglement Program, regardless of whether the injury or death is caused by project activities. Sightings of injured or dead marine mammals not associated with project activities can be reported to the USCG on VHF Channel 16 or to NMFS Stranding and Entanglement Hotline. In addition, if the injury or death was caused by a project vessel (*e.g.*, SRV, support vessel, or repair/maintenance vessel), USCG must be notified immediately, and a full report must be provided to NMFS, Northeast Regional Office, and NMFS, Office of Protected Resources. The report must include the following information: (1) The time, date, and location (latitude/longitude) of the incident; (2) the name and type of vessel involved; (3) the vessel's speed during the incident; (4) a description of the incident; (5) water depth; (6) environmental conditions (*e.g.*, wind speed and direction, sea state, cloud cover, and visibility); (7) the species identification or description of the animal; (8) the fate of the animal; and (9) photographs or video footage of the animal (if equipment is available). Activities will not resume until review and approval has been given by NMFS.

An annual report on marine mammal monitoring and mitigation will be submitted to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office, on August 1 of each year. The annual report shall cover the time period of January 1 through December 31 of the previous year for each year of activity. The weekly and annual reports shall include data collected for each distinct marine mammal species observed in the project area in Massachusetts Bay during the period of LNG facility operations and repair/maintenance activities. The annual report shall also include a description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation and repair/maintenance

activities. Additional information that will be recorded by Neptune or its contractors during operation and repair/maintenance activities and contained in the reports include: results of empirical source level estimation for thrusters while in use and activities associated with maintenance and repair events, date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel or at the repair site when a marine mammal is sighted, and whether thrusters were in use and, if so, how many at the time of the sighting.

In addition to annual reports, Neptune must submit a draft comprehensive final report to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office, 180 days prior to the expiration of these regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first 4.5 years of the LOA. A revised final comprehensive technical report, including all monitoring results during the entire period of the LOAs will be due 90 days after the end of the period of effectiveness of the regulations.

General Conclusions Drawn From Previous Monitoring Reports

Throughout the construction period (July 2008–November 2009 with work stoppages during peak right whale season), Neptune submitted weekly reports on marine mammal sightings in the area. While it is difficult to draw biological conclusions from these reports, NMFS can make some general conclusions. Data gathered by PSOs is generally useful to indicate the presence or absence of marine mammals (often to a species level) within the safety zones (and sometimes without) and to document the implementation of mitigation measures. Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance as a result of Neptune's activities were observed by the PSOs. Of course, these observations only cover the animals that were at the surface and within the distance that the PSOs could see. Neptune has not yet conducted any repair or maintenance activities at the Port.

As described previously in this document, Neptune was required to maintain an acoustic array to monitor calling North Atlantic right whales (humpback and fin whale calls were also able to be detected). The ARUs log continuous acoustic data for up to 110 days per each deployment. At the end of each ARU recording cycle, the 19 units are recovered by BRP personnel. The data are analyzed based on seven objectives, which are as follows: (1) Determine daily presence of fin whale sounds; (2) determine daily presence of humpback whale sounds; (3) determine hourly presence of right whale sounds; (4) estimate locations and numbers of vocalizing right whales in the monitoring area each day; (5) estimate sound exposure for each locatable vocalizing whale; (6) assess noise conditions; and (7) improve analysis software applications.

Cornell BRP analyzed the data and submitted a report covering the initial construction phase of the project, which occurred in 2008. While acoustic data can only be collected if the animals are actively calling, the report indicates that humpback and fin whales were heard calling on at least some of the ARUs on all construction days, and right whale calls were heard only 28 percent of the time during active construction days. Background noise analysis revealed definite increases in acoustic noise in association with the different types of construction activities with increases highest in the right whale band and next highest in the humpback band. The report asserted that the influence of construction activities on the acoustic habitat that was monitored could not be adequately evaluated by simply counting the number of detected whales exposed to a received noise level above 120 dB.

The September 2010 ARU quarterly passive acoustic monitoring status report indicates that only a small portion of the 2010 data have been analyzed to date. The final *Marine Mammal Acoustic Monitoring and Analysis for the Operation of the Neptune Liquefied Natural Gas Terminal: 1 January–31 December 2010* will be submitted to NOAA, USGC, and MARAD by July 31, 2011.

The AB network has been deployed and operational in the Boston TSS since January 2010. Acoustic data from these buoys are sent to the BRP Cornell lab in near-real-time for analysis for the presence of North Atlantic right whales in the monitoring area. Positive North Atlantic right whale detections are relayed to SRVs during transit through the shipping lanes. The cycle of data analysis and information submission is a 24 hrs/day, 7 days/week operation when SRVs are in the monitoring area. To date, Cornell has prepared and submitted two reports for the AB system for 2010: January–June time period and July–September time period.

There are two monitoring conditions that dictate the tasks performed by analysts at BRP: "normal" monitoring conditions and "heightened watch" monitoring conditions. During "normal" monitoring conditions (*i.e.,* no SRVs are present in the monitoring area), analysts at BRP monitor and report on North Atlantic right whale activity twice a day. During "heightened watch" monitoring conditions (*i.e.,* when a SRV is 24 hours from the TSS AB coverage area, traveling through the Boston Shipping Lanes or transiting to the Neptune Port from the Boston Shipping Lanes) analysts at BRP monitor and report on North Atlantic right whale acoustic activity in near-real-time. Table 1 in this document outlines the detections and data that were recorded on the ABs from January–September 2010. The highest number of detections was recorded in March and the lowest number recorded in June. During the period January–September 2010, there were two SRV visits to the Port. This resulted in "heightened watch" monitoring conditions of the AB array for 2 days in February, 2 days in March, 7 days in April, 1 day in May, 1 day in July, and 7 days in August. The passive acoustic arrays will remain deployed during the effective period of these regulations in order to obtain information during the operational phase of the Port facility.

TABLE 1—INFORMATION ON NORTH ATLANTIC RIGHT WHALE CALL DATA COLLECTED FROM THE AB ARRAY DEPLOYED NEAR THE NEPTUNE PORT FROM JANUARY THROUGH SEPTEMBER 2010

	January	February	March	April	May	June	July	August	September
Number of ABs with a detection	8	10	10	10	10	5	8	8	8
Total number of detections for all ABs	328	573	3,874	2,786	1,538	34	64	112	189
Highest number of detections on a single day	58 (Jan. 14)	103 (Feb. 25)	1,059 (Mar. 25)	255 (Apr. 24)	186 (May 1)	8 (Jun. 15)	26 (Jul. 3)	35 (Aug. 14)	43 (Sep. 18)
Number of days with no recorded detections	5	2	0	0	1	14	16	9	11

Adaptive Management

NMFS has included an adaptive management component in the regulations governing the take of marine mammals incidental to operation and repair/maintenance activities at the Neptune Port. In accordance with 50 CFR 216.105(c), regulations for the proposed activity must be based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review and comment. The use of adaptive management will allow NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate for subsequent LOAs.

The following are some of the possible sources of applicable data:

- Results from Neptune's monitoring from the previous year;
- Results from general marine mammal and sound research; or
- Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

If, during the effective period of the regulations, new information is presented from monitoring, reporting, or research, these regulations may be modified, in whole, or in part after notice and opportunity for public review and comment, as allowed for in 50 CFR 216.105(c). In addition, LOAs shall be withdrawn or suspended if, after notice and opportunity for public comment, the Assistant Administrator finds, among other things, that the regulations are not being substantially complied with or the taking allowed is having more than a negligible impact on the species or stock, as allowed for in 50 CFR 216.106(e). That is, should substantial changes in marine mammal populations in the project area occur or monitoring and reporting show that the Port operations are having more than a negligible impact on marine mammals, then NMFS reserves the right to modify the regulations and/or withdraw or suspend LOAs after public review and comment.

Comments and Responses

On December 21, 2010 (75 FR 80260), NMFS published a proposed rule in response to Neptune's request to take marine mammals incidental to port commissioning and operations, including maintenance and repair activities, at its Deepwater Port in Massachusetts Bay and requested comments, information, and suggestions concerning the request. During the 45-day public comment period, NMFS received comments from two private individuals and the Marine Mammal Commission (MMC). NMFS has responded to these comments here.

Comment 1: One of the private citizen letters noted the continual harassment and stress sustained by marine mammals from human activities, and, therefore, urged that the regulations be denied.

Response: NMFS considered the potential for harassment from these activities in its impacts analysis in the proposed rule (75 FR 80260, December 21, 2010). Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. Based on the assessment in the proposed rule and contained later in this document, NMFS determined that the level of harassment from these activities would take only small numbers of marine mammals and would not have more than a negligible impact on the affected species or stocks. There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes. The permissible methods of taking and the required mitigation, monitoring, and reporting measures are laid out in this final rule.

Comment 2: The second private citizen letter expressed contradicting points of view. It stated on the one hand that NMFS should not stop LNG operations, as it would force increased prices for the public. However, the letter also stated that NMFS should take positive steps to protect marine mammals.

Response: NMFS is not the agency with regulatory authority over offshore deepwater LNG ports. That authority falls to the USCG and MARAD. Therefore, those are the agencies that either allow or deny LNG port construction and operation. NMFS authorizes the take of marine mammals incidental to a specified activity if certain findings are made. Those findings are described in the "Background" section found earlier in this document. The final rule and associated LOA contain mitigation and monitoring measures to ensure the least practicable adverse impact on marine mammal species and stocks in the Port area.

Comment 3: The MMC expressed three concerns with the information in the proposed rule as to the derivation of take estimates. First, the MMC expressed concern about the 120-dB zones that were used as they were smaller than those derived from in-situ measurements and incorporated into models in appendices in Neptune's application. This resulted in an underestimation of the zones of exposure. Second, the hypothetical strip width that was used by NMFS was much smaller than the strip width used during the surveys, thus producing overestimates of marine mammal densities in the area. Lastly, NMFS only estimated take from repair and maintenance activities and DP but not weathervaning.

The MMC is concerned that the presence of these errors and omissions in the proposed rule may have compromised the public's opportunity to comment meaningfully on the proposed authorization. Without seeing the new analyses, it is difficult to know whether the final rule will differ significantly enough from the proposed rule that an additional opportunity for public review and comment should be provided. Therefore, the MMC recommends that NMFS allow for an additional opportunity for public review and comment before publication of a final rule if the recalculated takes or zones in which takes might occur are significantly greater than those described in the proposed rule. If NMFS determines that additional notice and opportunity to comment are not needed, the MMC recommends that NMFS ensure that the revised estimates of the zones of exposure and anticipated takes for each of the three proposed activities are provided in the final rule, together with the rationale for not providing an additional opportunity for public review and comment.

Response: NMFS has revised the take estimates in this final rule from those contained in the proposed rule. A summary of the revisions is provided here, and more details can be found in the "Estimated Take by Incidental Harassment" section found later in this document.

As noted by the MMC, NMFS inadvertently did not estimate takes from weathervaning in the proposed rule. Takes from this activity (in

addition to DP use and repair/maintenance activities) have now been calculated and added to the total annual take estimate for each species. NMFS estimated that Neptune would require up to 8 days/year to conduct weathervaning to maintain position at the Port. This is based on information contained in their application and associated appendices. Including this activity only added a very small number of individuals of each species to the overall take totals for each species.

In December 2009, LGL Limited completed a Second Supplementary Biological Effects Report titled *Assessment of the Effects of Underwater Noise from Thrusters to be Used on the Neptune LNG Project* (LGL, 2009). This report incorporated measurements of the SRVs conducted by Samsung and new transmission loss modeling by JASCO Applied Sciences. This report presents zones of influence (ZOIs; *e.g.,* the area ensonified by the 120-dB contour) for DP during thruster use for docking and undocking, weathervaning (to maintain position on the mooring), and repair and maintenance activities. For each of these three activities that have the potential to result in take of marine mammals, LGL presented a range for the radius of the 120-dB isopleth. NMFS took the average (or mean) value for each of these three radii to determine the ZOIs for each activity and the amount of take for each species. NMFS used the following radii (and ZOIs) in its take calculations:

- DP during thruster use for docking and undocking: Radius of 2.33 mi (3.75 km) and an area of 17.06 mi^2 (44.18 km^2);
- Weathervaning: Radius of 3.2 mi (5.15 km) and an area of 32.17 mi^2 (83.32 km^2); and
- Repair and maintenance activities: Radius of 4.38 mi (7.05 km) and an area of 60.29 mi^2 (156.14 km^2).

The radius for DP increased only slightly between the proposed and final rules from 1.9 mi (3 km) to 2.33 mi (3.75 km). The increase in radius (and therefore ZOI) from repair and maintenance activities had a more dramatic increase between the proposed and final rules: 2.4 mi (3.9 km) to 4.38 mi (7.05 km). However, the radius for repair and maintenance activities assumes that all such activities would be similar to construction activities. Activities during construction were noisier and required more vessels on site at the same time than what would be expected for most repair or maintenance type activities. Therefore, this radius and associated ZOI are likely overestimates, as many of the activities would not occur on this large of a scale.

As noted by the MMC, NMFS used an extremely conservative hypothetical strip width in the proposed rule to derive density estimates. By doing so, the density estimates were severely inflated. NMFS has reviewed the 2006 NCCOS report from which data were used to determine species densities. Some of the data used a strip-transect survey method. The value for this was 2.3 mi (3.7 km). In order to convert a strip-transect value to a line transect for the strip width, one must divide the strip transect width by 2. Therefore, in this final rule, NMFS has used a strip width of 1.15 mi (1.85 km) to derive density estimates for the seven species discussed in the NCCOS (2006) report. This value is more realistic of actual field conditions than the original value used in the proposed rule. By using this larger strip width, the take estimates dropped dramatically (especially for DP thruster use), even with the larger ZOIs. The take estimates for DP thruster use with the lower density estimates and larger ensonified areas decreased by nearly three times the values in the proposed rule.

NMFS has determined that there does not need to be another opportunity for public comment on this rule based merely on the fact that the take estimates have been revised. When all of the recommended modifications to the take estimates were made (*i.e.,* inclusion of weathervaning, increasing ZOIs, and increasing strip width), the end result was that in all cases, the take estimates decreased slightly for the species described in the 2006 NCCOS report. Additionally, the public's opportunity to comment meaningfully was not compromised. Besides the MMC, only two other people submitted comment letters. Neither of these letters discussed the issue of take estimates or how the values were calculated in the proposed rule. NMFS has provided ample explanation for how the estimates were derived in this final rule and where changes in derivation were made from the proposed rule.

Comment 4: The MMC recommends that NMFS adopt a consistent requirement that mitigation zones be clear of all species of marine mammals for 30 minutes before initiation or resumption of activities.

Response: NMFS has changed the requirement that repair and maintenance activities not resume until the marine mammal has been positively confirmed to have left the mitigation zone to also state that if the animal has not been re-sighted for 30 minutes in the appropriate mitigation zone that activities may resume. This change is consistent with requirements and conditions contained in other MMPA ITAs.

Comment 5: The MMC notes that the proposed rule uses a 0.6-mi (1-km) radius of the area that must be visible for certain activities and a 0.5-mi (0.8-km) radius for repair and maintenance activities. The basis for allowing lower visibility for certain activities is not clear. The MMC recommends that NMFS require that visibility also be at least 0.6 mi (1 km) before maintenance and repair activities can proceed or provide a reasoned basis for allowing these activities under poorer visibility.

Response: NMFS has changed the visibility requirement for repair and maintenance activities in the final rule to be consistent with that of other activities for which mitigation is required in the rule. NMFS agrees with the MMC that there is no reason for the discrepancy in the visibility distances and therefore has made the requested change. The mitigation requirements for such activities now state that a zone of 0.6 mi (1 km) must be visible.

Comment 6: The MMC also questions whether the planned visual monitoring is adequate for mitigation purposes. The proposed rule specifies that PSOs would conduct visual monitoring for 40 minutes each hour, beginning at daybreak. With that 20-minute break each hour, if the Port operates 24 hours/day, then in a season with 12 hours of daily sunlight, observers would be on watch for a total of 8 hours only—that is, during one-third of operations. In essence, NMFS' approach implies that visual monitoring is necessary for mitigation purposes only at certain times, and the MMC does not see the basis for that conclusion. To address that concern, the MMC recommends that NMFS (1) require that PSOs monitor continuously for the presence of marine mammals when activities occur during daylight hours and (2) either prohibit nighttime operations or adopt measures that it can demonstrate to be reliable for detecting all marine mammals within the specified mitigation zones under nighttime conditions.

Response: The information contained in the proposed rule about the procedures used by PSOs during repair and maintenance activities at the Neptune Port was not described clearly. Additional information has been added to the "Monitoring and Reporting" section of this document to add clarity.

PSOs are on-duty continuously to monitor for the presence of marine mammals. This includes work done during nighttime hours. Two PSOs are on-watch at all times and take turns during the shift between being the

primary observer watching for marine mammals and the secondary observer who records sightings in the log book and watches for marine mammals when not entering data. Should repair and maintenance activities occur during nighttime hours, PSOs are equipped with night vision devices. These devices have proven to be useful within the small distances that are encompassed by the mitigation zones for this project.

Comment 7: The MMC believes that NMFS' determination under the MMPA that these activities will have a negligible impact on marine mammal species or stocks needs to take into account possible cumulative effects, even if cumulative effects analyses have been conducted under the National Environmental Policy Act (NEPA). Unless such an analysis is done, NMFS could continue indefinitely to grant ITAs for individual activities that, by themselves, have a negligible impact even though the combined total of all impacts might significantly impede a species' recovery or contribute to its further decline. With that concern in mind, the MMC recommends that NMFS include in its final rule an analysis evaluating the impact of the proposed operations together with the cumulative impacts of all the other pertinent risk factors affecting right whales and other marine mammals that occur in the Port area and explain why it believes that the combined impacts would be negligible.

Response: NMFS considered the cumulative effects analysis contained in the USCG's and MARAD's 2006 Final EIS and other relevant data to inform its MMPA determination here. NMFS was a cooperating agency in the development of both the Draft and Final EISs for this project. Pursuant to NEPA, those documents contained a cumulative impacts assessment, as well as an assessment of the impacts of the proposed Neptune Port construction, operation, and abandonment on marine mammals and other protected resources.

Section 101(a)(5)(A) of the MMPA and its implementing regulations require NMFS to consider a request for the taking of marine mammals incidental to a specified activity within a specified geographical region and, assuming certain findings can be made, to authorize the taking of small numbers of marine mammals while engaged in that activity. NMFS has defined "specified activity" in 50 CFR 216.103 as "any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals." When making a negligible impact determination, NMFS considers the total impact during each 5-year period resulting from the specified activity only and supports its determination by relying on factors such as: (1) The number of anticipated mortalities from the activity; (2) the number and nature of anticipated injuries from the activity; (3) the number, nature, intensity, and duration of Level B harassment resulting from the activity; and (4) the context in which the takes occur.

NMFS considered the impacts analyses (*i.e.,* direct, indirect, and cumulative) contained in the 2006 EIS in reaching its conclusion that any marine mammals exposed to the low level sounds produced by operations or repair/maintenance activities at the Neptune Port would be disturbed for only a short period of time and would not be harmed or killed. Furthermore, the required mitigation and monitoring measures are expected to reduce the likelihood or severity of any impacts to marine mammals over the course of these activities.

Moreover, NMFS gave careful consideration to a number of other issues and sources of information. In particular, NMFS relied upon a number of scientific reports, including the 2009 and 2010 U.S. Atlantic and Gulf of Mexico Marine Mammal SARs to support its findings. The SARs contain a description of each marine mammal stock, its geographic range, a minimum population estimate, current population trends, current and maximum net productivity rates, optimum sustainable population levels and allowable removal levels, and estimates of annual human-caused mortality and serious injury through interactions with commercial fisheries. NMFS also used data from the 2006 NCCOS report to determine density levels of several of the marine mammal species in the proposed activity area.

After careful consideration of the proposed activities, the context in which Neptune's proposed activities would occur, the best available scientific information, and all effects analyses (including cumulative effects), NMFS has determined that the taking from the specified activities: (1) Would not result in more than the behavioral harassment (*i.e.,* Level B harassment) of small numbers of marine mammal species or stocks; (2) would not result in more than a negligible impact on affected species or stocks; and (3) would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses. Therefore NMFS has decided to issue regulations and associated LOA(s) to Neptune to take, by no more than Level B harassment, small numbers of marine mammals incidental to operation and repair/maintenance activities at the Neptune Port off Massachusetts.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]." Only take by Level B harassment is anticipated as a result of Neptune's operational and repair/maintenance activities. Anticipated take of marine mammals is associated with thruster sound during maneuvering of the SRVs while docking and undocking, occasional weathervaning at the Port, and during thruster use of DP maintenance vessels should a major repair be necessary. The regasification process itself is an activity that does not rise to the level of taking, as the modeled source level for this activity is 110 dB (rms). Certain species may have a behavioral reaction to the sound emitted during the activities; however, hearing impairment as a result of these activities is not anticipated. Additionally, vessel strikes are not anticipated, especially because of the required speed restriction measures that were described earlier in this document.

For continuous sounds, such as those produced by Neptune's activities, NMFS uses a received level of 120-dB (rms) to indicate the onset of Level B harassment. The basis for Neptune's "take" estimate is the number of marine mammals that potentially could be exposed to sound levels in excess of 120 dB. This has been determined by applying the modeled ZOI to the seasonal use (density) of the area by marine mammals and correcting for seasonal duration of sound-generating activities and estimated duration of individual activities when the maximum sound-generating activities are intermittent to occasional. Nearly all of the required information is readily available in the MARAD/USCG Final EIS, with the exception of marine mammal density estimates for the project area. In the case of data gaps, a conservative approach was used to ensure that the potential number of takes is not underestimated, as described next.

Based on comments received from the MMC, NMFS has reevaluated the take estimates. The following factors for developing the take estimates have been taken into account in this final rule, which were not considered in the proposed rule:

- Takes from weathervaning were also estimated (in addition to takes from thruster use during DP and repair and maintenance activities, which were estimated in the proposed rule);
- The ZOIs for each of the three activities listed here are taken from Appendix C3 in Neptune's application, which are taken from in-situ measurements and incorporated into models in Neptune's application instead of the ZOIs from earlier reports, which were used in the proposed rule; and
- Density estimates were derived using a strip width of 1.15 mi (1.85 km) instead of the overly conservative strip width of 0.25 mi (0.4 km) used in the proposed rule.

In December 2009, LGL Limited completed a Second Supplementary Biological Effects Report titled *Assessment of the Effects of Underwater Noise from Thrusters to be Used on the Neptune LNG Project* (LGL, 2009). This report incorporated measurements of the SRVs conducted by Samsung and new transmission loss modeling by JASCO Applied Sciences. This report presents ZOIs for DP during thruster use for docking and undocking, weathervaning (to maintain position on the mooring), and repair and maintenance activities. For each of these three activities that have the potential to result in take of marine mammals, LGL presented a range for the radius of the 120-dB isopleth and also for the 120-dB ensonified area. NMFS took the average (or mean) value for each of these three radii to determine the ZOIs for each activity and the amount of take for each species from the three activities. Therefore, NMFS used the following radii (and ZOIs) in its take calculations:

- DP during thruster use for docking and undocking: Radius of 2.33 mi (3.75 km) and an area of 17.06 mi^2 (44.18 km^2);
- Weathervaning: Radius of 3.2 mi (5.15 km) and an area of 32.17 mi^2 (83.32 km^2); and
- Repair and maintenance activities: Radius of 4.38 mi (7.05 km) and an area of 60.29 mi^2 (156.14 km^2).

Additionally, in the calculation of take from repair and maintenance activities, the proposed rule determined that such activities may only need to occur for 14 days each year. However, after a reevaluation, NMFS has determined that it would be more appropriate to assume 28 days per year for repair and maintenance activities. While some repairs may take 3–4 weeks in any given year, there is also the possibility that some years may not have any repair or maintenance activities occur.

NMFS recognizes that baleen whale species other than North Atlantic right whales have been sighted in the project area from May to November. However, the occurrence and abundance of fin, humpback, and minke whales is not well documented within the project area. Nonetheless, NMFS used the data on cetacean distribution within Massachusetts Bay, such as those published by the NCCOS (2006), to determine potential takes of marine mammals in the vicinity of the project area. Neptune presented density estimates using the CETAP (1982) and U.S. Navy MRA (2005) data. The NCCOS (2006) report uses information from these sources; however, it also includes information from some other studies. Therefore, NMFS used density information for the species that are included in the NCCOS (2006) report. These species include: North Atlantic right, fin, humpback, minke, pilot, and sei whales and Atlantic white-sided dolphins.

The NCCOS study used cetacean sightings from two sources: (1) The North Atlantic Right Whale Consortium (NARWC) sightings database held at the University of Rhode Island (Kenney, 2001); and (2) the Manomet Bird Observatory (MBO) database, held at NMFS' Northeast Fisheries Science Center (NEFSC). The NARWC data contained survey efforts and sightings data from ship and aerial surveys and opportunistic sources between 1970 and 2005. The main data contributors included: The CETAP, the Canadian Department of Fisheries and Oceans, the Provincetown Center for Coastal Studies, International Fund for Animal Welfare, NEFSC, New England Aquarium, WHOI, and the University of Rhode Island. A total of 406,293 mi (653,725 km) of survey track and 34,589 cetacean observations were provisionally selected for the NCCOS study in order to minimize bias from uneven allocation of survey effort in both time and space. The sightings-per-unit-effort (SPUE) was calculated for all cetacean species by month covering the southern Gulf of Maine study area, which also includes the project area (NCCOS, 2006).

The MBO's Cetacean and Seabird Assessment Program (CSAP) was contracted from 1980 to 1988 by NEFSC to provide an assessment of the relative abundance and distribution of cetaceans, seabirds, and marine turtles in the shelf waters of the northeastern U.S. (MBO, 1987). The CSAP program was designed to be completely compatible with NEFSC databases so that marine mammal data could be compared directly with fisheries data throughout the time series during which both types of information were gathered. A total of 8,383 mi (5,210 km) of survey distance and 636 cetacean observations from the MBO data were included in the NCCOS analysis. Combined valid survey effort for the NCCOS studies included 913,840 mi (567,955 km) of survey track for small cetaceans (dolphins and porpoises) and 1,060,226 mi (658,935 km) for large cetaceans (whales) in the southern Gulf of Maine. The NCCOS study then combined these two data sets by extracting cetacean sighting records, updating database field names to match the NARWC database, creating geometry to represent survey tracklines and applying a set of data selection criteria designed to minimize uncertainty and bias in the data used.

Based on the comprehensiveness and total coverage of the NCCOS cetacean distribution and abundance study, NMFS calculated the estimated take number of marine mammals based on the most recent NCCOS report published in December, 2006. A summary of seasonal cetacean distribution and abundance in the project area was provided in the proposed rule, in the "Description of Marine Mammals in the Area of the Specified Activity" section (75 FR 80260, December 21, 2010). For a detailed description and calculation of the cetacean abundance data and SPUE, refer to the NCCOS study (NCCOS, 2006). SPUE for all four seasons were analyzed, and the highest value SPUE for the season with the highest abundance of each species was used to determine relative abundance. Based on the data, the relative abundance of North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins, as calculated by SPUE in number of animals per square kilometer, is 0.0082, 0.0097, 0.0265, 0.0059, 0.0084, 0.0407, and 0.1314 n/km, respectively. Table 2 in this document outlines the density, abundance, take estimates, and percent of population for the 14 species for which NMFS is authorizing Level B harassment.

In calculating the area density of these species from these linear density data, NMFS used 1.15 mi (1.85 km) as the strip width (W). This is larger than the extremely conservative hypothetical strip width of 0.25 mi (0.4 km) that was used in the proposed rule. This revised strip width is based on the distance of

visibility used in the NARWC data that was part of the NCCOS (2006) study. However, those surveys used a strip transect instead of a line transect methodology. Therefore, in order to obtain a strip width, one must divide the visibility or transect value in half. Since the visibility value used in the NARWC data was 2.3 mi (3.7 km), it thus gives a strip width of 1.15 mi (1.85 km). Based on this information, the area density (D) of these species in the project area can be obtained by the following formula:

$D = SPUE/2W$.

Based on the calculation, the estimated take numbers by Level B harassment on an annual basis for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins, within the 120-dB ensonified area during DP of thrusters for docking and undocking of approximately 17.06 mi^2 (44.18 km^2) maximum ZOI, corrected for 50 percent underwater, are 7, 9, 24, 5, 2, 36, and 118, respectively. This estimate is based on an estimated 50 SRV trips annually (for all of these species except for sei whales) that will produce sounds of 120 dB or greater. This estimate is based on an estimated 12.5 SRV trips annually that will produce sounds of 120 dB or greater for sei whales. Sei whales only occur in the area in the spring. Therefore, shipments during the other three seasons will not result in the take of sei whales. For this reason, take from shipment operations has only been calculated at a quarter of the rate of the other species for sei whales. With the revised strip width and ZOI, the take estimates for these seven species from DP during thruster use is about one-third the estimates in the proposed rule (75 FR 80260, December 21, 2010).

Based on the same calculation method described above for DP thruster use (but using the 120-dB ZOI of approximately 60.29 mi^2 (156.14 km^2)), the estimated take numbers by Level B harassment on an annual basis for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins incidental to Port maintenance and repair activities, corrected for 50 percent underwater, are 15, 17, 47, 11, 7, 72, and 233, respectively. These numbers are based on 28 days of repair and maintenance activities occurring annually (for all of these species except for sei whales). As mentioned previously, sei whales only occur in the area in spring. Since most repair work is to be scheduled for the spring and summer seasons, the take estimate for sei whales was calculated based on 14 days or repair and maintenance activities annually. It is unlikely that this much repair and maintenance work would be required each year. With the revised strip width and ZOI, the take estimates for these seven species from maintenance and repair activities increased only slightly (*i.e.,* no more than 9 individuals for any endangered whale species) from the proposed rule (75 FR 80260, December 21, 2010).

The third activity that has the potential to take marine mammals is weathervaning in order to maintain position at the Port. This activity is not anticipated to occur for more than 8 days in any given year. Therefore, the take estimates are based on the possibility of weathervaning occurring for up to 8 days for all species except sei whales. Again, since sei whales only occur in the area in spring, the estimate for this species was calculated at one-quarter the rate (*i.e.,* 2 days of weathervaning per year). Using a ZOI of 32.17 mi^2 (83.32 km^2), the estimated take numbers by Level B harassment on an annual basis for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins incidental to weathervaning, corrected for 50 percent underwater, are 2, 3, 7, 2, 1, 11, 36, respectively.

The total estimated annual take of each of these species as a result of all three activities with the potential to incidentally take marine mammals (*i.e.,* DP thruster use, repair and maintenance activities, and weathervaning) at the Neptune Port facility is: 24 North Atlantic right whales; 29 fin whales; 78 humpback whales; 18 minke whales; 12 sei whales; 119 long-finned pilot whales; and 387 Atlantic white-sided dolphins. These numbers represent a maximum of 7, 1.3, 9.2, 0.5, 3.1, 0.9, and 0.6 percent of the populations for these species or stocks in the western North Atlantic, respectively. The revised take estimates for these seven species are lower than the take estimates presented in the proposed rule (75 FR 80260, December 21, 2010). It is likely that individual animals will be "taken" by harassment multiple times (because certain individuals may occur in the area more than once while other individuals of the population or stock may not enter the project area). Additionally, the highest value SPUE for the season with the highest abundance of each species was used to determine relative abundance. Moreover, it is not expected that Neptune will have 50 SRV transits and LNG deliveries in the first year or two of operations. Therefore, these percentages represent the upper boundary of the animal population that could be affected. Thus, the actual number of individual animals being exposed or taken is expected to be far less, especially in the first couple of years of operation.

In addition, bottlenose dolphins, common dolphins, Risso's dolphins, killer whales, harbor porpoises, harbor seals, and gray seals could also be taken by Level B harassment as a result of the deepwater LNG port project. Because these species are less likely to occur in the area, and there are no density estimates specific to this particular area, NMFS based the take estimates on one or two encounters with typical group size. Therefore, NMFS estimates that up to approximately 10 bottlenose dolphins, 20 common dolphins, 20 Risso's dolphins, 20 killer whales, 5 harbor porpoises, 15 harbor seals, and 15 gray seals could be exposed to continuous noise at or above 120 dB re 1 μPa rms incidental to operations (*i.e.,* DP thruster use and weathervaning) and repair and maintenance activities annually, respectively. The take estimates for these seven species have not changed from the proposed rule.

Because Massachusetts Bay represents only a small fraction of the western North Atlantic basin where these animals occur, NMFS has determined that only small numbers of the marine mammal species or stocks in the area would be potentially affected by the Neptune LNG deepwater project. The take estimates presented in this section of the document do not take into consideration the mitigation and monitoring measures required in the regulations.

TABLE 2—DENSITY ESTIMATES, POPULATION ABUNDANCE ESTIMATES, TOTAL ANNUAL AUTHORIZED TAKE (WHEN COMBINE TAKES FROM DP THRUSTER USE, MAINTENANCE/REPAIR ACTIVITIES, AND WEATHERVANING), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES

Species	Density	Abundance [1]	Abundance [2]	Total annual authorized take	Percentage of stock or population
North Atlantic right whale	0.0022	345	361	24	6.6–7
Fin whale	0.0026	2,269	3,985	29	0.7–1.3
Humpback whale	0.0072	847	847	78	9.2
Minke whale	0.0016	3,312	8,987	18	0.2–0.5
Sei whale	0.0023	386	386	12	3.1
Long-finned pilot whale	0.011	31,139	12,619	119	0.4–0.9
Atlantic white-sided dolphin	0.0355	63,368	63,368	387	0.6
Bottlenose dolphin	NA	7,489	9,604	10	0.1
Common dolphin	NA	120,743	120,743	20	0.02
Risso's dolphin	NA	20,479	20,479	20	0.1
Killer whale	NA	NA	NA	20	NA
Harbor porpoise	NA	89,054	89,054	5	0.01
Harbor seal	NA	99,340	NA	15	0.02
Gray seal	NA	125,541–169,064	125,541–169,064	15	0.01

[1] Abundance estimates in 2009 NMFS Atlantic and Gulf of Mexico SAR;
[2] Abundance estimates in 2010 Draft NMFS Atlantic and Gulf of Mexico SAR; NA=Not Available.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined "negligible impact" in 50 CFR 216.103 as " * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Neptune's port operation and maintenance and repair activities, and none are authorized by NMFS. Additionally, animals in the area are not anticipated to incur any hearing impairment (*i.e.,* TTS, a Level B harassment, or PTS, a Level A [injury] harassment), as the modeling results for the SRV indicate a source level of 180 dB (rms), which is below the threshold used by NMFS for acoustic injury to marine mammals. All takes are anticipated to be by Level B behavioral harassment only. Certain species may have a behavioral reaction (*e.g.,* increased swim speed, avoidance of the area, *etc.*) to the sound emitted during the operations and maintenance activities. Table 2 in this document outlines the number of Level B harassment takes that are anticipated as a result of the activities. These takes are anticipated to be of low intensity due to the low level of sound emitted by the activities themselves. The activities could occur year-round. However, operations are not anticipated to occur on successive days. Should repair or maintenance work be required, this could occur on successive days but likely only for 1–2 weeks but no more than 3–4 weeks. The activities do not occur in any critical habitat for the affected species, although there is some nearby for North Atlantic right whales. Maintenance and repair activities will be conducted to avoid times of year when that species is most likely to be in the area.

While some of the species occur in the project area year-round, some species only occur in the area during certain seasons. For example, sei whales are only anticipated in the area during the spring. Therefore, if shipments and/or maintenance/repair activities occur in other seasons, the likelihood of sei whales being affected is quite low. Additionally, any repairs that can be scheduled in advance will be scheduled to avoid the peak time that North Atlantic right whales occur in the area, which usually is during the early spring. North Atlantic right, humpback, and minke whales are not expected in the project area in the winter. During the winter, a large portion of the North Atlantic right whale population occurs in the southeastern U.S. calving grounds (*i.e.,* South Carolina, Georgia, and northern Florida). The fact that certain activities will occur during times when certain species are not commonly found in the area will help reduce the amount of Level B harassment for these species.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Operational activities (*i.e.,* DP and weathervaning) are not anticipated to occur at the Port on consecutive days. Once Neptune is at full operations, SRV shipments would occur every 4–8 days, with thruster use needed for a couple of hours during each shipment. Weathervaning is anticipated to be needed during only a small portion of the shipments. Therefore, Neptune will not be creating increased sound levels in the marine environment for several days at a time.

Of the 14 marine mammal species likely to occur in the area, four are listed as endangered under the ESA: North Atlantic right, humpback, fin, and sei whales. These four species, as well as the northern coastal stock of bottlenose dolphin, are also considered depleted under the MMPA. The affected humpback and North Atlantic right whale populations have been increasing in recent years. However, there is insufficient data to determine population trends for the other depleted species in the project area. There are several well known North Atlantic right

whale feeding grounds in the CCB and GSC. However, they are outside of the area of the Port. As mentioned previously, to the greatest extent practicable, all maintenance/repair work will be scheduled during the May 1 to November 30 time frame to avoid peak right whale feeding in these areas, which occur close to the Neptune Port. Additionally, to protect North Atlantic right whales (and other marine mammals in the project area), Neptune must cease sound emitting activities and/or reduce vessel speed if animals enter into the designated zones. No mortality or injury is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

The population estimates for the species that may be taken by harassment from the most recent U.S. Atlantic SARs were provided in Table 2 in this document. From the most conservative estimates of both marine mammal densities in the project area and the size of the 120-dB ZOI, the maximum calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population sizes (9.2 percent for humpback whales, 6.6–7 percent for North Atlantic right whales, and no more than 3.1 percent of any other species).

As stated previously, NMFS' practice has been to apply the 120 dB re 1 μPa (rms) received level threshold for underwater continuous sound levels to determine whether take by Level B harassment occurs. However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 15, 17, 19, and 21 in Southall *et al.* (2007) outline the numbers of low-frequency, mid-frequency, and high-frequency cetaceans and pinnipeds in water, respectively, reported as having behavioral responses to non-pulses in 10-dB received level increments. These tables illustrate, especially for cetaceans, that more intense observed behavioral responses did not occur until sounds were higher than 120 dB (rms). Many of the animals had no observable response at all when exposed to anthropogenic sound at levels of 120 dB (rms) or even higher.

The take estimates presented in this document are likely an overestimate of the actual number of animals that may be taken by Level B harassment in any given year. First, NMFS used the highest value SPUE for the season with the highest abundance of each species to determine relative abundance from the NCCOS (2006) report. However, the SPUE quantiles used in that report had very large ranges. For example, for humpback whales, NMFS used the SPUE quantile with a value of 0.1–11.8 but used 11.8 as the SPUE to determine density. In most cases, the highest value SPUE in any given quantile is many magnitudes larger than the minimum value in that particular quantile. Second, the estimates assume that repairs will be required every year, which may not be the case. For the reasons discussed in this section of the document (and elsewhere), the take estimates presented by NMFS are likely an overestimate.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that operation, including repair and maintenance activities, of the Neptune Port will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from Neptune's activities will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

On January 12, 2007, NMFS concluded consultation with MARAD and USCG under section 7 of the ESA on the proposed construction and operation of the Neptune LNG facility and issued a Biological Opinion. The finding of that consultation was that the construction and operation of the Neptune LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green, or leatherback sea turtles.

On March 2, 2010, MARAD and USCG sent a letter to NMFS requesting reinitiation of the ESA section 7 consultation. MARAD and USCG determined that certain routine planned operations and maintenance activities, inspections, surveys, and unplanned repair work on the Neptune Deepwater Port pipelines and flowlines, as well as any other Neptune Deepwater Port component (including buoys, risers/umbilicals, mooring systems, and sub-sea manifolds), may constitute a modification not previously considered in the 2007 Biological Opinion. Construction of the Port facility has been completed, and, therefore, is no longer part of the proposed action. On July 12, 2010, NMFS' Northeast Regional Office issued a Biological Opinion, which concludes that the operation of the Neptune LNG deepwater port, including required maintenance and repair work, is likely to adversely affect, but is not likely to jeopardize the continued existence of the North Atlantic right, humpback, fin, and sei whales. NMFS reached this conclusion after reviewing the best available information on the status of endangered and threatened species under NMFS jurisdiction, the environmental baseline for the action area, the effects of the action, and the cumulative effects in the action area. Although MARAD served as the lead Federal agency for the section 7 consultation, the Biological Opinion also considered the effects of permits issued by the Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Environmental Protection Agency for various portions of the maintenance and operation of the Port and associated pipeline, as well as NMFS' issuance of authorizations to Neptune under the MMPA for the take of marine mammals incidental to Port operations and maintenance/repairs. NMFS has determined that issuance of these regulations and subsequent LOAs will not have any impacts beyond those analyzed in the 2010 Biological Opinion. NMFS' Northeast Regional Office will issue an Incidental Take Statement upon issuance of the LOA.

National Environmental Policy Act (NEPA)

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the proposed Neptune LNG Deepwater Port (see **ADDRESSES**). A notice of availability of the Final EIS/EIR was published by MARAD on November 2, 2006 (71 FR 64606). The Final EIS/EIR provides detailed

information on the proposed project facilities, construction methods, and analysis of potential impacts on marine mammals.

NMFS was a cooperating agency in the preparation of the Draft and Final EISs based on a Memorandum of Understanding related to the Licensing of Deepwater Ports entered into by the U.S. Department of Commerce along with 10 other government agencies. On June 3, 2008, NMFS adopted the USCG and MARAD FEIS and issued a separate Record of Decision for issuance of authorizations pursuant to sections 101(a)(5)(A) and (D) of the MMPA for the construction and operation of the Neptune LNG Port facility. NMFS reviewed the FEIS to ensure that the analysis contained in that document accurately describes and analyzes the impacts to the human environment of NMFS' action of issuing an MMPA authorization for the operation and repair and maintenance of the Neptune Port. NMFS has determined that the FEIS sufficiently covers the activities considered in this final rule.

Classification

The Office of Management and Budget (OMB) has determined that this final rule is not significant for purposes of Executive Order 12866.

At the proposed rule stage, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Neptune LNG LLC is the only entity that would be subject to the requirements in these regulations. Neptune is one of several companies at GDF SUEZ Energy North America (GSENA), which itself is a business division of GDF SUEZ Energy Europe & International. GSENA has more than 2,000 employees in North America alone. Therefore, it is not a small governmental jurisdiction, small organization, or small business, as defined by the Regulatory Flexibility Act. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This final rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: June 7, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Subpart R is added to part 217 to read as follows:

Subpart R—Taking of Marine Mammals Incidental to Operation and Maintenance of the Neptune Liquefied Natural Gas Facility Off Massachusetts

Sec.

217.170 Specified activity and specified geographical region.
217.171 Effective dates.
217.172 Permissible methods of taking.
217.173 Prohibitions.
217.174 Mitigation.
217.175 Requirements for monitoring and reporting.
217.176 Applications for Letters of Authorization.
217.177 Letters of Authorization.
217.178 Renewal of Letters of Authorization and adaptive management.
217.179 Modifications of Letters of Authorization.

Subpart R—Taking of Marine Mammals Incidental to Operation and Maintenance of a Liquefied Natural Gas Facility Off Massachusetts

§ 217.170 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Neptune LNG LLC (Neptune) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to commissioning and operation, including maintenance and repair activities, at the Neptune Deepwater Port (Port).

(b) The taking of marine mammals by Neptune may be authorized in a Letter of Authorization only if it occurs at the Neptune Deepwater Port within Outer Continental Shelf blocks NK 19–04 6525 and NK 19–04 6575, which are located at approximately 42°28′09″ N. lat and 70°36′22″ W. long.

§ 217.171 Effective dates.

Regulations in this subpart are effective from July 11, 2011, through August 10, 2016.

§ 217.172 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 217.177 of this chapter, the Holder of the Letter of Authorization (hereinafter "Neptune") may incidentally, but not intentionally, take marine mammals within the area described in § 217.170(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The incidental take of marine mammals under the activities identified in § 217.170(a) is limited to the following species and is limited to Level B Harassment:

(1) Mysticetes:

(i) North Atlantic right whale (*Eubalaena glacialis*)—120 (an average of 24 annually).

(ii) Fin whale (*Balaenoptera physalus*)—145 (an average of 29 annually).

(iii) Humpback whale (*Megaptera novaeangliae*)—390 (an average of 78 annually).

(iv) Minke whale (*Balaenoptera acutorostrata*)—90 (an average of 18 annually).

(v) Sei whale (*Balaenoptera borealis*)—60 (an average of 12 annually).

(2) Odontocetes:

(i) Long-finned pilot whale (*Globicephala melas*)—595 (an average of 119 annually).

(ii) Atlantic white-sided dolphin (*Lagenorhynchus acutus*)—1,935 (an average of 387 annually).

(iii) Bottlenose dolphin (*Tursiops truncatus*)—50 (an average of 10 annually).

(iv) Common dolphin (*Delphinus delphis*)—100 (an average of 20 annually).

(v) Risso's dolphin (*Grampus griseus*)—100 (an average of 20 annually).

(vi) Killer whale (*Orcinus orca*)—100 (an average of 20 annually).

(vii) Harbor porpoise (*Phocoena phocoena*)—25 (an average of 5 annually).

(3) Pinnipeds:

(i) Harbor seal (*Phoca vitulina*)—75 (an average of 15 annually).

(ii) Gray seal (*Halichoerus grypus*)—75 (an average of 15 annually).

§ 217.173 Prohibitions.

Notwithstanding takings contemplated in § 217.170 and authorized by a Letter of Authorization issued under §§ 216.106 and 217.177 of this chapter, no person in connection with the activities described in § 217.170 may:

(a) Take any marine mammal not specified in § 217.172(b);

(b) Take any marine mammal specified in § 217.172(b) other than by incidental, unintentional Level B Harassment;

(c) Take a marine mammal specified in § 217.172(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.177 of this chapter.

§ 217.174 Mitigation.

(a) When conducting the activities identified in § 217.170(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 217.177 must be implemented. These mitigation measures include but are not limited to:

(1) Major Repairs (May 1–November 30):

(i) During repairs, if a marine mammal is detected within 0.6 mi (1 km) of the repair vessel (or acoustically), the vessel superintendent or on-deck supervisor shall be notified immediately. The vessel's crew will be put on a heightened state of alert. The marine mammal will be monitored constantly to determine if it is moving toward the repair area.

(ii) Repair vessels shall cease any movement in the area if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) from the operating repair vessel. Repair vessels shall cease any movement in the construction area if a right whale is sighted within or approaching to a distance of 500 yd (457 m) from the operating vessel. Vessels transiting the repair area, such as pipe haul barge tugs, shall also be required to maintain these separation distances.

(iii) Repair vessels shall cease all sound emitting activities if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) or if a right whale is sighted within or approaching to a distance of 500 yd (457 m), from the operating repair vessel. The back-calculated source level, based on the most conservative cylindrical model of acoustic energy spreading, is estimated to be 139 dB re 1 μPa.

(iv) Repair activities may resume after the marine mammal is positively reconfirmed outside the established zones (either 500 yd (457 m) or 100 yd (91 m), depending upon species) or if the marine mammal has not been re-sighted in the established zones for 30 minutes.

(v) While under way, all repair vessels shall remain 500 yd (457 m) away from right whales and 100 yd (91 m) away from all other marine mammals, unless constrained by human safety concerns or navigational constraints.

(vi) All repair vessels 300 gross tons or greater must maintain a speed of 10 knots (18.5 km/hr) or less. Vessels less than 300 gross tons carrying supplies or crew between the shore and the repair site must contact the Mandatory Ship Reporting System, the U.S. Coast Guard (USCG), or the protected species observers (PSOs) at the repair site before leaving shore for reports of recent right whale sightings or active Dynamic Management Areas (DMAs) and, consistent with navigation safety, restrict speeds to 10 knots (18.5 km/hr) or less within 5 mi (8 km) of any recent sighting location and within any existing DMA.

(vii) Vessels transiting through the Cape Cod Canal and Cape Cod Bay (CCB) between January 1 and May 15 must reduce speeds to 10 knots (18.5 km/hr) or less, follow the recommended routes charted by NOAA to reduce interactions between right whales and shipping traffic, and avoid aggregations of right whales in the eastern portion of CCB.

(2) Major Repairs (December 1–April 30): If unplanned/emergency repair activities cannot be conducted between May 1 and November 30, then Neptune shall implement the following mitigation measures in addition to those listed in § 217.174(a)(1)(i) through (vii):

(i) If on-board PSOs do not have at least 0.6-mi (1-km) visibility, they shall call for a shutdown of repair activities. If dive operations are in progress, then they shall be halted and divers brought on board until visibility is adequate to see a 0.6-mi (1-km) range. At the time of shutdown, the use of thrusters must be minimized to the lowest level needed to maintain personnel safety. If there are potential safety problems due to the shutdown, the captain must decide what operations can safely be shut down and shall document such activities in the data log.

(ii) Prior to leaving the dock to begin transit, the barge must contact one of the PSOs on watch to receive an update of sightings within the visual observation area. If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel shall hold for 30 minutes and again seek clearance to leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release and will grant clearance if no North Atlantic right whales have been sighted in the last 30 minutes in the visual observation area.

(iii) Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels who will have responsibilities for watching for marine mammals. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in the Letter of Authorization, sighting log requirements, and procedures for reporting injured or dead marine mammals. These designated crew members shall be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew members shall sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch shall be recorded in the log book. Any whale sightings within 3,281 ft (1,000 m) of the vessel shall result in a high alert and slow speed of 4 knots (7.4 km/hr) or less. A sighting within 2,461 ft (750 m) shall result in idle speed and/or ceasing all movement.

(iv) The material barges and tugs used for repair work shall transit from the operations dock to the work sites during daylight hours, when possible, provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug shall be 5 knots (9.3 km/hr).

(v) Consistent with navigation safety, all repair vessels must maintain a speed of 10 knots (18.5 km/hr) or less during daylight hours. All vessels shall operate at 5 knots (9.3 km/hr) or less at all times within 3.1 mi (5 km) of the repair area.

(3) Speed Restrictions in Seasonal Management Areas (SMAs): Repair vessels and shuttle regasification vessels (SRVs) shall transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' regulations at 50 CFR 224.105 that implement speed

restrictions to reduce the likelihood and severity of ship strikes of right whales:

(i) CCB SMA from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42° 12′ N. latitude;

(ii) Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30′ N. 69°45′ W.; thence to 42°30′ N. 70°30′ W.; thence to 42°12′ N. 70°30′ W.; thence to 42°12′ N. 70°12′ W.; thence to 42°04′ 56.5″ N. 70°12′ W.; thence along mean high water line and inshore limits of COLREGS limit to a latitude of 41°40′ N.; thence due east to 41°41′ N. 69°45′ W.; thence back to starting point; and

(iii) Great South Channel (GSC) SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

(A) 42°30′ N. 69°45′ W.
(B) 41°40′ N. 69°45′ W.
(C) 41°00′ N. 69°05′ W.
(D) 42°09′ N. 67°08′ 24″ W.
(E) 42°30′ N. 67°27′ W.
(F) 42°30′ N. 69°45′ W.

(4) Additional Mitigation Measures:

(i) When approaching and departing from the Neptune Port, SRVs shall use the Boston Traffic Separation Scheme (TSS) starting and ending at the entrance to the GSC. Upon entering the TSS, the SRV shall go into a "heightened awareness" mode of operation.

(ii) In the event that a whale is visually observed within 0.6 mi (1 km) of the Port or a confirmed acoustic detection is reported on either of the two auto-detection buoys (ABs) closest to the Port, departing SRVs shall delay their departure from the Port, unless extraordinary circumstances, defined in the Marine Mammal Detection, Monitoring, and Response Plan (the Plan), require that the departure is not delayed. The departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 0.6 mi (1 km) from the Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the Port or visually within 0.6 mi (1 km) from Neptune.

(iii) SRVs that are approaching or departing from the Port and are within the Area to be Avoided (ATBA) surrounding Neptune shall remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) away from all other visually detected whales unless extraordinary circumstances, as defined in Section 1.2 of the Plan, require that the vessel stay its course. The ATBA is defined in 33 CFR 150.940. It is the largest area of the Port marked on nautical charts, and it is enforceable by the USCG in accordance with the 33 CFR 150.900 regulations. The Vessel Master shall designate at least one lookout to be exclusively and continuously monitoring for the presence of marine mammals at all times while the SRV is approaching or departing Neptune.

(iv) Neptune shall ensure that other vessels providing support to Port operations during regasification activities that are approaching or departing from the Port and are within the ATBA shall be operated so as to remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) from all other visually detected whales.

(v) PSOs shall direct a moving vessel to slow to idle if a baleen whale is seen less than 0.6 mi (1 km) from the vessel.

(vi) Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

(vii) Neptune must immediately suspend any repair and maintenance or operations activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the Port facility activities. Upon finding a dead or injured marine mammal, Neptune must contact NMFS, the Northeast Stranding and Disentanglement Program, and the USCG. NMFS will review the documentation submitted by the PSO and attempt to attribute a cause of death. Activities shall not resume until review and approval has been given by NMFS.

(5) Additional mitigation measures as contained in a Letter of Authorization issued under §§ 216.106 and 217.177 of this chapter.

(b) [Reserved]

§ 217.175 Requirements for monitoring and reporting.

(a) Visual Monitoring Program:

(1) Neptune shall employ PSOs during maintenance- and repair-related activities on each vessel that has a dynamic positioning system. Two (2) PSOs shall be on-duty at all times. All PSOs must receive NMFS-approved PSO training and be approved in advance by NMFS after a review of their qualifications.

(2) Qualifications for these PSOs shall include direct field experience on a marine mammal observation vessel and/or aerial surveys in the Atlantic Ocean/Gulf of Mexico.

(3) The PSOs (one primary and one secondary) are responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary PSO shall act as the identification specialist, and the secondary PSO shall serve as data recorder and also assist with identification. Both PSOs shall have responsibility for monitoring for the presence of marine mammals.

(4) The PSOs shall monitor the maintenance/repair area using the naked eye, hand-held binoculars, and/or power binoculars.

(5) The PSOs shall scan the ocean surface during maintenance- and repair-related activities and record all sightings in marine mammal field sighting logs. Observations of marine mammals shall be identified to the species or the lowest taxonomic level possible, and their relative position in relation to the vessel shall be recorded.

(6) While a SRV is navigating within the designated TSS, three people have lookout duties on or near the bridge of the ship including the SRV Master, the Officer-of-the-Watch, and the Helmsman on watch.

(7) In addition to standard watch procedures, while the SRV is within the ATBA and/or while actively engaging in the use of thrusters, an additional lookout shall be designated to exclusively and continuously monitor for marine mammals. Once the SRV is moored and regasification activities have begun, the vessel is no longer considered in "heightened awareness" status.

(8) At the conclusion of regasification activities, when the SRV is prepared to depart from the Port, the Master shall once again ensure that the responsibilities as defined in the Plan are carried out. All sightings of marine mammals by the designated lookout, individuals posted to navigational lookout duties, and/or any other crew member while the SRV is within the TSS, in transit to the ATBA, within the ATBA, and/or when actively engaging in the use of thrusters shall be immediately reported to the Officer-of-the-Watch who shall then alert the Master.

(b) Passive Acoustic Monitoring (PAM) Program:

(1) Neptune shall work with NMFS, Stellwagen Bank National Marine Sanctuary (SBNMS), and other scientists

to install and monitor an array of passive acoustic detection buoys in the Boston TSS that meets the criteria specified in the recommendations developed by NOAA through consultation with the USCG under the National Marine Sanctuary Act (NMSA). The system shall provide near real-time information on the presence of vocalizing whales in the shipping lanes.

(2) Neptune shall work with NMFS, SBNMS, and other scientists to monitor the archival array of acoustic recording units (ARUs), or "pop-ups," around the Port that meets the criteria specified in the program developed by NOAA in consultation with the USCG under the NMSA. The ARUs shall remain in place for 5 years following initiation of operations to monitor the actual acoustic output of port operations and alert NOAA to any unanticipated adverse effects of port operations, such as large-scale abandonment of the area or greater acoustic impacts than predicted through modeling.

(3) Passive acoustic devices shall be actively monitored for detections by a NMFS-approved bioacoustic technician.

(4) Repair Activity PAM Measures: PAM, in addition to that required in this section of these regulations, shall be required, on a case-by-case basis, during both planned and emergency repair activities in order to better detect right whales in the area of repair work and to collect additional data on the noise levels produced during repair and maintenance activities.

(i) Neptune shall work with NOAA (NMFS and SBNMS) to evaluate when to install and maintain an array of real-time passive acoustic detection buoys to provide early warnings for potential occurrence of right whales in the vicinity of the repair area. The number of passive acoustic detection buoys installed around the activity site, if deemed necessary, shall be commensurate with the type and spatial extent of maintenance/repair work required, but must be sufficient to detect vocalizing right whales within the 120-dB impact zone.

(ii) Neptune shall provide NMFS with empirically measured source level data for all sources of noise associated with Port maintenance and repair activities. Measurements shall be carefully planned and coordinated with noise-producing activities and shall be collected from the passive detection network.

(5) SRV Regasification PAM Measures: Source levels associated with dynamic positioning of SRVs at the buoys shall be estimated using empirical measurements collected from a platform positioned as close as practicable to thrusters while in use.

(c) Neptune must implement the following reporting requirements:

(1) Because the Port is within the Mandatory Ship Reporting Area (MSRA), all SRVs transiting to and from the Port must report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA must report their activities to WHALESNORTH. Any North Atlantic right whale sightings must be reported to the NMFS Sighting Advisory System.

(2) *Repair Work Reports.* (i) For major repair work associated with the pipeline lateral or other port components, Neptune shall notify the appropriate NOAA personnel as soon as practicable after it is determined that repair work must be conducted.

(ii) During maintenance and repair of the pipeline lateral or other port components, weekly status reports must be provided to NOAA. The weekly report must include data collected for each distinct marine mammal species observed in the project area during the period of the repair activity. The weekly reports shall include the following:

(A) The location, time, and nature of the pipeline lateral activities;

(B) Whether the dynamic position (DP) system was operated and, if so, the number of thrusters used and the time and duration of DP operation;

(C) Marine mammals observed in the area (number, species, age group, and initial behavior);

(D) The distance of observed marine mammals from the repair activities;

(E) Observed marine mammal behaviors during the sighting;

(F) Whether any mitigation measures were implemented;

(G) Weather conditions (sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, *etc.*);

(H) Condition of the marine mammal observation (visibility and glare); and

(I) Details of passive acoustic detections and any action taken in response to those detections.

(iii) For all minor repair work, Neptune must notify NOAA regarding when and where the repair/maintenance work is to take place along with a tentative schedule and description of the work, as soon as practicable after it is determined that repair work must be conducted. Vessel crews shall record/document any marine mammal sightings during the work period.

(iv) At the conclusion of all minor repair work, Neptune shall provide NOAA with a report describing any marine mammal sightings, the type of work taking place when the sighting occurred, and any avoidance actions taken during the repair/maintenance work.

(3) *Incident Reports.* During all phases of project repair/maintenance activities and operation, sightings of any injured or dead marine mammals must be reported immediately to the Chief, Permits, Conservation and Education Division or staff member and the Northeast Stranding and Disentanglement Program, regardless of whether the injury or death is caused by project activities. If the injury or death was caused by a project vessel (*e.g.*, SRV, support vessel, or construction vessel), the USCG must be notified immediately, and a full report must be provided to NMFS. Activities will not resume until review and approval has been given by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) The name and type of vessel involved;

(iii) The vessel's speed during the incident;

(iv) Description of the incident;

(v) Water depth;

(vi) Environmental conditions (*e.g.,* wind speed and direction, sea state, cloud cover, and visibility);

(vii) Species identification or description of the animal;

(viii) The fate of the animal; and

(ix) Photographs or video footage of the animal (if equipment is available).

(4) *Annual Reports.* (i) An annual report on marine mammal monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization), on August 1 of each year. The annual report shall cover the time period of January 1 through December 31 of each year of activity.

(ii) The annual report shall include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of Port operations and repair/maintenance activities. The annual report shall also include a description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation and repair/maintenance activities. Additional information that shall be recorded by Neptune or its contractor during operations and repair/maintenance activities and contained in the reports include: results of empirical

source level estimation for thrusters while in use and activities associated with maintenance and repair events, date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel when a marine mammal is sighted, and whether thrusters were in use and, if so, how many at the time of the sighting.

(5) *Five-year Comprehensive Report.* (i) Neptune shall submit a draft comprehensive final report to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization), 180 days prior to the expiration of the regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four and a half years of the LOA.

(ii) Neptune shall submit a revised final comprehensive technical report, including all monitoring results during the entire period of the LOAs, 90 days after the end of the period of effectiveness of the regulations to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization).

§ 217.176 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103) conducting the activity identified in § 217.170(a) (*i.e.,* Neptune) must apply for and obtain either an initial Letter of Authorization in accordance with § 217.177 or a renewal under § 217.178.

(b) [Reserved]

§ 217.177 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.,* mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 217.178 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 and § 217.177 of this chapter for the activity identified in § 217.170(a) shall be renewed upon request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under § 217.176 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS recieves the monitoring reports required under § 217.175(c)(1)–(4); and

(3) NMFS determines that the mitigation, monitoring and reporting measures required under §§ 217.174 and 217.175 and the Letter of Authorization issued under §§ 216.106 and 217.177 of this chapter were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If either a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 217.178 or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with Neptune regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from Neptune's monitoring from the previous year;

(2) Results from general marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

§ 217.179 Modifications of Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§ 216.106 and 217.177 of this chapter and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.178, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.172(b), a Letter of Authorization issued pursuant to §§ 216.106 and 217.177 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. 2011–14614 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 113
Monday, June 13, 2011

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

DEPARTMENT OF LABOR

5 CFR Chapter XLII

20 CFR Chapters IV, V, VI, VII, and IX

29 CFR Subtitle A and Chapters II, IV, V, VII, and XXV

30 CFR Chapter I

41 CFR Chapters 50, 60, and 61

48 CFR Chapter 29

Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

AGENCY: Office of the Secretary, Labor.

ACTION: Request for Information.

SUMMARY: In response to the President's Executive Order 13563 on improving regulation and regulatory review, the Department of Labor (DOL or the Department) prepared a preliminary plan to review its existing significant regulations. The purpose of this notice is to invite public comment on the Department's preliminary plan.

DATES: Comments must be received on or before 11:59 p.m. (EDST) on July 1, 2011.

ADDRESSES: You may submit comments through the Department's Regulations Portal at *http://dolregs.ideascale.com.* All comments will be available for public inspection at *http://dolregs.ideascale.com.*

FOR FURTHER INFORMATION CONTACT: e. christi cunningham, Associate Assistant Secretary for Regulatory Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–2312, Washington, DC 20210, *cunningham.christi@dol.gov,* (202) 693–5959 (this is not a toll-free number). Individuals with hearing impairments may call 1–800–877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: On January 18, 2011, President Obama issued Executive Order 13563, "Improving Regulation and Regulatory Review." The Order explains the Administration's goal of creating a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation" while using "the best, most innovative, and least burdensome tools to achieve regulatory ends." The Executive Order requires agencies to develop and submit a preliminary plan within 120 days from the January 18 issuance date that explains how each agency will review existing significant regulations to identify whether any regulations may be made more effective or less burdensome.

On May 26, 2011, the Department published its preliminary plan (*http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system*). To ensure that the plan meets the objectives of the Executive Order and to benefit from the expertise of the Department's regulated communities, academia and the public, the Department is now requesting public comments on the preliminary plan.

To facilitate receipt of public comments, the Department has established an Internet portal specifically designed to capture your input and suggestions, *http://dolregs.ideascale.com.* By visiting the portal, you can review the Department's preliminary plan; provide input; and review suggestions and comments submitted by other interested parties. The Department is specifically seeking comments in the following areas:

- Rules currently under consideration for retrospective analysis.
- Development of a strong, ongoing culture of retrospective analysis and strengthening internal review expertise.
- Factors and processes that will be used in setting priorities.
- Plans for retrospective analysis, revisiting and revising rules and coordinating with other Federal agencies.
- Metrics used to evaluate regulations, ensuring availability of data and incorporation of experimental design.

The portal will be open to receive comments from June 2, 2011 through July 1, 2011.

When providing input, the Department requests that commenters provide as much detail as possible and provide empirical evidence and data to support responses, whenever possible. The Department will consider public comments as it finalizes its plan for Retrospective Analysis of Existing Rules. The Department is issuing this request solely to seek useful information as it develops its review plan. While responses to this request do not bind the Department to any further actions related to the response, all submissions will be made available to the public on *http://dolregs.ideascale.com.*

Authority: E.O. 13653, 76 FR 3821, Jan. 21, 2011; E.O. 12866, 58 FR 51735, Oct. 4, 1993.

Dated: June 7, 2011.

e. christi cunningham,

Associate Assistant Secretary for Regulatory Affairs.

[FR Doc. 2011–14585 Filed 6–10–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2011–0047]

Privacy Act of 1974: Implementation of Exemptions; U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection—001 Alien File, Index, and National File Tracking System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of an updated system of records pursuant to the Privacy Act of 1974 for the Department of Homeland Security United States Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection—001 Alien File, Index, and National File Tracking system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The legacy final rule (28 CFR 16.99) exempting the Immigration and Naturalization Service A–File and Central Index System, JUSTICE/INS–

001A legacy system of records from certain portions of the Privacy Act remains in effect until publication of a final rule for this system by the Department.

DATES: Comments must be received on or before July 13, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0047, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. 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.*

Instructions: All submissions received must include the agency name and docket number for this notice. 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.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact Donald K. Hawkins, Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave., NW., Washington, DC 20529. For privacy issues please contact Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Homeland Security (DHS) implements U.S. immigration law and policy through the U.S. Citizenship and Immigration Service's (USCIS) processing and adjudication of applications and petitions submitted for citizenship, asylum, and other immigration benefits. USCIS also supports national security by preventing individuals from fraudulently obtaining immigration benefits and by denying applications from individuals who pose national security or public safety threats. U.S. immigration policy and law is also implemented through U.S. Immigration and Customs Enforcement's (ICE) law enforcement activities and U.S. Customs and Border Protection's (CBP) inspection and border protection processes.

The Alien File (A–File), Index, and National File Tracking System of Records is the official record system that contains information regarding transactions involving an individual as he/she passes through the U.S. immigration and inspection process. The DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records contains personally identifiable information (PII) such as the individual's name, Alien Registration Number (A–Number), receipt number, date and place of birth, date and port of entry, as well as the location of each official A–File. It may also contain other personal identifiers such as an individual's social security number. Some records contained in the DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records are derived from separate systems of record, in which case the system of records notice pertaining to the originating system would govern the treatment of those records. Previously, the legacy agency Immigration and Naturalization Services (INS) collected and maintained information concerning all of these immigration and inspection interactions. Since the formation of DHS, however, immigration responsibilities have been divided among USCIS, ICE, and CBP. While USCIS is the custodian of the A–File, all three components create and use A–Files.

A notice detailing this system of records was last published in the **Federal Register** on January 16, 2007, as the DHS/USCIS–001 Alien File and Central Index System (CIS), (72 FR 1755).

DHS is updating the DHS/USCIS–001 Alien File and Central Index System of Records to be renamed DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records to include the following substantive changes: (1) The addition of thirteen routine uses and updates to other routine uses to allow DHS to share information from the system; (2) an update to the classification level of the system and to provide notice that the system may contain classified records; and (3) a proposed exemption from certain provisions of the Privacy Act for records that are classified.

DHS is renaming this system in order to provide a better description of the types of records that are maintained in this system of records. These records may be maintained in paper or electronic format, but the uses and protections outlined in the notice do not change because of the format or the specific IT system in which they are maintained. DHS has provided more explicit notice on the specific IT systems where these types of records may exist under "Location."

Routine Use changes (the letter in parentheses corresponds to the Routine Use): DHS has added thirteen new routine uses and modified others in order to allow DHS to release system information:

(A) Updated: To include DHS as an additional party for litigation in the release of information to the Department of Justice (DOJ);

(D) New: To an agency, organization, or individuals for the purpose of performing audits or oversight as authorized by law;

(F) Updated: To include interns and students working on assignments for DHS;

(I) New: To courts for immigration, civil, or criminal proceedings;

(K) New: To DOJ or other Federal agencies when conducting litigation to assist in development of the agency's legal and/or policy position;

(L) Updated: To include sharing with international organizations about an alien or an enforcement operation with transnational implications;

(P) New: To a government organization in regards to hiring or retention of an individual where failure to disclose information on an individual is likely to create a security risk;

(Q) Updated: Rewritten to provide better clarification on when information is released to current or prospective employers;

(T) New: To Congress during the private immigration relief legislation process;

(U) Updated: To government agencies to assist in the collection of debts;

(V) Updated: To third parties posting immigration bonds;

(BB) New: To third parties when an individual will be released from DHS custody to assist with arranging housing or medical care;

(CC) New: To domestic government agencies when an individual will be released from DHS custody and there are concerns related to health and safety;

(DD) New: To foreign governments to coordinate removal of individuals;

(EE) New: To law enforcement agencies for de-conflicting investigations and other coordination of law enforcement activities;

(FF) New: To custodial agencies to place an immigration detainer on an

individual or to facilitate the transfer of custody of the individual from DHS to that agency;

(GG) New: To government agencies to confirm the location, custodial status, removal or voluntary departure of an alien in order to facilitate the custody, care and/or legal rights of the individual's minor children;

(HH) New: To government agencies to assist in making determinations of redress;

(II) New: To share information from the system on a case-by-case basis with the news media or public.

The latter sharing, to the news media or public, would be done only with the approval of the DHS Chief Privacy Officer, who will weigh the public interest in receiving the information against the privacy interests of the individual to whom the information pertains, when the disclosure is necessary to preserve confidence in the integrity of DHS or demonstrate the accountability of DHS personnel.

Classification level: DHS has updated the SORN to indicate that both classified and unclassified information may be maintained in the A–File, as such DHS is providing a concurrent notice of proposed rulemaking pursuant to the Privacy Act of 1974 for the DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records to include an exemption for classified information in addition to the existing law enforcement information exemption. The proposed rule extends the Privacy Act exemption to classified information and then re-publishes the existing exemptions claimed for the legacy JUSTICE/INS–001A A-File and CIS, (66 FR 46812). Generally, USCIS, ICE, and CBP are not the originators of the classified materials maintained in some A-Files. DHS, therefore, would rely upon the Privacy Act exemptions claimed by the system of records from which the classified material originated. By issuing this particular exemption, DHS is providing further transparency about the existence of classified material in this system of records. All of the exemptions DHS is proposing are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. Until DHS publishes a final rule exempting the system from certain portions of the Privacy Act, the legacy final rule exempting the JUSTICE/INS–001A A-File and CIS, (66 FR 46812) legacy system of records from certain portions of the Privacy Act remains in effect for this system of records.

Pursuant to Public Law 107–296, Homeland Security Act of 2002, Section 804 Savings Provisions, and by reference 28 CFR Appendix C to part 16, subpart E, pertaining to the INS A-File and CIS, JUSTICE/INS–001A (66 FR 46812) system of records notice, the records and information in this system are exempt from 5 U.S.C. 552a (c)(3) and (4), (d), (e)(1), (2), and (3), (e)(4)(G) and (H), (e)(5) and (8), and (g) of the Privacy Act. These exemptions apply only to the extent that records in the system are subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

Administrative changes: In addition to the above mentioned substantive changes to this system of records notice, DHS has updated the categories of individuals and categories of records so that they are more clearly defined.

Consistent with DHS's statutory information sharing mission, information stored in the DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records may be shared with other DHS components, as well as appropriate Federal, state, local, Tribal, foreign, or international government agencies. This sharing will take place only after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the purposes of this system of records and the routine uses set forth in this system of records notice.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records. Some information in DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records relates to official DHS national security, law enforcement, immigration, and intelligence activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes; to avoid disclosure of activity techniques; to protect the identities and physical safety of confidential informants and law enforcement personnel; to ensure DHS' ability to obtain information from third parties and other sources; to protect the privacy of third parties; and to safeguard classified information. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of Federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A System of Records Notice for DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.*; Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to part 5, the following new paragraph "55":

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

55. DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records consists of electronic and paper records and will be used by USCIS, ICE, and CBP. DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to: the enforcement of civil and criminal laws; investigations, inquiries, and proceedings thereunder; and national security and intelligence activities. DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other Federal, state, local, Tribal, territorial, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to limitations set forth in 5 U.S.C. 552a(c)(3) and (c)(4): (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (e)(12); (f); (g)(1); and (h) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to limitations set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(1) and (k)(2). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses, DHS employees' identities, or confidential informants.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (e)(12) (Computer Matching) if the agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the **Federal Register** notice of such establishment or revision.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(k) From subsection (h) (Legal Guardians) the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

Dated: May 27, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–14486 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Doc. AMS–NOP–11–0002; NOP–11–02]

National Organic Program; Notice of Draft Guidance for Accredited Certifying Agents and Certified Operations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of Availability With Request For Comments.

SUMMARY: The National Organic Program (NOP) is announcing the availability of four draft guidance documents intended for use by accredited certifying agents and certified operations. The draft guidance documents are entitled as follows: "The Use of Kelp in Organic Livestock Feed (NOP 5027)"; "Responding to Results from Pesticide Residue Testing (NOP 5028)"; "Seeds, Annual Seedlings, and Planting Stock in Organic Crop Production (NOP 5029)"; and "Evaluating Allowed Ingredients and Sources of Vitamins and Minerals For Organic Livestock Feed, Feed Supplements, and Feed Additives (NOP 5030)".

These draft guidance documents are intended to inform the public of NOP's current thinking on these topics. A notice of availability of final guidance on these topics will be issued upon their final approval. Once finalized, these guidance documents will be available from the NOP through "The Program Handbook: Guidance and Instructions for Accredited Certifying Agents (ACAs) and Certified Operations.

DATES: To ensure that NOP considers your comment on this draft guidance before it begins work on the final

version of the guidance, submit written comments on the draft guidance by August 12, 2011.

ADDRESSES: Submit written requests for hard copies of these draft guidance documents to Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave., SW., Room 2646 So., Ag Stop 0268, Washington, DC 20250–0268. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance documents.

Interested persons may comment on these four draft guidance documents using the following procedures:

Internet: http://www.regulations.gov.

Mail: Comments may be submitted by mail to: Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave., SW., Room 2646 So., Ag Stop 0268, Washington, DC 20250–0268.

Written comments responding to this request should be identified with the document number AMS–NOP–11–0002; NOP–11–02. You should clearly indicate your position and the reasons for your position. You should clearly indicate which guidance document you are commenting on, especially if you choose to comment on more than one draft guidance document. If you are suggesting changes to a draft guidance document, you should include recommended language changes, as appropriate, along with any relevant supporting documentation.

USDA intends to make available all comments, including names and addresses when provided, regardless of submission procedure used, on *http://www.regulations.gov* and at USDA, AMS, NOP, Room 2646–South building, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to noon and from 1 to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South building to view comments from the public to this notice are requested to make an appointment by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT: Melissa R. Bailey, PhD, Director, Standards Division, National Organic Program (NOP), USDA–AMS–NOP, 1400 Independence Ave., SW., Room 2646–So., Ag Stop 0268, Washington, DC 20250–0268, *Telephone:* (202) 720–3252, E-mail: *NOP.guidance@ams.usda.gov,* or visit the NOP *Web site* at: *http://www.ams.usda.gov/nop.*

SUPPLEMENTARY INFORMATION:

I. Background

The NOP selected the topics for the four draft guidance documents announced through this notice in response to recommendations issued by the National Organic Standards Board (NOSB) and the need to improve consistency in how certifying agents and certified operations are implementing the NOP regulations at 7 CFR part 205. The NOP developed "Seeds, Annual Seedlings, and Planting Stock in Organic Crop Production (NOP 5029)", and "Evaluating Allowed Ingredients and Sources of Vitamins and Minerals For Organic Livestock Feed, Feed Supplements, and Feed Additives (NOP 5030)" in response to outstanding NOSB recommendations from May 2002, February 2005, and November 2008. The NOP developed "The Use of Kelp in Organic Livestock Feed (NOP 5027)" in response to requests by certifying agents and certified operations for clarifications on this issue. The NOP developed "Responding to Results from Pesticide Residue Testing (NOP 5028)" to describe the reporting scheme and actions that certifying agents should be instituting to meet the requirements at § 205.670 of the NOP regulations.

II. Significance of Guidance

These draft guidance documents are being issued in accordance with the Office of Management and Budget (OMB) Bulletin on Agency Good Guidance Practices (GGPs) (January 25, 2007, 72 FR 3432–3440).

The purpose of GGPs is to ensure that program guidance documents are developed with adequate public participation, are readily available to the public, and are not applied as binding requirements. The draft guidance, when finalized, will represent the NOP's current thinking on these topics. It does not create or confer any rights for, or on, any person and does not operate to bind the NOP or the public. Guidance documents are intended to provide a uniform method for operations to comply that can reduce the burden of developing their own methods and simplify audits and inspections. Alternative approaches that can demonstrate compliance with the Organic Foods Production Act (OFPA), as amended (7 U.S.C. 6501–6522), and its implementing regulations are also acceptable. As with any alternative compliance approach, the NOP strongly encourages industry to discuss alternative approaches with the NOP before implementing them to avoid unnecessary or wasteful expenditures of resources and to ensure the proposed alternative approach complies with the Act and its implementing regulations.

Electronic Access

Persons with access to Internet may obtain the draft guidance at either NOP's Web site at *http://www.ams.usda.gov/nop* or *http://www.regulations.gov.* Requests for hard copies of the draft guidance documents can be obtained by submitting a written request to the person listed in the **ADDRESSES** section of this Notice.

Authority: 7 U.S.C. 6501–6522.

Dated: June 7, 2011.

Ellen King,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–14500 Filed 6–10–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AMS–FV–10–0099; FV11–983–1 PR]

Pistachios Grown in California, Arizona, and New Mexico; Proposed Amendments to Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: Four amendments to Marketing Agreement and Order No. 983, which regulates the handling of pistachios grown in California, Arizona, and New Mexico, were proposed by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. The proposed amendments would provide authority to establish aflatoxin and quality regulations for pistachios shipped to export markets, including authority to establish different regulations for different markets. The order currently provides authority for aflatoxin and quality regulations only for pistachios shipped to domestic markets. These proposed amendments are intended to provide authority to ensure uniform and consistent aflatoxin and quality regulations in the domestic and various export markets.

DATES: Comments must be received by July 13, 2011.

ADDRESSES: Written comments should be submitted to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington,

DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov*. All comments should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this proposed rule will be included in the record and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

To the extent practicable, all documents filed with the Docket Clerk should also be submitted electronically to Martin Engeler at the email address noted for him in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; 2202 Monterey Street, Fresno, California, 93721; Telephone: (559)487–5110, Fax: (559) 487–5906, or Kathleen M. Finn, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Martin.Engeler@ams.usda.gov* or *Kathy.Finn@ams.usda.gov*.

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Laurel.May@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement and Order No. 983, both as amended (7 CFR part 983), regulating the handling of pistachios produced in California, Arizona, and New Mexico, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act." The applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendment of the order through this informal rulemaking action. A producer referendum may be held in the future to determine support for the proposed order amendments, if deemed appropriate.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246) made changes to section 18c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August, 21, 2008). The changes to section 18c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend federal fruit, vegetable, and nut marketing agreements and orders if certain criteria are met.

AMS has considered the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and other relevant matters, and has determined that amending the order as proposed by the committee could appropriately be accomplished through informal rulemaking. AMS will analyze any comments received on the amendments proposed in this rule, and if warranted, will conduct a producer referendum to determine grower support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments favored by producers participating in the referendum.

The proposed amendments were unanimously recommended by the Committee following deliberations at a public meeting on July 9, 2010. The Committee's proposed amendments would: (1) Provide authority to establish aflatoxin sampling, analysis, and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets. (2) Provide authority to establish quality and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets. (3) Change a related section of the order concerning substandard pistachios to conform to the proposed addition of export authority. (4) Correct an erroneous cross-reference to another section of the order.

Proposal Number 1—Aflatoxin Regulation Authority

Section 983.50 of the order provides authority to establish aflatoxin sampling, analysis, and inspection requirements applicable to pistachios shipped for domestic human consumption. Section 983.150 of the order's administrative rules and regulations establish such requirements. These regulations prohibit the shipment of pistachios for domestic human consumption unless they have been sampled and tested according to specific procedures and protocols, and certified that they do not contain traces of aflatoxin exceeding a tolerance level of 15 parts per billion (ppb). The aflatoxin regulations under the order are intended to help assure consumers of a good quality product and to reduce the risk of potential aflatoxin contamination. While authority exists to establish aflatoxin regulations for domestic shipments of pistachios, no such authority exists under the order for export shipments. This proposed amendment would add authority to establish aflatoxin regulations for shipments of pistachios to export markets.

When the order was promulgated in 2004, a State of California marketing agreement was in effect that provided aflatoxin testing and certification for export shipments to designated markets. Under that program, handlers tested and certified export shipments according to the methods and protocols acceptable to the export destination. Thus, the authority to regulate export shipments was not included in the order to avoid duplication. The State program served the needs of the industry for several years, but was terminated in 2010. Although handlers continue to test and certify product prior to shipping into export markets, there is currently no program in place to establish uniform and consistent procedures.

The export market is becoming increasingly important to the U.S. pistachio industry to market its

continually increasing production. Pistachio acreage and production in the U.S. has been increasing steadily since the crop became commercially significant in the 1970's. This upward trend has continued since the order was promulgated, and is expected to continue into the foreseeable future. According to information reported by the Committee, in 2004 pistachio bearing acreage in California was 93,000 acres and non-bearing acreage was 24,733 acres, for a total of 117,773 acres. In 2010, bearing acreage was 137,102 acres and non-bearing acreage was 78,234, for a total of 215,336 acres. This represents an 83 percent increase in total acreage in just six years. The increased plantings are a response to the growing demand for U.S. pistachios, especially in export markets. A review of Committee shipment data indicates a substantial increase in shipments to export markets has occurred in recent years. Export shipments of open inshell pistachios increased from 95,761,666 pounds in the 2004–05 shipping season to 192,436,136 pounds in the 2009–10 season. Exports represented approximately 63 percent of total U.S. pistachio shipments during the 2009–10 season, underscoring the importance of the export market to the industry.

In view of the new plantings of pistachios as represented by the non-bearing acreage data, it is readily apparent that the production of U.S. pistachios will increase significantly in coming years. Successful marketing of the crop in the future will be dependent not only on sustaining current markets, but increasing the global demand to absorb the increased production. In order to accomplish this, it is important to reduce the risk of an aflatoxin incident involving U.S. pistachios.

In the mid-1990's, heightened consumer concern about aflatoxin occurred in Europe which resulted in a significant drop in pistachio consumption in those markets. Issues involving other commodities have also occurred in recent years, with adverse impacts. The pistachio industry thus believes it would be prudent to avail itself of an additional tool that could be used to reduce the risk of potential aflatoxin incidence in U.S. pistachios and the associated negative impacts.

Although pistachios destined for export markets are currently being tested and certified based on the requirements in those markets and customer's needs, there is currently no program in place with government oversight to ensure all handlers are following specific established protocols and procedures. Adding authority to the order to allow issuance of rules and regulations for aflatoxin testing and certification for export shipments would provide a mechanism to establish uniform and consistent aflatoxin sampling, analysis, and inspection requirements for shipments of domestically produced pistachios to export markets. A program with consistent and uniform procedures, with Federal oversight, would help instill confidence with foreign customers and government officials that the U.S. pistachio industry is committed to providing a good quality product to its markets that match or exceed the standards of the importing country.

The intent of the proposed amendments authorizing aflatoxin regulation for exports is to provide an additional tool under the order to aid in successful marketing of future crops.

The various export markets to which pistachios are shipped often have different requirements, such as allowable aflatoxin tolerance levels. Thus, the Committee also recommended adding authority to the order to establish different aflatoxin regulations for different markets. The proposed amendment would therefore authorize different regulations for different markets.

If the order is amended to include authority to establish aflatoxin regulations for shipments to export markets, specific regulations would need to be added to the order's rules and regulations through the informal rulemaking process. If the industry chooses to pursue such regulations, the Committee would meet to consider and analyze the available information in developing any recommendation to AMS. Any recommendation of the Committee concerning potential aflatoxin regulations would require a unanimous vote of 12 Committee members or alternate members acting in their stead according to the voting requirements in § 983.43 of the order.

For the reasons stated above, it is proposed that § 983.50, Aflatoxin regulations, be amended to authorize the Committee, with approval of the Secretary, to establish aflatoxin sampling, analysis, and inspection requirements for pistachios to be shipped for human consumption in export markets. It is also proposed that § 983.50 of the order be amended to authorize the Committee, with approval of the Secretary, to establish different aflatoxin requirements for different markets.

Proposal Number 2—Quality Regulation Authority

Section 983.51 of the order provides authority for the Committee, with approval of the Secretary, to establish quality and inspection requirements for pistachios shipped for domestic human consumption. There are currently no such requirements in effect under the order.

When the order was promulgated in 2004, specific requirements pertaining to quality levels were contained in the provisions of the order. These provisions were in effect from 2004 through 2007. In December 2007, the requirements were suspended because they were no longer meeting the industry's needs. In November 2009, the order was amended and the suspended quality requirements were removed from the order and replaced with broad authority for quality regulation. At that time, there was no desire by the industry to reinstate the specific quality regulations previously in effect or any intent to recommend any form of quality regulation. However, the industry desired to retain authority to implement some form of quality regulation in the future if circumstances warrant. Informal rulemaking would be required to reinstate quality regulations.

Applying similar logic, the Committee recommended at its July 2010 meeting to amend the broad quality authority under the order to include the authority to establish requirements for export shipments, in addition to domestic shipments. No quality regulations are currently being contemplated by the industry; however, the Committee believes it would be prudent to expand the current authority for quality regulations to include export shipments. Adding broad authority for quality regulations for exports would provide flexibility in the order by increasing the industry's ability to respond to quality issues related to exports, if they arise. Exports are becoming an increasingly important market for the industry and currently account for nearly two-thirds of domestically produced pistachios.

The Committee also recommended adding authority to the order to establish different quality requirements for different markets. Similar to the discussion under Proposal Number 1, different markets to which pistachios are shipped may have different quality requirements or concerns. The proposed amendment would therefore authorize different quality regulations for different markets. This would provide additional flexibility to the order to address different market needs.

If the order is amended to include authority to establish quality regulations for shipments to export markets, specific regulations would need to be added to the order's rules and regulations through the informal

rulemaking process. If the industry chooses to pursue such regulations, the Committee would meet to consider and analyze the available information in developing a recommendation to AMS. Any recommendation of the Committee concerning potential quality regulations would require a unanimous vote of 12 Committee members or alternate members acting in their stead according to the voting requirements in § 983.43 of the order.

For the reasons stated above, it is proposed that § 983.51, Quality regulations, be amended to authorize the Committee, with approval of the Secretary, to establish quality and inspection requirements for pistachios to be shipped for human consumption in export markets. It is also proposed that § 983.51 of the order be amended to authorize the Committee, with approval of the Secretary, to establish different quality requirements for different markets.

Proposal Number 3—Conforming Change

Section 983.57 of the order provides authority to establish reporting and disposition procedures for pistachios that do not meet aflatoxin or quality requirements (substandard product) to ensure they are not shipped for domestic human consumption. Since the order currently authorizes regulation of the domestic market only, § 983.57 does not reference the utilization of reporting and disposition procedures to ensure that substandard pistachios are not shipped to other markets besides the domestic market. Therefore, if Proposal Numbers 1 and 2 are adopted to include authority to regulate other markets, a conforming change should be made to § 983.57 to reference the utilization of reporting and disposition procedures to ensure substandard pistachios are not shipped to any market for which regulations exist.

It is therefore proposed that § 983.57, Substandard pistachios, be amended to authorize reporting and disposition procedures for substandard pistachios to ensure they are not shipped for human consumption in any market for which aflatoxin and/or quality requirements exist pursuant to § 983.50 and/or § 983.51.

Proposal Number 4—Correction

Section 983.53 of the order pertains to aflatoxin testing of minimal quantities of pistachios and provides, in part, that lots of pistachios exceeding the maximum tolerance level for aflatoxin may be tested again after being reworked as specified in § 983.50. The reference to § 983.50 is incorrect. The correct section, which pertains to rework procedures, is § 983.52. This proposed amendment recommended by the Committee would correct the erroneous reference.

It is therefore proposed to amend § 983.53 by removing the reference to § 983.50 in paragraph (a) (2) and replacing it with the correct reference to § 983.52.

Initial Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 850 producers and 29 handlers of pistachios in the production area encompassing California, Arizona, and New Mexico. The Small Business Administration (SBA) (13 CFR 121.201) defines small agricultural producers as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those having annual receipts of less than $7,000,000.

Based on Committee data, it is estimated that over 70 percent of the handlers ship less than $7,000,000 worth of pistachios and would thus be considered small business under the SBA definition. It is also estimated that over 80 percent of the growers in the production area produce less than $750,000 worth of pistachios and would thus be considered small businesses under the SBA definition.

The amendments proposed by the Committee would provide authority to establish aflatoxin sampling, analysis, and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets; provide authority to establish quality and inspection requirements for shipments of pistachios to export markets, including authority to establish different regulations for different markets; change a related section of the order concerning substandard pistachios to conform to the proposed addition of export authority; and correct an erroneous cross-reference to another section of the order.

These proposed amendments were unanimously recommended at a public meeting of the Committee held on July 10, 2010. None of the proposed amendments would have an immediate impact on handlers or producers if they are approved because they would not establish any requirements or regulations on handlers. However, the proposed amendments that would add authority to the order to regulate exports could impact growers and handlers in the industry if the authority is implemented. Therefore, the potential costs that may be associated with future regulation of exports is discussed below. In the event implementing regulations are subsequently recommended by the Committee if the proposed amendments are approved, additional analysis of the potential costs and benefits would be conducted as part of the informal rulemaking process.

Under § 983.50 of the order and § 983.150 of the administrative rules and regulations, sampling, analysis, and inspection of pistachios for aflatoxin is required prior to shipment to domestic markets. Specific procedures and requirements for handlers to follow are prescribed. It is anticipated that any requirements recommended for export shipments would be similar to those in effect for domestic shipments. Thus, the associated costs would be similar.

The costs of complying with aflatoxin regulations can be broken into three basic elements: Sampling of the product, the market value of the product samples that are used in testing, and the cost of the aflatoxin analysis performed by laboratories. These costs can vary among handlers depending on their particular operations. In recognition of this, the Committee provided estimates of the various cost elements for purposes of this discussion.

The cost of drawing samples from lots is estimated to range from $50.00 to $75.00 per lot. The variation in this cost can be attributed to factors such as the type of inspection program utilized by handlers. For purposes of this evaluation a cost factor of $70.00 per lot is utilized. The cost of the product used in sampling and testing varies depending upon the market price for pistachios. For purposes of this evaluation a value of $3.00 per pound as estimated by the Committee is utilized. At $3.00 per pound and a 44-pound sample, the cost of product used in sampling is $132.00 per lot. Laboratory costs for analyzing aflatoxin content are estimated to be $100.00 per test; with two tests per lot, the cost is $200.00 per lot.

Pistachio lots tested for aflatoxin can vary in size, but for purposes of this evaluation, a lot size of 50,000 pounds is used as that is a reasonable representative size for a typical handler operation. Applying the above cost estimates to a lot size of 50,000 pounds results in the following cost estimates on a per pound basis:

1. Sampling cost: $0.0014 per pound ($70.00 per lot divided by 50,000 pounds).

2. Value of product used in sampling: $0.0026 per pound ($132.00 per lot divided by 50,000 pounds).

3. Analytical cost of aflatoxin testing: $0.0040 per pound ($200 per sample divided by 50,000 pounds).

This results in a total estimated per pound cost of $0.0060 ($0.0014 + $0.0026 + $0.0040), or 0.8 cents per pound.

When compared to the market price for pistachios, the direct costs associated with an aflatoxin program are proportionately small. Utilizing a market price of $3.00 per pound as used in the above cost estimates, the costs of aflatoxin sampling and testing represent 0.27 percent of the market price. Even if the market price for pistachios was $1.00 per pound, the aflatoxin sampling and testing costs would be well below one percent of the price.

Most handlers who shipped pistachios to export markets in the past were signatories to a state marketing agreement that required aflatoxin sampling and analysis. That program was terminated in 2010. Since then, most handlers reportedly conduct aflatoxin testing and certification on export shipments to satisfy the requirements of the various markets. Therefore, the costs discussed above are already being borne by handlers.

While difficult to quantify, one of the primary benefits of an aflatoxin program is the reduced risk of a potential food incident. For example, in the late 1990s, high aflatoxin levels were detected in pistachios in European markets. This led to a 60 percent decrease in pistachio imports in Europe, and it took several years for the market to return to more normal levels. The U.S was not dominant in the European market at that time, but in recent years, Europe has become an increasingly significant market for U.S. pistachios. Regardless of the location of the market, this example demonstrates the devastating effect a food quality or food safety issue can have on the marketing of a product.

Another benefit of an aflatoxin testing program is the resulting reduction in the incidence of rejected shipments at their destination. Many countries test product prior to allowing its importation. Product that does not meet the importing country's standards can be rejected and returned to the shipper. It is estimated that the cost of handling or returning a rejected lot is between $12,000 and $15,000 per lot. Product that has been tested prior to shipment based on the requirements of its market destination is less likely to be rejected and would not incur the associated costs.

Avoiding a disruption in the marketing of pistachios in export markets is important in maintaining the viability of the industry. Shipments of open inshell pistachios increased dramatically in recent years; from 95,761,666 pounds in the 2004–05 shipping season to 192,436,136 pounds in the 2009–10 season, according to Committee data. Exports represented approximately 63 percent of total U.S. pistachio shipments during the 2009–10 season. According to statistics reported by the Committee, total acreage increased from 117,773 acres in 2004 to 215,336 acres in 2010, representing an 83 percent increase. Much of this acreage is non-bearing and will come into production in the near future. These statistics demonstrate that domestic production of pistachios will continue to increase in the future, and export markets must be maintained to accommodate the increased supplies.

Expanding order authority to include establishing aflatoxin requirements applicable to export shipments will provide an additional tool to aid in the marketing of pistachios covered under the order. In the event the authority is implemented, the potential costs associated with a mandatory aflatoxin program for exports are expected to be more than offset by the potential benefits discussed above.

An analysis of the potential costs of adding authority to the order to establish quality regulations is not possible because no quality regulations are currently in effect under the order, and none are being contemplated. Quality regulations were in effect for domestic shipments from 2004 through 2007, but were suspended because they were no longer meeting the industry's needs. However, the order still contains broad authority for domestic quality regulations and the industry may desire to reinstate them if circumstances warrant. As a result of the increasing importance of the export market as demonstrated above, the Committee recommended adding authority to the order for quality regulation for export shipments in the event circumstances in the future warrant their implementation.

If such authority is added to the order, a unanimous action of the Committee would be required to recommend the establishment of any export quality regulations. In addition, informal rulemaking would be required for implementation, and an analysis of the potential costs and benefits would be conducted during that process.

The remaining proposed amendments are administrative in nature and would have no economic impact on growers or handlers. One of the proposed amendments would add conforming language to another section of the order if other amendments are approved, and another proposed amendment would correct an incorrect section reference in the order.

Alternatives to these proposals include making no changes at this time. However, the Committee believes it would be beneficial to have the means necessary to apply regulations to the export markets if circumstances warrant.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0215, "Pistachios Grown in California". No changes in those requirements as a result of this proceeding are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

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

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

The Committee's meeting, at which these proposals were discussed, was widely publicized throughout the pistachio industry. All interested persons were invited to attend the meeting and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the meeting was public, and all entities, both large and small, were encouraged to express their views on these proposals.

Finally, interested persons are invited to submit comments on the proposed amendments to the order, including

comments on the regulatory and informational impacts of this action on small businesses.

Following analysis of any comments received on the amendments proposed in this rule, AMS will determine whether to proceed, and if so, would conduct a producer referendum. Information about the referendum, including dates and voter eligibility requirements, would be published in a future issue of the **Federal Register**. If appropriate, a final rule would then be issued to effectuate the amendments favored by producers participating in the referendum.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

General Findings

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

1. The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of pistachios grown in California, Arizona, and New Mexico in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order;

3. The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pistachios produced or packed in the production area; and

5. All handling of pistachios produced or packed in the production area as defined in the marketing agreement and order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 30-day comment period is provided to allow interested persons to respond to these proposals. Thirty days is deemed appropriate because the proposed changes have been widely publicized, and implementation of the changes, if adopted, would be desirable to benefit the industry as soon as possible. Any comments received on the amendments proposed in this rule will be analyzed, and if warranted, a producer referendum will be conducted to determine grower support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments favored by producers participating in the referendum.

List of Subjects in 7 CFR Part 983

Marketing agreements, Pistachios, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 983 is proposed to be amended as follows:

PART 983—PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO

1. The authority citation for 7 CFR part 983 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 983.50 to read as follows:

§ 983.50 Aflatoxin regulations.

The committee shall establish, with the approval of the Secretary, such aflatoxin sampling, analysis, and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. The committee may also establish, with the approval of the Secretary, such requirements for pistachios to be shipped for human consumption in export markets. No handler shall ship, for human consumption in domestic, or if applicable, export markets, pistachios that exceed an aflatoxin level established by the committee and approved by the Secretary. All shipments to markets for which requirements have been established must be covered by an aflatoxin inspection certificate. The committee may, with the approval of the Secretary, establish different sampling, analysis, and inspection requirements, and different aflatoxin level requirements, for different markets.

3. Revise § 983.51 to read as follows:

§ 983.51 Quality regulations.

For any production year, the committee may establish, with the approval of the Secretary, such quality and inspection requirements applicable to pistachios shipped for human consumption in domestic or export markets as will contribute to orderly marketing or be in the public interest. In such production year, no handler shall ship pistachios for human consumption in domestic, or if applicable, export markets unless they meet the applicable requirements as evidenced by certification acceptable to the committee. The committee may, with the approval of the Secretary, establish different quality and inspection requirements for different markets.

§ 983.53 [Amended]

4. Amend § 983.53 by removing the reference to "§ 983.50" and adding in its place "§ 983.52" in paragraph (a)(2).

5. Revise § 983.57 to read as follows:

§ 983.57 Substandard pistachios.

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet aflatoxin and quality requirements are not shipped for human consumption in those markets for which such requirements exist pursuant to § 983.50 and § 983.51.

Dated: June 5, 2011.

Ellen King,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–14432 Filed 6–10–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

7 CFR Part 3434

RIN 0524–AA39

Hispanic-Serving Agricultural Colleges and Universities (HSACU) Certification Process

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The National Institute of Food and Agriculture (NIFA) is requesting comments on the proposed process to certify a qualifying college or university as a Hispanic-Serving Agricultural Colleges and Universities (HSACU) institution. NIFA is proposing to amend our regulations in the Code of Federal Regulations to chronicle the eligibility criteria colleges and universities must satisfy in order to be certified as HSACU institutions by the Secretary of Agriculture.

DATES: Written comments are invited from interested individuals and organizations. To be considered in the formulation of the guidelines, comments must be received on or before August 12, 2011.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 0524–AA39, by any of the following methods:

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

E-mail: hsacu@nifa.usda.gov. Include RIN 0524–AA39 in the subject line of the message.

Fax: 202–401–7752.

Mail: Paper, disk or CD–ROM submissions should be submitted to Policy and Oversight Division; National Institute of Food and Agriculture; U.S. Department of Agriculture; STOP 2299; 1400 Independence Avenue, SW., Washington, DC 20250–2299.

Hand Delivery/Courier: Policy and Oversight Division; National Institute of Food and Agriculture; U.S. Department of Agriculture; Room 3107, Waterfront Centre; 800 9th Street, SW., Washington, DC 20024.

Instructions: All comments submitted must include the agency name and the RIN for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Matthew Lockhart, Senior Policy Specialist; National Institute of Food and Agriculture; U.S. Department of Agriculture; STOP 2299; 1400 Independence Avenue, SW., Washington, DC 20250–2299; *Voice:* (202) 570–7410; *E-mail: mlockhart@nifa.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

Authority

Section 7101 of the Food, Conservation, and Energy Act of 2008 (FCEA) (Pub. L. 110–246) amended section 1404 of the National Agricultural Research Teaching Policy Act of 1977, 7 U.S.C. 3103, to add a definition for a new group of cooperating educational institutions known as Hispanic-serving agricultural colleges and universities (HSACUs). Section 1404 defines HSACUs as colleges or universities that qualify as "Hispanic-serving institutions," as that term is defined in Section 1101a of title 20, and that offer associate, bachelors, or other accredited degree programs in agriculture-related fields. An exception is made to the HSACU definition so that it does not include 1862 institutions as defined in Section 2 of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. 7601).

Section 7129 of the FCEA authorizes the following five new programs for HSACUs: (1) HSACU Endowment Fund (formula-based); (2) HSACU Equity Grants Program (formula-based); (3) HSACU Institutional Capacity-Building Grants Program (competitive); (4) HSACU Extension Grants Program (competitive); and (5) HSACU Fundamental and Applied Research Grants Program (competitive). Funding for these programs is subject to the availability of appropriations. The FY 2011 President's Budget proposed $10,000,000 to initially fund the HSACU Endowment. If the proposed budget is enacted and an appropriation is made for the Endowment Fund, it will represent the first time funds have been appropriated for a HSACU program.

In addition, the FCEA amends section 406(b) of the Agricultural Research, Extension, and Education Reform Act of 1998, 7 U.S.C. 7626, to expand the eligibility for NIFA Integrated Research, Education, and Extension Competitive Grants Programs to include HSACUs.

NIFA was delegated authority to enter into agreements necessary to administer the HSACU Endowment Fund in 7 CFR 2.66(a)(144). NIFA, formerly the Cooperative State Research, Education, and Extension Service (CSREES), distributes federal funds to land grant colleges of agriculture to provide partial support for state-level research, education, and extension. NIFA's mission is to work with university partners to advance research, extension, and higher education in the food, agricultural, and related environmental and human sciences to benefit people, communities, and the nation.

For clarification, the rules for funds distributed to the HSACUs from the HSACU Endowment Fund shall be contained within 7 CFR part 3437. We will add and publish part 3437 shortly to provide specific administrative provisions for the HSACU Endowment Program (e.g., applicability of regulations, purpose, definitions, eligibility, use of funds, administrative duties, and other sections, as appropriate).

Solicitation of Stakeholder Input

On Sunday October 12, 2008, NIFA held a listening session for Hispanic-Serving Institutions (HSI) representatives at the Hyatt Regency in Denver, Colorado to discuss the Food, Conservation, and Energy Act of 2008 (FCEA) (Pub. L. 110–246) that created a new set of programs dedicated to the HSI community. NIFA solicited and welcomed commentaries on any part of these new programs including ways to interpret and implement the definition of the new category of institutions established by the FCEA. Since the term "agricultural-related fields" posed a challenge concerning its interpretation, HSI representatives also were given the opportunity to share their thoughts in written form by October 27, 2008.

During this listening session, 20 individuals, from 17 institutions and two organizations, provided public comments on the definition of Hispanic-Serving Agricultural Colleges and Universities (HSACUs). HSACUs are universities that qualify as Hispanic-Serving institutions as defined in the Higher Education Act of 1965, and offer Associate's, Bachelor's, or other accredited degree programs in agricultural-related fields. The session results can be found on the NIFA Web site at the following web page: *http://www.nifa.usda.gov/business/reporting/stakeholder/hsacu.html.*

The NIFA Assistant Administrator gave introductory remarks and explained how the session would be conducted. Dr. Jose Vicente, President of Miami-Dade North College, gave a detailed synopsis of their institution and stated that creating the Hispanic-Serving Agricultural Colleges and Universities is essential to increase and diversify the workforce in agricultural-related fields. Dr. Vicente expressed that

HSIs do not have land-grant status and only receive peripheral benefits from the FCEA. Three other universities, including a private college in Florida also shared a similar opinion. They also shared how their facilities provide services for Hispanic students in science, technology, engineering and mathematics, especially in urban settings. Lehman College of the City University of New York institutions stated that support for joint research programs and partnerships between HSIs and non-HSIs should be created.

Dr. Nora de la Garza from Laredo Community College emphasized the importance of including nontraditional agricultural colleges as the designation for HSACUs is made and that her college is historically a HSI. Laredo Community College and Houston Community College received a USDA grant to organize a Consortium of HSIs on capacity building. The Consortium has expanded to 21 members.

The Texas A&M–Kingsville representative, Mr. Frank Ureño, noted that for an institution to be eligible for this program it should currently be offering an accredited degree program in agriculture, but the most appropriate method would be to define the qualified schools as those with accredited programs in agriculture defined by the classification of instructional programs originally developed by the United States Department of Education. Ms. Maria Alvarez from El Paso Community College in Texas requested that two-year institutions be included in the HSACU definition. Dr. Ray Garza from the University of Texas at San Antonio noted that even though they are not a land-grant institution or an agriculture school, they are associated with two projects such as the Hispanic Leadership Program and the Agriculture and Natural Resources program and that they have placed students in positions throughout the USDA, particularly within the U.S. Forest Service.

Speakers from California State University-Fresno, California State Polytechnic University-Pomona, and California State University-Monterey Bay stated that they as HSIs will have representation on the national agriculture research, education—extension, education, and economics—advisory board. Dr. Charles Boyer, from CSU-Fresno, highlighted the key role CSU-Fresno plays in the richest farmland area in the country. The CSU-Monterey Bay representative, Mr. Stephen Reed, talked about the importance of innovative course offerings such as their agribusiness management concentration. Dr. Sandra Smith, the representative from Global Learning Semesters, a partner with the Hispanic Association of Colleges and Universities (HACU) and all of the HACU institutions in internationalizing student experiences, highlighted USDA's priority in internationalizing agricultural education, research, and outreach and the opportunity to partnership with Land-Grant Institutions.

Dr. Antonio Flores, President and Chief Executive Officer of HACU, an association that represents over 250 associate members (colleges and universities) with a minimum of 25 percent Hispanic undergraduate enrollment, recommended that both two- and four-year HSIs be equitably represented in HSACU. Mr. James Herrell, from Otero Junior College in Southeastern Colorado, articulated that access to higher education is most predicted on where one lives and one's capacity to be mobile. Mr. Paul Gutierrez, from New Mexico State University, stated that demographics of professional staff and faculty teaching in colleges of agriculture across the county did not reflect diversity. He added that more focus should be put on the needs of the rural Hispanic and Native American communities and not on the traditional institutional labels that tend to direct use of the resources.

Dr. Jose Rivera, from the University of the Sacred Heart, a private university in Puerto Rico, highlighted the transformation in the job market and job creation where there is increased focus on interdisciplinary and multidisciplinary education and initiatives. Ms. Agnes Mojica from the Inter American University of Puerto Rico at San German recommended that HSACUs should be considered not by states but by regions to avoid discriminating against certain states that may have a greater number of institutions.

Rebecca Orozco, director of the Center for Life on Earth at Cochise College located in southeastern Arizona emphasized the need for their program in agriculture in this impoverished area, because they are preparing students to continue onward to a university degree in agriculture and related fields.

Construction of Eligibility Criteria

Because HSACUs are not specifically named in the authorizing statute, NIFA is required to establish a criteria to designate HSACUs based on the definition provided in the legislation, which states that HSACUs are defined as HSIs that offer "agriculture-related programs." As part of the process to determine which programs qualify as "agriculture-related", NIFA incorporated a suggestion from the listening session to utilize the Classification of Instructional Programs (CIP) coding system developed by the U.S. Department of Education's National Center for Education Statistics as an instrument to identify agriculture-related programs.

The CIP coding system provides a taxonomic scheme that supports accurate tracking and reporting of fields of study and program completions activity. The CIP is organized on three levels: The 2-digit series represent the most general groupings of related programs, the 4-digit series are intermediate groupings of programs, and the 6-digit codes represent specific instructional programs. More information about CIP codes is available at *http://nces.ed.gov/ipeds/cipcode*.

To ensure impartiality of the parties involved in constructing the eligibility criteria, NIFA Deputy Administrators selected two National Program Leaders (NPLs) within their respective units to serve on a panel to review the CIP codes in an attempt to determine which instructional programs qualify as agriculture-related fields. The panel of 10 NPLs came from the following NIFA units: Competitive Programs, Economic and Community Systems, Families 4–H and Nutrition, Natural Resources and Environment, and Plant and Animal Systems. NIFA also asked these NPLs to provide input on a list of elements to consider for the eligibility criteria by ranking them in terms of importance (most important to least important). The elements considered were the number of agriculture-related programs, the number of Hispanic graduates, total enrollment, total Hispanic enrollment, and history of working with NIFA. Comments from the panel's review and the listening session provided the foundation in the development of the eligibility criteria for the HSACU certification process.

From the input received at the listening session, NIFA learned that there is a strong preference among stakeholders to limit the number of eligible institutions during the initial phase of the implementation process to maximize the impact of limited funding available at the outset of each HSACU program. However, there is no basis to limit the number of HSACUs if institutions otherwise meet the eligibility requirements as defined in the statute and this regulation.

Furthermore, in March 2010, the American Enterprise Institute released a report, "Rising to the Challenge," which charted graduation rates of Hispanic College students through use of data on six-year graduation rates from the U.S.

Department of Education's National Center for Education Statistics. This report noted that an institution is granted HSI designation based on enrollment numbers rather than a performance-based measure, such as student retention or graduation.

NIFA agrees that a performance-based measure will provide institutions with an incentive to take on a proactive role in increasing focus on graduating Hispanic students in agriculture-related fields in order to be certified as a HSACU. Hence, NIFA will grant HSACU certification to HSIs with agriculture-related programs where at least one Hispanic student obtained a degree in an agriculture-related field during the most recent reported academic year (i.e., the 2008–09 academic year).

HSACU certifications granted to institutions will remain valid for a period of one year.

Methodology for HSACU Certification

The certification process starts with NIFA obtaining the latest available report from the U.S. Department of Education's National Center for Education Statistics that lists all HSIs and the degrees conferred by these institutions during the most recently completed academic year. This report is used to identify Hispanic-serving Institutions that conferred a degree in an instructional program that appears in Appendix A of this Part and confirm that a degree was awarded to a Hispanic student in an agriculture-related field to form a group of institutions that are eligible to be certified as a HSACU (Appendix B).

NIFA will announce the list of schools with HSACU certification through a notice in the **Federal Register** and post the list on the NIFA Web site in September 2011. For the initial certification, HSIs with agriculture-related programs will be granted HSACU certification for a period of one year, thus the next announcement will take place in 2012 and this process will be repeated on an annual basis thereafter. NIFA expects to make these annual announcements, starting in 2012, during the month of June to allow time for appeals to take their course and be addressed by the start of the following fiscal year.

Composition of HSACUs

Based on the eligibility criteria provided in this proposed rule along with the most recent report made available to us from the U.S. Department of Education's National Center for Education Statistics (2008–09 academic year), fifty-seven (57) college and universities meet the HSI and agriculture-related field criteria (see Appendix B for a complete list of the 57 schools). Of the 57 schools up for certification, 22 schools offer Associate's degrees (39%), 32 schools offer Bachelor's degrees (56%), 19 offer Master's degrees (33%), and four offer a doctoral degree (7%). Note that the total of schools offering each degree type adds up to more than 57 because several schools offer more than one degree type (e.g., Bachelors and Masters).

Of these 57 schools, 26 schools are in the Western region (46%), 25 schools are in the Southern region (44%), three schools are in the North Central region (5%), and three schools are in the Northeastern region (5%). With this composition, NIFA is confident that HSACUs are sufficiently represented across all regions and institution types.

We expect the complete list of HSACU institutions to be slightly different when the Final Rule is published in the **Federal Register** in September 2011 as the list will be based on data from the 2009–10 academic year report, which is expected to be available before the scheduled publication date.

NIFA will permit HSIs that are not granted HSACU certification to submit an appeal within 30 days of NIFA's announcement of HSACU institutions. The appellant must submit a request for review to the NIFA official specified in the notification with details on the nature of the disagreement and include supporting documents. The appeal procedure will consist of two levels to allow an institution to request further review on its case should the initial NIFA review result in a rejection of the appeal.

Timeline for Implementing Regulations

NIFA is publishing this rule as a proposed rule with a 60-day comment period and anticipates addressing comments and publishing a final rule by September 1, 2011.

II. Administrative Requirements for the Proposed Rulemaking

Executive Order 12866

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

Regulatory Flexibility Act of 1980

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

Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 *et seq.* NIFA has determined that the PRA does not apply because this rule does not contain any information collection requirements that require approval of the OMB.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Catalog of Federal Domestic Assistance

This proposed regulation applies to the Federal assistance program administered by NIFA under the Catalog for Federal Domestic Assistance (CFDA) No. 10.310, Agriculture and Food Research Initiative (AFRI). New CFDAs will be established for each HSACU program as funds are appropriated.

Unfunded Mandates Reform Act of 1995 and Executive Order 13132

The Department has reviewed this final rule in accordance with the requirements of Executive Order No. 13132, 64 FR 43225 (August 10, 1999) and the Unfunded Mandates Act of 1995, 2 U.S.C. 1501 *et seq.,* and has found no potential or substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. As there is no Federal mandate contained herein

that could result in increased expenditures by State, local, or tribal governments or by the private sector, the Department has not prepared a budgetary impact statement.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The Department has reviewed this proposed rule in accordance with Executive Order 13175, 65 FR 67249 (November 9, 2000), and has determined that it does not have "tribal implications." The proposed rule does not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

Clarity of This Regulation

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

List of Subjects in Part 3434

Administrative practice and procedure; Agricultural research, education, extension; Hispanic-Serving Institutions; Federal assistance.

For the reasons set forth in the preamble, the National Institute of Food and Agriculture proposes to add a new part 3434 to Chapter XXXIV of Title 7 of the Code of Federal Regulations to read as set forth below:

PART 3434—HISPANIC-SERVING AGRICULTURAL COLLEGES AND UNIVERSITIES CERTIFICATION PROCESS

Sec.

3434.1 Applicability of regulations.
3434.2 Purpose.
3434.3 Definitions.
3434.4 Eligibility.
3434.5 Agriculture-related fields.
3434.6 Certification.
3434.7 Duration of certification.
3434.8 Appeals.
3434.9 Recertification.
3434.10 Reporting requirements.
Appendix A to Part 3434—List of agriculture-related fields.
Appendix B to Part 3434—List of HSACU institutions, 2011–2012.

Authority: Section 7101 of the Food, Conservation, and Energy Act of 2008; Pub. L. 110–246 (7 U.S.C. 3103).

§ 3434.1 Applicability of regulations.

This part establishes the process to certify and designate a group of eligible educational institutions as Hispanic-Serving Agricultural Colleges and Universities, as authorized by Section 7101 of the Food, Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 3103; Pub. L. 110–246.

§ 3434.2 Purpose.

The Secretary will follow the processes and criteria established in this regulation to certify and designate qualifying colleges and universities as HSACUs. Institutions designated as a HSACU will be eligible for five new programs authorized by Congress in section 7129 of the FCEA as well as for other ongoing NIFA programs for which HSACUs are now eligible (e.g., integrated programs authorized by section 406 of the Agricultural Research, Extension, and Education Reform Act of 1998). The five new programs include the HSACU Endowment Fund (formula-based), HSACU Institutional Capacity Building Grants Program (competitive), HSACU Extension Grants Program (competitive), HSACU Applied and Fundamental Research Grants Program (competitive), and HSACU Equity Grants Program (formula-based). The administrative provisions, including reporting requirements, for the HSACU Endowment Fund will be established in a separate part (7 CFR part 3437). The administrative provisions and reporting requirements for the other four new HSACU programs will be established as subparts in 7 CFR part 3430.

§ 3434.3 Definitions.

Agency or NIFA means the National Institute of Food and Agriculture.

Agriculture-related fields means a group of instructional programs that are determined to be agriculture-related fields of study for HSACU eligibility purposes by a panel of National Program Leaders at the National Institute of Food and Agriculture.

Department means the United States Department of Agriculture.

Hispanic-serving Institution means an institution of higher education that is an eligible institution, as that term is defined at 20 U.S.C. 1101a; and has an enrollment of undergraduate full-time equivalent students that is at least 25 percent Hispanic students, as reported to the U.S. Department of Education's Integrated Postsecondary Education Data System during the fall semester of the previous academic year.

Secretary means the Secretary of Agriculture and any other officer or employee of the Department to whom the authority involved has been delegated.

§ 3434.4 Eligibility.

(a) *General.* To be eligible to receive designation as a HSACU, colleges and universities must:

(1) Qualify as Hispanic-serving institutions; and

(2) Offer associate, bachelors, or other accredited degree programs in agriculture-related fields pursuant to § 3434.5 of this Part.

(b) *Non-eligibility.* The following colleges and universities are ineligible for HSACU certification:

(1) 1862 land-grant institutions, as defined in section 2 of the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. 7601);

(2) Institutions that appear in the Lists of Parties Excluded from Federal financial and nonfinancial assistance and benefits programs (Excluded Parties List System);

(3) Institutions that are not accredited by a nationally recognized accredited agency or association; and

(4) Institutions that did not produce a Hispanic graduate in an agriculture-related field of study during the most recent completed academic year.

§ 3434.5 Agriculture-related fields.

(a) The Secretary shall use the Classification of Instructional Programs (CIP) coding system developed by the U.S. Department of Education's National Center for Education Statistics as the source of information for all existing instructional programs. This source is located at *http://nces.ed.gov/ipeds/cipcode*.

(b) A complete list of instructional programs deemed to be agriculture-related fields by the Secretary is provided in Appendix A of this part. This list will include the full six-digit CIP code and program title (or major) for each agriculture-related instructional program.

(c) The list of agriculture-related fields will be updated every five years. However, the Secretary reserves the right to make changes at any time, if deemed appropriate and necessary.

(d) Any changes made in the CIP coding system by the U.S. Department of Education may result in a review or reevaluation of the list of agriculture-related fields by the Secretary.

§ 3434.6 Certification.

(a) Except as provided in paragraph (c) of this section, institutions that meet the eligibility criteria set forth in § 3434.4 and offer agriculture-related programs in accordance to the criteria set forth in § 3434.5 (see list in Appendix A) shall be granted HSACU certification by the Secretary.

(b) A complete list of institutions with HSACU certification shall be provided

in Appendix B of this part and posted on the NIFA Web site at *http://www.nifa.usda.gov*.

(c) Institutions that did not produce a Hispanic graduate in an agriculture-related field of study during the most recent completed academic year shall not be granted HSACU certification by the Secretary.

(d) The list of HSACU institutions will be updated annually. However, the Secretary reserves the right to make changes at any time, when deemed appropriate and necessary.

§ 3434.7 Duration of certification.

(a) Except as provided in paragraphs (b) and (c) of this section, HSACU certification granted to an institution by the Secretary under this part shall remain valid for a period of one (1) year.

(b) Failure to maintain eligibility status at any time during the HSACU certification period shall result in an immediate revocation of HSACU certification.

(c) Failure to remain in compliance with reporting requirements or adherence to any administrative or national policy requirements listed in award terms and conditions for any of the HSACU programs may result in a suspension or an immediate revocation of HSACU certification.

§ 3434.8 Appeals.

(a) An institution not listed as a HSACU in § 3434.6 of this Part may submit an appeal to address denial of a certification made pursuant to this part. Such appeals must be in writing and received by the Appeals Officer, Policy and Oversight Division, National Institute of Food and Agriculture, U.S. Department of Agriculture, 800 9th Street, SW., Washington, DC 20024 within thirty (30) days following an announcement of institutions designated for certification. The Appeals Officer will consider the record of the decision in question, any further written submissions by the institution, and other available information and shall provide the appellant a written decision as promptly as circumstances permit. Such appeals constitute an administrative review of the decision appealed from and are not conducted as an adjudicative proceeding.

(b) Appeals involving an agriculture-related field of study must include the CIP code and program title of the field of study (or major).

(c) Appeals from non-HSI schools will not be considered.

(d) The NIFA Assistant Director of the Institute of Youth, Family, and Community shall serve as the Appeals Officer.

(e) In considering such appeals or administrative reviews, the Appeals Officer shall take into account alleged errors in professional judgment or alleged prejudicial procedural errors by NIFA officials. The Appeals Officer's decision may:

(1) Reverse the appealed decision;

(2) Affirm the appealed decision;

(3) Where appropriate, withhold a decision until additional materials are provided.

The Appeals Officer may base his/her decision in whole or part on matters or factors not discussed in the decision appealed from.

(f) If the NIFA decision on the appeal is adverse to the appellant or if an appellant's request for review is rejected, the appellant then has the option of submitting a request to the NIFA Deputy Director for Food and Community Resources for further review.

(g) The request for further review must be submitted to Policy and Oversight Division, National Institute of Food and Agriculture, U.S. Department of Agriculture, 800 9th Street, SW., Washington, DC 20024 within thirty (30) days following the Appeals Officer's decision.

(h) No institution shall be considered to have exhausted its administrative remedies with respect to the certification or decision described in this part until the NIFA Deputy Director for Food and Community Resources has issued a final administrative decision pursuant to this section. The decision of the NIFA Deputy Director for Food and Community Resources is considered final.

(i) Appellants shall be notified in writing of any decision made by NIFA in regards to the appeal.

§ 3434.9 Recertification.

(a) The recertification process for a HSACU remains the same as the process outlined in § 3434.6.

(b) There is no limit to the number of times an institution may be recertified as a HSACU.

(c) In the event an institution is not granted recertification due to noncompliance with reporting requirements for a HSACU program, the institution shall be notified in writing and given a period of ninety (90) days from the date of notification to be in compliance.

§ 3434.10 Reporting requirements.

(a) The certification process does not involve any reporting requirements.

(b) Reporting requirements for HSACU programs (e.g., HSACU Endowment Fund) shall be established in separate parts.

Appendix A to Part 3434—List of Agriculture-Related Fields

The instructional programs listed in this appendix are observed to be agriculture-related fields for HSACU eligibility purposes. Programs are listed in numerical order by their six-digit CIP code followed by the full title of the instructional program, as listed by the U.S. Department of Education.

01.0000, Agriculture, General
01.0101, Agricultural Business and Management, General
01.0102, Agribusiness/Agricultural Business Operations
01.0103, Agricultural Economics
01.0104, Farm/Farm and Ranch Management
01.0105, Agricultural/Farm Supplies Retailing and Wholesaling
01.0106, Agricultural Business Technology
01.0199, Agricultural Business and Management, Other
01.0201, Agricultural Mechanization, General
01.0204, Agricultural Power Machinery Operation
01.0205, Agricultural Mechanics and Equipment/Machine Technology
01.0299, Agricultural Mechanization, Other
01.0301, Agricultural Production Operations, General
01.0302, Animal/Livestock Husbandry and Production
01.0303, Aquaculture
01.0304, Crop Production
01.0306, Dairy Husbandry and Production
01.0307, Horse Husbandry/Equine Science and Management
01.0308, Agroecology and Sustainable Agriculture
01.0309, Viticulture and Enology
01.0399, Agricultural Production Operations, Other
01.0401, Agricultural and Food Products Processing
01.0504, Dog/Pet/Animal Grooming
01.0505, Animal Training
01.0507, Equestrian/Equine Studies
01.0508, Taxidermy/Taxidermist
01.0599, Agricultural and Domestic Animal Services, Other
01.0601, Applied Horticulture/Horticultural Operations, General
01.0603, Ornamental Horticulture
01.0604, Greenhouse Operations and Management
01.0605, Landscaping and Groundskeeping
01.0606, Plant Nursery Operations and Management
01.0607, Turf and Turfgrass Management
01.0608, Floriculture/Floristry Operations and Management
01.0699, Applied Horticulture/Horticultural Business Services, Other
01.0701, International Agriculture
01.0801, Agricultural and Extension Education Services
01.0802, Agricultural Communication/Journalism
01.0899, Agricultural Public Services, Other
01.0901, Animal Sciences, General
01.0902, Agricultural Animal Breeding
01.0903, Animal Health
01.0904, Animal Nutrition
01.0905, Dairy Science
01.0906, Livestock Management
01.0907, Poultry Science

01.0999, Animal Sciences, Other
01.1001, Food Science
01.1002, Food Technology and Processing
01.1099, Food Science and Technology, Other
01.1101, Plant Sciences, General
01.1102, Agronomy and Crop Science
01.1103, Horticultural Science
01.1104, Agricultural and Horticultural Plant Breeding
01.1105, Plant Protection and Integrated Pest Management
01.1106, Range Science and Management
01.1199, Plant Sciences, Other
01.1201, Soil Science and Agronomy, General
01.1202, Soil Chemistry and Physics
01.1203, Soil Microbiology
01.1299, Soil Sciences, Other
01.9999, Agriculture, Agriculture Operations, and Related Sciences, Other
03.0101, Natural Resources/Conservation, General
03.0103, Environmental Studies
03.0104, Environmental Science
03.0199, Natural Resources Conservation and Research, Other
03.0201, Natural Resources Management and Policy
03.0204, Natural Resources Economics
03.0205, Water, Wetlands, and Marine Resources Management
03.0206, Land Use Planning and Management/Development
03.0207, Natural Resources Recreation and Tourism
03.0208, Natural Resources Law Enforcement and Protective Services
03.0299, Natural Resources Management and Policy, Other
03.0301, Fishing and Fisheries Sciences and Management
03.0501, Forestry, General
03.0502, Forest Sciences and Biology
03.0506, Forest Management/Forest Resources Management
03.0508, Urban Forestry
03.0509, Wood Science and Wood Products/Pulp and Paper Technology
03.0510, Forest Resources Production and Management
03.0511, Forest Technology/Technician
03.0599, Forestry, Other
03.0601, Wildlife and Wildlands Science and Management
03.9999, Natural Resources and Conservation, Other
13.1301, Agricultural Teacher Education
14.0301, Agricultural/Biological Engineering and Bioengineering
19.0501, Foods, Nutrition, and Wellness Studies, General
19.0504, Human Nutrition
19.0505, Foodservice Systems Administration/Management
19.0599, Foods, Nutrition, and Related Services, Other

Appendix B to Part 3434—List of HSACU Institutions, 2011–2012

The institutions listed in this appendix will be granted HSACU certification by the Secretary and will be eligible for HSACU programs for the period starting October 1, 2011 and ending September 30, 2012. Institutions are listed alphabetically with the campus indicated where applicable under the state of the school's location.

California (19)

Allan Hancock College
Bakersfield College
California State Polytechnic University-Pomona
California State University-Bakersfield
California State University-Fresno
California State University-Fullerton
California State University-Monterey Bay
College of the Desert
College of the Sequoias
Fullerton College
Hartnell College
Merced College
Modesto Junior College
Mt. San Antonio College
Reedley College
Santa Ana College
Southwestern College
University of California-Merced
University of California-Riverside

Florida (3)

Barry University
Florida International University
Nova Southeastern University

Illinois (2)

Northeastern Illinois University
Triton College

Kansas (1)

Seward County Community College

New Mexico (5)

Eastern New Mexico University-Main Campus
Mesalands Community College
New Mexico Highlands University
University of New Mexico-Main Campus
Western New Mexico University

New York (3)

CUNY Bronx Community College
CUNY Lehman College
Mercy College-Main Campus

Puerto Rico (12)

Bayamon Central University
Inter American University of Puerto Rico-Bayamon
Inter American University of Puerto Rico-Metro
Inter American University of Puerto Rico-Ponce
Inter American University of Puerto Rico-San German
Pontifical Catholic University of Puerto Rico-Ponce
Universidad Del Este
Universidad Del Turabo
Universidad Metropolitana
University of Puerto Rico-Humacao
University of Puerto Rico-Rio Piedras Campus
University of Puerto Rico-Utuado

Texas (10)

Palo Alto College
Southwest Texas Junior College
Sul Ross State University
Texas A&M University-Corpus Christi
Texas A&M University-Kingsville
Texas State Technical College-Harlingen
University of Texas at Brownsville
University of Texas at El Paso
University of Texas at San Antonio
University of Texas of the Permian Basin

Washington (2)

Heritage University
Yakima Valley Community College

Done in Washington, DC, this 7th day of June, 2011.

Ralph Otto,

Deputy Director, National Institute of Food and Agriculture.

[FR Doc. 2011–14498 Filed 6–10–11; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2011–BT–STD–0031]

RIN 1904–AC54

Commercial and Industrial Pumps

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

ACTION: Request for Information (RFI).

SUMMARY: The Energy Policy and Conservation Act as amended (42 U.S.C. 6291 *et seq.*) prescribes energy conservation standards for certain commercial and industrial equipment, and requires the Department of Energy (DOE) to administer an energy conservation program for the equipment. In this notice, DOE requests information from interested parties regarding product markets, energy use, test procedures, and energy efficient product designs for commercial and industrial pumps. Additional input and suggestions relevant to this equipment are also welcome.

DATES: Written comments and information are requested by July 13, 2011.

ADDRESSES: Interested persons may submit comments in writing, identified by docket number EERE–2011–BT–STD–0031, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: Pumps-RFI-2011-STD-0031@ee.doe.gov.* Include EERE–2011–BT–STD–0031 and/or RIN 1904–AC54 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Request for Information for Commercial and Industrial Pumps, EERE–2011–BT–STD–0031 and/or RIN 1904–AC54, 1000 Independence Avenue, SW.,

Washington, DC 20585–0121. *Phone:* (202) 586–2945. Please submit one signed paper original.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original.

• *Instructions:* All submissions received must include the agency name and docket number.

Docket: For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Llenza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2192. E-mail: *Charles.Llenza@ee.doe.gov.*

In the Office of General Counsel, Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7796. E-mail: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

1. Statutory Authority

Title III of the Energy Policy and Conservation Act (EPCA) of 1975, as amended (42 U.S.C. 6291 *et seq.*), sets forth various provisions designed to improve energy efficiency. Part C of EPCA includes measures to improve the energy efficiency of commercial and industrial equipment.[1] See 42 U.S.C. 6311–6316.

Section 6311(A) includes electric motors and pumps as "covered equipment." Section 6316(a) describes how provisions in Part A (which concerns "Consumer Products Other Than Automobiles") apply to industrial equipment, which includes pumps.[2]

Sections 6314 and 6315 concern test procedures and labeling, respectively, for covered equipment. The provisions in these sections, in combination with section 6316(a), give DOE authority to establish test procedures and to prescribe a labeling rule for pumps.

Based on the information DOE receives in response to this Request for Information, DOE will determine whether to initiate a rulemaking to establish a test procedure, energy conservation standard, or labeling requirement for commercial and industrial pumps.

2. Evaluation of Pumps as Covered Equipment

EPCA lists several specific types of "industrial equipment" as "covered equipment," including electric motors and pumps. (42 U.S.C. 6311(1))

DOE estimates that commercial, industrial, and agricultural pumps consume approximately 0.63 quads per year of electricity and that technologies exist that can reduce this consumption by approximately 0.190 quads annually.

DOE used industry and census data to calculate the average establishment energy use for pumps.

Industrial Pumps

Several estimates have been made of industrial pump electricity use. Four are discussed here. The most recent, made for the DOE Office of Energy Efficiency and Renewable Energy Industrial Technologies program by Energetics Incorporated, states that the total industrial energy use of industrial pumps is estimated to be 185,000 million kWh or 0.63 quads site energy use. The machine drive energy data used in this estimate (*http://www1.eere.energy.gov/industry/rd/footprints.html*) were primarily provided by the DOE Energy Information Administration's (EIA's) *Manufacturing Energy Consumption Survey* (MECS). The machine drive energy includes pump energy and reflects consumption in the year 2006, when the survey was last completed.

Another recent report for the United Nations ("Motor System Efficiency Supply Curves UNIDO," Dec. 2010),[3] also used the 2006 MECS data. The total industrial energy use was estimated to be 126,180 million kWh or 0.43 quads site energy use. Part of the reason for the lower estimate in this study is that the authors listed a lower value for the petroleum refining industry than any of the other three studies.

An earlier study conducted for DOE, "United States Industrial Electric Motor Systems Opportunities Assessment, December, 2002,"[4] estimated energy used by pumps in the manufacturing sector. This energy use estimate did not include agriculture, oil and gas extraction, water and wastewater, or mineral mining. Standard Industrial Codes (SICs) from 20–39 (except for 21 and 39) were included in the analysis. The site energy use estimated for the year 1994 was 142,690 million kWh or 0.49 quads site energy use. Table 2.1 lists the energy use for each industry analyzed.

TABLE 2.1—INDUSTRIAL SECTOR ELECTRICITY USE BY PUMPS

Industry	Pump electricity use (millions of kWh)
Food	6,218
Textile Mill products	2,949
Lumber and Wood	1,209
Furniture and Fixtures	27
Paper and Allied products	31,309
Printing and Publishing	84
Chemical and Allied Products	37,591
Petroleum and Coal Products	30,643
Rubber and Miscellaneous Plastics	9,211
Stone, Clay and Glass Products	90
Primary Metal Industries	7,646
Fabricated Metal Industries	903
Industrial Machinery and Equipment	968
Electronics and Other Electric Equipment	7,732
Transportation Equipment	5,517
Instruments and Related Products	594

The American Council for an Energy-Efficient Economy (ACEEE) 2003 report "Realizing Energy Efficiency Opportunities in Industrial Fan and Pump Systems" summarizes the energy use of pumps in a variety of industrial settings (including manufacturing,

[1] Part C was re-designated Part A–1 on codification of the U.S. Code for editorial reasons.

[2] It states that the provisions of section 6296(a), (b), and (d), the provisions of subsections (l) through (s) of section 6295, and section 6297 through 6306 shall apply with respect to electric motors and pumps to the same extent and in the same manner as they apply in part A. In applying the provisions in the sections cited above, section 6316(a)(1) states that references to sections 6293, 6294, and 6295 of this title shall be considered as references to sections 6314, 6315, and 6313 of this title, respectively; and section 6316(a)(3) states that the term "equipment" shall be substituted for the term "product."

[3] McKane, A. and A. Hasanbeigi, "Motor Systems Efficiency Supply Curves," United Nations Industrial Development Organization. (2010) (Available at: *http://industrial-energy.lbl.gov/files/industrial-energy/active/0/UNIDO%20Motor%20Systems%20Efficiency%20Supply%20Curves.pdf*)

[4] U.S Department of Energy, "United States Industrial Electric Motor Systems Market Opportunities Assessment." Office of Energy Efficiency and Renewable Energy, United States Department of Energy. (2002) Available at: *http://www.oit.doe.gov/bestpractices/*

mining, and agriculture).[5] The report provides total electricity consumption and an estimate of the energy savings possible if available technologies were utilized. The report estimates the total annual agricultural and industrial electricity demand for pumps to be 140.6 billion kWh or 0.480 quads of site energy use.

TABLE 2.2—INDUSTRIAL SECTOR ELECTRICITY DEMAND AND PUMP ELECTRICITY USE

Industry	Electricity demand in 2006 *billion kWh*	Pumps' share of electricity use %	Pump electricity use in 2006 *billion kWh*
Agriculture	16.3	25	4.1
Mining	85.4	7	6.0
Food Mfg.	78.0	11	8.6
Textile Product Mills	6.0	14	0.8
Wood Product Mfg.	28.9	4	1.2
Paper Mfg.	122.2	28	34.2
Petroleum and Coal Products Mfg.	60.1	51	30.7
Chemical Mfg.	207.1	18	37.3
Plastics & Rubber Mfg.	53.4	9	4.8
Nonmetallic Minerals Product Mfg.	44.8	4	1.8
Primary Metal Mfg.	140.0	2	2.8
Fabricated Metal Product Mfg.	42.2	7	3.0
Machinery Mfg.	32.7	8	2.6
Computer & Electronic Product Mfg.	27.5	2	0.6
Transportation Equipment Mfg.	57.7	4	2.3
Total	1,002.4		140.6

The studies cited above (see Table 2.3) provide estimates of total annual pump energy use ranging from about 126,000 million kWh to 185,000 million kWh (about 0.43 to 0.63 quads) of site energy use. All the studies excluded oil and gas extraction, and water and wastewater pumping. All the studies found that the paper, chemical, and petroleum and coal products manufacturing industries are the three leading users of pump energy. If the total industrial energy use is estimated using the most recent MECS and including all of the petroleum refining industry pump energy use, an estimate of 0.63 quads of site electricity use is derived. The primary energy use is about three times the site energy use, or 1.9 quads.

TABLE 2.3—SUMMARY OF INDUSTRIAL ENERGY USE FOR PUMPS

Study	Annual site electricity use (billion kWh)
DOE Energetics, 2006, "Manufacturing Energy and Carbon Footprints"	185.0
United Nations Industrial Development Organization (UNIDO), 2010, "Motor Systems Efficiency Supply Curves"	126.0
DOE Opportunity Assessment, 2002, "United States Industrial Electric Motor Systems Market Opportunities Assessment"	142.7
ACEEE, 2003, "Realizing Energy Efficiency Opportunities in Industrial Fan and Pump Systems"	140.6

Based on U.S. Census data,[6] the number of establishments involved in mining, manufacturing, and agriculture is estimated as follows.

TABLE 2.4—NUMBERS OF ESTABLISHMENTS BY SECTOR

Sector	Establishments
Agriculture, 1997	91,000
Manufacturing, 2005	323,476
Mining, 1997	21,839
Total	436,315

Using the highest estimate, the average per-establishment energy use for pumps for agricultural, manufacturing, and mining establishments in 2006 was 1.27 million kWh.

Commercial Building Heating, Ventilation, and Air Conditioning Pumps

Based on a 1999 analysis by Arthur D. Little, Inc. (ADL), the average per-establishment energy use for pumps in commercial heating, ventilation, and air conditioning (HVAC) applications for 1999 was about 8.5 MWh, which exceeds 150 kWh for the 12-month period of 1999. The ADL analysis, "Energy Consumption Characteristics of Commercial Building HVAC Systems," Volume 2, used EIA's 1999 Commercial Buildings Energy Consumption Survey data to develop its estimate.

a. Savings Estimate

Reports cited in this RFI estimate potential energy savings from pumps of 10 percent to 50 percent.[7] Because these estimates include a variety of system and pump efficiency measures including proper sizing of equipment,

[5] Nadel, S. and N. Elliot. "Realizing Energy Efficiency Opportunities in Industrial Fan and Pump Systems," Washington, DC.: American Council for an Energy-Efficient Economy. (2003) Available at: *http://www.nwcouncil.org/dropbox/6th%20Plan%20Industrial/Industrial%20Conservation%20Data%20Catalogue/ISC%20Document%20Catalogue_Public%20Version-5%20June%202009/Documents/Tier%202/ACEEE_fans%20and%20pumps_Apr%202003.pdf*

[6] *http://www.ces.census.gov/index.php/bds/bds_database_list*

[7] UNIDO estimates cost-effective potential at 29 percent and technical potential at 43 percent for US industrial pumping system. Opportunities Assessment reports a midrange savings of 9.6 percent of pump energy use through system efficiency improvements for a total of 20 percent. ACEEE estimates that "the typical energy savings from fan, pump, or blower-system upgrades vary from 20 percent to 50 percent."

the lowest energy savings estimate of 10 percent, based on an European Union (EU) study of pump efficiencies (cited in (c) below), is assumed for the pump efficiency alone. If that estimate is converted to primary energy, the savings are estimated to be 0.19 quads. The potential for energy savings is concentrated in paper manufacturing, mining, chemical manufacturing, petroleum and coal products manufacturing, and primary metal manufacturing, which account for 75 percent of the potential total energy savings from industrial pumps.

b. Efficiency Considerations

Pump system efficiencies depend on design factors such as surface roughness, internal clearances, solids handling capability, curve shape, mechanical shaft seal losses, and other factors.

c. Summary of Data and Calculations

Analyses based on data from the 2003 EU "European Guide to Pump Efficiency for Single Stage Centrifugal Pumps"[8] show that for typical flow rates it is reasonable to expect an efficiency improvement of 10 percent from the mean pump efficiency to the maximum practically attainable level.

TABLE 2.5—SUMMARY TABLE OF PRIMARY ENERGY CONSUMPTION AND ESTIMATED SAVINGS

Sector	Establishments	Energy per establishment *kWh*	Energy consumption *million kWh*	Estimated savings (@ 10%) *million kWh*
Industrial	436,315	1,272,000	555,000	55,000
Commercial Building HVAC	4,657,000	8,496	39,565	7,913

3. Other Regulatory Programs

The U.S. Environmental Protection Agency and DOE jointly administer the voluntary ENERGY STAR labeling program (*http://www.energystar.gov*) for various products and equipment. ENERGY STAR currently has no labeling program for energy-efficient pumps. Some states, including California, have prescribed standards and other regulations regarding pumps, in particular for hydronic systems, including a requirement for variable speed drives on pumps larger than 5 horsepower (California Energy Commission, "2008 Building Energy Efficiency Standards for Residential and Nonresidential Buildings," effective January 1, 2010, Section 144(j)).

4. Regulatory Scope

DOE has not previously conducted an energy conservation standard rulemaking for pumps. With this notice, DOE states its intention to evaluate the energy savings potential of energy conservation standards, labels, or both for commercial and industrial pumps. DOE requests information from interested parties regarding product markets, energy use, test procedures, and energy efficient product design. After public comment on this RFI, DOE will consider developing test procedures and energy conservation standards or labels for this equipment.

Test procedures prescribed in accordance with EPACT 2005 "shall be reasonably designed to produce test results which reflect energy efficiency, energy use, and estimated operating costs of a type of industrial equipment (or class thereof) during a representative average use cycle (as determined by the Secretary), and shall not be unduly burdensome to conduct." (42 U.S.C. 6314) In a test procedure rulemaking, DOE prepares a notice of proposed rulemaking (NOPR) and allows interested parties to present oral and written data, views, and arguments with respect to such procedures. In prescribing new test procedures, DOE takes into account relevant information including technological developments relating to energy use or energy efficiency of pumps.

With respect to rulemakings for energy conservation standards, DOE typically prepares a framework document, which describes the issues, analyses, and process that it is considering for the development of energy conservation standards. After receiving comments on the framework document, DOE typically prepares a preliminary analysis and technical support document (TSD). The preliminary analysis typically provides initial draft analyses of potential energy conservation standards on consumers, manufacturers, and the nation. None of these steps is required by statute.

DOE is required to publish a NOPR for new or amended conservation standards. The NOPR presents DOE's proposal for potential energy conservations standards and a summary of the results of DOE's supporting technical analysis. The details of DOE's standards analysis are provided in a TSD that describes both the burdens and benefits of potential standards, pursuant to 42 U.S.C. 6295(o)(B)(i). After the publication of the NOPR, DOE affords interested persons an opportunity during a period of not less than 60 days to provide oral and written comment. After receiving and considering the comments on the NOPR and not less than 90 days after the publication of the NOPR, DOE issues any final rule prescribing new or amended energy conservation standards.

5. Potential Definition(s)

DOE will consider adding a definition for "Commercial, Industrial, and Agricultural Pumps (Pumps)" in the Code of Federal Regulations to clarify coverage of any potential test procedure or energy conservation standard. There currently is no statutory definition of pumps. DOE is considering the following definitions of pumps for potential test procedures and energy conservation standards and to provide clarity for interested parties as it continues its analyses. DOE seeks feedback from interested parties on the following potential definition(s) of pumps.

a. Definition of Rotodynamic Pumps

Rotodynamic pumps are kinetic machines that impart energy continuously to the pumped fluid by means of a rotating impeller, propeller, or rotor. The most common types of rotodynamic pumps are centrifugal (radial), mixed flow, and axial flow pumps.

i. Centrifugal (Radial) Flow

Centrifugal pumps use bladed impellers with essentially radial outlets to transfer rotational mechanical energy to the fluid, primarily by increasing the fluid kinetic energy (angular

[8] European Commission. "European Guide to Pump Efficiency for Single Stage Centrifugal Pumps," Varese, Italy: European Commission. (2003) Available at: *http://work.sitedirect.se/sites/europump/europump/index.php?show=226_SWE&&page_anchor=http://work.sitedirect.se/sites/europump/europump/p226/p226_swe.php*

momentum) and also increasing potential energy (static pressure). Kinetic energy is then converted into usable pressure energy in the discharge collector.

Centrifugal pumps that have single inlet impellers usually have a specific speed below approximately 90 (4,500). Those having double-suction impellers usually have a specific speed below approximately 135 (7,000). In pumps of this type, the liquid enters the impeller at the hub and flows radially to the periphery, exiting perpendicular to the rotating shaft.

ii. Mixed Flow

This type of pump has a single inlet impeller whereby the flow enters axially and discharges in a mixed axial and radial direction. Pumps of this type usually have a specific speed that ranges from approximately 90 (4,500) to 200 (10,000).

iii. Axial Flow

A pump of this type, sometimes called a propeller pump, has a single inlet impeller. The flow enters axially and discharges nearly axially. Pumps of this type usually have a specific speed above approximately 200 (10,000).

b. Definition of Positive Displacement Pumps

Positive displacement pumps add energy by trapping liquid in a confined space and forcibly moving it out of the pump and into the discharge pipe. This pumping action is accomplished by one of three methods:

(1) Reciprocating action of plungers, pistons, bellows or diaphragms;

(2) Rotary action of mechanical devices such as gears, screws, vanes, etc.; or

(3) Blow case arrangements using pressurized air to displace liquid.

Public Participation

A. Submission of Information

DOE will accept information and data in response to this Request for Information as provided in the **DATES** section above. Information submitted to the Department by e-mail should be provided in WordPerfect, Microsoft Word, PDF, or text file format. Those responding should avoid the use of special characters or any form of encryption, and wherever possible, comments should include the electronic signature of the author. Comments submitted to the Department by mail or hand delivery/courier should include one signed original paper copy. No telefacsimiles will be accepted. Comments submitted in response to this notice will become a matter of public record and will be made publicly available.

B. Issues on Which DOE Seeks Information

DOE welcomes comments on the energy use and energy efficiency of commercial and industrial pumps and related issues. DOE is particularly interested in receiving comments from interested parties on the following issues:

(1) Definition(s) of pumps, pump product classes, and diversity of pump types within pump product classes;

(2) Energy use by pumps as summarized in Table 3.1;

(3) Overview of the industrial and commercial pump market, including shipments and efficiencies ranges;

(4) Availability and applicability of U.S. and international test procedures for pumps;

(5) Assistance and resources available from stakeholders, states, local jurisdictions, and others.

Issued in Washington, DC on June 7, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–14553 Filed 6–10–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0378; Airspace Docket No. 11–AEA–11]

Proposed Establishment of Class E Airspace; Forest, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Forest, VA to accommodate new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures serving New London Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations within the National Airspace System.

DATES: Comments must be received on or before July 28, 2011. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey, SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2011–0378; Airspace Docket No. 11–AEA–11, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2011–0378; Airspace Docket No. 11–AEA–11) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Comments wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2011–0378; Airspace Docket No. 11–AEA–11. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and

comments submitted through *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, room 210, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Forest, VA providing the controlled airspace required to support the new RNAV GPS standard instrument approach procedures for New London Airport. Controlled airspace extending upward from 700 feet above the surface is required for the safety and management of IFR operations.

Class E airspace designations are published in Paragraph 6005 of FAA order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in subtitle VII, part, A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at New London Airport, Forest, VA.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA VA E5 Forest, VA [New]

New London Airport

(Lat. 37°16′19″ N., long. 79°20′10″ W.)

That airspace extending upward from 700 feet above the surface within a 8.4-mile radius of New London Airport and within 2 miles either side of the 347° bearing from the airport extending from the 8.4-mile radius to 12.1 miles northwest of the airport.

Issued in College Park, Georgia on May 26, 2011.

Mark D. Ward,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–14588 Filed 6–10–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[Docket No. USCG–2011–0348]

RIN 1625–AA01

Anchorage; Change to Cottonwood Island Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to increase the size of the Cottonwood Island Anchorage on the Columbia River. The change is necessary to help ensure that there is sufficient space to accommodate vessels needing to anchor at the anchorage and will do so by expanding the area available for anchoring.

DATES: Comments and related material must be received by the Coast Guard on or before July 13, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0348 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail MST1 Jaime Sayers, Waterways Management Branch, Coast Guard Sector Columbia River; telephone

503–240–9319, e-mail *Jaime.A.Sayers@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0348), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and click on the "submit a comment" box. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2011–0348" in the "Keyword" box. Click "Search" and then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0348" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

Based on current usage and forecasted growth in shipping on the Columbia River, the Captain of the Port Columbia River believes that the Cottonwood Island Anchorage's size is insufficient as currently established. This rule would increase the size of the Cottonwood Island Anchorage on the Columbia River to help ensure that there is sufficient space to accommodate vessels needing to anchor at the anchorage.

Discussion of Proposed Rule

This proposed rule would extend the east side of the existing Cottonwood Island Anchorage by approximately one mile. The new anchorage would encompass all waters of the Columbia River enclosed by a line beginning west-southwest of Longview, WA at latitude 46° 05′ 56.83″ N longitude 122° 56′ 53.22″ W; thence continuing easterly to latitude 46° 05′ 14.02″ N longitude 122° 54′ 45.75″ W; thence continuing east-southeasterly to latitude 46° 04′ 57.08″ N longitude 122° 54′ 12.46″ W; thence continuing southeasterly to latitude 46° 04′ 37.26″ N longitude 122° 53′ 45.50″ W; thence continuing south-southeasterly to latitude 46° 04′ 13.70″ N longitude 122° 53′ 23.72″ W; thence continuing south southeasterly to latitude 46° 03′ 54.92″ N longitude 122° 53′ 11.88″ W; thence continuing south-southeasterly to latitude 46° 03′ 34.95″ N longitude 122° 53′ 03.24″ W; thence continuing south-southeasterly to latitude 46° 03′ 11.60″ N longitude 122° 52′ 56.36″ W; thence continuing southerly to latitude 46° 02′ 27.30″ N longitude 122° 52′ 52.05″ W; thence continuing westerly to latitude 46° 02′ 26.90″ N longitude 122° 53′ 00.47″ W; thence continuing northerly to latitude 46° 03′ 00.78″ N longitude 122° 53′ 05.89″ W; thence continuing north-northwesterly to latitude 46° 03′ 32.06″ N longitude 122° 53′ 19.68″ W; thence continuing north-northwesterly to latitude 46° 03′ 50.84″ N longitude 122° 53′ 27.81″ W; thence continuing north-northwesterly to latitude 46° 04′ 08.10″ N longitude 122° 53′ 38.70″ W; thence continuing north-northwesterly to latitude 46° 04′ 29.41″ N longitude 122° 53′ 58.17″ W; thence continuing north-northwesterly to latitude 46° 04′ 49.89″ N longitude 122° 54′ 21.57″ W; thence continuing northwesterly to latitude 46° 05′ 06.95″ N longitude 122° 54′ 50.65″ W; thence continuing northwesterly to latitude 46° 05′ 49.77″ N longitude 122° 56′ 58.12″ W; thence continuing north-northeasterly to the beginning point at latitude 46° 05′ 56.83″ N longitude 122° 56′ 53.22″ W.

The previously existing anchorage ends and the new extended portion of the anchorage proceeds southerly from the points at latitude 46° 03′ 34.95″ N longitude 122° 53′ 03.24″ W and latitude 46° 03′ 32.06″ N and longitude 122° 53′ 19.68″ W.

Geographically this amendment would extend the current anchorage from the east end of Cottonwood Island in the vicinity of the spoil area to approximately the Kalama North dock and the previous site of the Trojan plant.

This anchorage location was chosen because it is a central anchorage for vessels coming both upriver and downriver. It would allow vessels a safe place to stop in the event they can no longer transit the river due to weather conditions or safety conditions. This area of the river also has a naturally occurring deep water section that is adjacent to the existing anchorage that allows for the safe anchoring of deep draft vessels.

Regulatory Analyses

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

Executive Order 12866 and Executive Order 13563

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The proposed rule is not significant because the modification of an existing anchorage would not have any significant costs or impacts on maritime activities associated with it.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities some of which may be small entities: the owners or operators of vessels wishing to anchor in or transit the anchorage established by this rule. The rule would not have a significant economic impact on a substantial number of small entities because vessels will still be able to use this area of the river. As is the case under the existing regulation, small vessels in the anchorage would be required to move while vessels are entering and/or exiting the anchorage to ensure safety of the smaller vessel. Vessels would be able to use the anchorage while deep draft vessels are at anchor as long as they maintain a safe distance from the vessels and do not pose a threat to the large vessel or their own vessel.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Waterways Management Branch, Coast Guard Sector Columbia River Oregon, telephone 503–240–9300. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule involves increasing the size of an anchorage, which is categorically excluded, under Figure 2–1, paragraph 34(f) of the Instruction. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 110 Anchorage Grounds

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 110.228(a)(10) to read as follows:

§ 110.228 Columbia River, Oregon and Washington.

(a) * * *

(10) *Cottonwood Island Anchorage.* An area enclosed by a line beginning west-southwest of Longview, WA at latitude 46° 05′ 56.83″ N longitude 122° 56′ 53.22″ W; thence continuing easterly to latitude 46° 05′ 14.02″ N longitude 122° 54′ 45.75″ W; thence continuing east-southeasterly to latitude 46° 04′ 57.08″ N longitude 122° 54′ 12.46″ W; thence continuing southeasterly to latitude 46° 04′ 37.26″ N longitude 122° 53′ 45.50″ W; thence continuing south-southeasterly to latitude 46° 04′ 13.70″ N longitude 122° 53′ 23.72″ W; thence continuing south southeasterly to latitude 46° 03′ 54.92″ N longitude 122° 53′ 11.88″ W; thence continuing south-southeasterly to latitude 46° 03′ 34.95″ N longitude 122° 53′ 03.24″ W; thence continuing south-southeasterly to latitude 46° 03′ 11.60″ N longitude 122° 52′ 56.36″ W; thence continuing southerly to latitude 46° 02′ 27.30″ N longitude 122° 52′ 52.05″ W; thence continuing westerly to latitude 46° 02′ 26.90″ N longitude 122° 53′ 00.47″ W; thence continuing northerly to latitude 46° 03′ 00.78″ N longitude 122° 53′ 05.89″ W; thence continuing north-northwesterly to latitude 46° 03′ 32.06″ N longitude 122° 53′ 19.68″ W; thence continuing north-northwesterly to latitude 46° 03′ 50.84″ N longitude 122° 53′ 27.81″ W; thence continuing north-northwesterly to latitude 46° 04′ 08.10″ N longitude 122° 53′ 38.70″ W; thence continuing north-northwesterly to latitude 46° 04′ 29.41″ N longitude 122° 53′ 58.17″ W; thence continuing north-northwesterly to latitude 46° 04′ 49.89″ N longitude 122° 54′ 21.57″ W; thence continuing northwesterly to latitude 46° 05′ 06.95″ N longitude 122° 54′ 50.65″ W; thence continuing northwesterly to latitude 46° 05′ 49.77″ N longitude 122° 56′ 58.12″ W; thence continuing north-northeasterly to the beginning point at latitude 46° 05′ 56.83″ N longitude 122° 56′ 53.22″ W.

* * * * *

Dated: May 11, 2011.

G.T. Blore,

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

[FR Doc. 2011–14505 Filed 6–10–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 268 and 271

[EPA–HQ–RCRA–2008–0332; FRL–9318–3]

RIN 2050–AG65

Land Disposal Restrictions: Revision of the Treatment Standards for Carbamate Wastes

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is proposing to revise the Land Disposal Restrictions (LDR) treatment standards for hazardous wastes from the production of carbamates and carbamate commercial chemical products, off-specification or manufacturing chemical intermediates and container residues that become hazardous wastes when they are discarded or intended to be discarded. Currently, under the LDR program, most carbamate wastes must be treated to meet numeric concentration limits before they can be land disposed. However, the lack of readily available analytical standards makes it difficult to measure whether the numeric LDR concentration limits have been met. Therefore, we are proposing as an alternative the use of the best demonstrated available technologies (BDAT) for treating these wastes. In addition, this action proposes to remove the carbamate Regulated Constituents from the table of Universal Treatment Standards.

DATES: Written comments must be received by July 13, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2008–0332, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov* and *jackson.mary@epa.gov.* Attention Docket ID No. EPA–HQ–RCRA–2008–0332.
- *Fax:* 202–566–9744. Attention Docket ID No. EPA–HQ–RCRA–2008–0332.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Attention Docket ID No. EPA–HQ–RCRA–2008–0332. Please include a total of 2 copies.
- *Hand Delivery:* Please deliver 2 copies to the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–RCRA–2008–0332. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which

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

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the HQ–Docket Center, Docket ID No. EPA–HQ–RCRA–2008–0332, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the RCRA Docket is (202) 566–0270. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For more information on this proposed rulemaking, contact Mary Jackson, Office of Resource Conservation and Recovery (MC: 5304P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. She can also be reached by telephone on 703–308–8453 or by e-mail at *jackson.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is EPA issuing this proposed rule?

EPA is proposing to revise the Land Disposal Restrictions (LDR) treatment standards for hazardous wastes from the production of carbamates and carbamate commercial chemical products, off-specification or manufacturing chemical intermediates and container residues that become hazardous wastes when they are discarded or intended to be discarded. This action is being taken because there may be no analytical standards readily available with which to measure compliance with the LDR requirements. An analytical standard is a reference material with a known concentration of a target chemical that is used to calibrate analytical instruments in order to confirm detection and quantification of that chemical.

RCRA LDR-related statutory language prohibits the land disposal of hazardous wastes unless wastes meet treatment standards set as concentration-based limits or methods of treatment designed to substantially diminish a hazardous waste's toxicity and/or mobility. Currently under the LDR program, most carbamate hazardous wastes must be treated to meet numeric concentration limits before the wastes can be land disposed. The lack of readily available analytical standards makes it difficult to measure whether the numeric concentration limits have been met. Therefore, we are proposing as an alternative the use of the best demonstrated available technologies for treating these wastes. This will provide significant treatment to minimize threats to human health and the environment, while avoiding the problems that result from the lack of analytical standards when determining if the numeric concentration limits have been met.

In addition, this action proposes to remove the carbamate Regulated Constituents from the table of Universal Treatment Standards at 40 CFR 268.48. We are taking this action so that they are not classified as underlying hazardous constituents requiring treatment to meet numeric concentration limits in wastes that display the characteristic of ignitability, reactivity, corrosivity or toxicity at the point of generation.

Today's proposed rule is necessary to allow hazardous waste management facilities to certify under 268.7 that carbamate-bearing wastes have been treated in compliance with the applicable LDR requirements. These facilities face potential curtailment of operations when they are unable to demonstrate waste and treatment residual concentrations meet the numerical LDR treatment standards through analytical testing.

In the Rules and Regulations section of this **Federal Register**, we are taking Direct Final action on the proposed amendments because we view them as uncontroversial, and we anticipate no adverse comments. If we receive no adverse comments, we will take no further action on the proposed amendments and the Direct Final Rule will become effective as provided in that section. If we receive adverse comments, however, we will withdraw those amendments for which adverse comment was received. We will publish a timely withdrawal in the **Federal Register** indicating the amendments being withdrawn. If any of the Direct Final Rule amendments in the Rules and Regulations section of this **Federal Register** are withdrawn, all comments will be addressed in a subsequent final action based on the proposed amendments. We will not institute a second proposal or allow for a comment period on the subsequent final action. Therefore, any parties interested in commenting must do so at this time.

The regulatory text for the proposal is identical to that for the Direct Final Rule published in the Rules and Regulations section of this **Federal Register**. For further supplementary information, see the Direct Final Rule.

Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Make sure to submit your comments by the comment period deadline identified.

II. Statutory and Executive Order Reviews

For a complete discussion of all of the administrative requirements applicable to this action, see the Direct Final Rule in the Rules and Regulations section of today's **Federal Register**.

The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as (1) a small business that is primarily engaged in hazardous waste treatment and disposal as defined by NAICS code 562211 with annual receipts of less than 12.5 million dollars (based on Small Business Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This rule will not have a significant economic impact on a substantial number of small entities because its merely establishes alternative treatment standards expressed as technologies that may be used to treat the carbamate hazardous waste under the LDR program. These carbamate hazardous wastes already are subject to numeric treatment standards under the LDR program, and thus, this rule will have no new impacts. Therefore, we hereby certify that this rule will not add any new regulatory requirements to small entities, and does not require a regulatory flexibility analysis.

List of Subjects

40 CFR Part 268

Environmental protection, Hazardous waste, Land disposal restrictions.

40 CFR Part 271

Environmental protection, Hazardous waste.

Dated: June 7, 2011.

Lisa P. Jackson,

Administrator.

[FR Doc. 2011–14592 Filed 6–10–11; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 76, No. 113

Monday, June 13, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Humboldt (NV) Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Humboldt (NV) Resource Advisory Committee (RAC) will meet in Winnemucca, Nevada. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meetings are open to the public. The purpose of the meetings is to review and recommend projects for funding.

DATES: There will be two July meetings. The first meeting will be held on July 7, 2011. The second meeting will be on July 27, 2011. Meetings will begin at 10 a.m. and end approximately 5 p.m.

ADDRESSES: The July 7th meeting will be held at the Humboldt County Library, 85 East 5th St., Winnemucca, Nevada 89445; and the July 27th meeting will be held at the County Extension Office, 1085 Fairgrounds Road, Winnemucca, Nevada in the 4–H room.

All project proposals and comments, including names and addresses when provided, are placed in the record and are available for public inspections and copying. The public may inspect project proposals and comments received at the Santa Rosa Ranger District. Please call ahead to 775–623–5025 to facilitate entry in the building to view these documents.

FOR FURTHER INFORMATION CONTACT: Shonna Ingram, RAC Coordinator, USDA, Humboldt-Toiyabe National Forest, Santa Rosa Ranger District, 1200 E. Winnemucca Blvd., Winnemucca, Nevada 89445; (775) 623–5025 x 117; e-mail: *sjingram@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. Requests for reasonable accommodation for access to the facility or proceedings may be made by contacting the person listed in **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: The following business will be conducted: Agenda items for July 7th meeting include: (1) Overview of project selection process; (2) Presentation and review of submitted proposals, and (3) Public Comment. Agenda items for July 27th meeting include: (1) Overview of project selection process; (2) Presentation and review of submitted proposals, (3) Selection of recommended proposals by RAC, and (4) Public Comment.

Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 23, 2011, to be scheduled on the agenda. Written comments and request for time and for oral comments must be sent to the Santa Rosa Ranger District, 1200 East Winnemucca Blvd., Winnemucca Nevada 89445, or by e-mail to *sjingram@fs.fed.us,* or via facsimile to 775–625–1200.

Project submittals by qualified entities must be received no later than 5 p.m. on June 23rd, 2011. Project forms and instructions are available on the Secure Rural Schools Web site—*https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf*.

Dated: June 3, 2011.

Jeanne M. Higgins,

Forest Supervisor, Humboldt—Toiyabe National Forest.

[FR Doc. 2011–14522 Filed 6–10–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 39–2011]

Foreign-Trade Subzone 78A Application for Expansion of Manufacturing Authority Nissan North America, Inc. (Electric Passenger Vehicles) Smyrna and Decherd, TN

An application has been submitted to the Foreign-Trade Zones Board (the Board) by Nissan North America, Inc. (NNA), operator of FTZ 78A, NNA facilities, Smyrna and Decherd, Tennessee, requesting authority to expand the scope of FTZ manufacturing authority. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and section 400.28(a)(2) of the Board's regulations (15 CFR part 400). It was formally filed on June 7, 2011.

Subzone 78A (over 4,000 employees, 550,000 light-duty motor vehicles/year) was approved by the Board in 1982 with authority granted for the manufacture of light-duty pickup trucks at the NNA plant located at 983 Nissan Drive in Smyrna, Tennessee (Board Order 190, 47 FR 16191, 4–12–1982), and the scope of manufacturing authority was expanded to include passenger sedans and minivans, engines, and transmissions in 1984 (Board Order 272, 49 FR 35395, 9–7–1984). In 1993, the subzone was expanded and the scope of manufacturing authority was expanded to accommodate an increase in overall production capacity at the plant (Board Order 632, 58 FR 18850, 3–30–1993). The subzone was subsequently expanded in 1997 to add a new engine and transmission production facility in Decherd, Tennessee (Board Order 869, 62 FR 13595, 3–21–1997).

The applicant now seeks to expand the scope of authority to include electric-powered, light-duty passenger vehicles (up to 150,000 vehicles/year) and related lithium-ion batteries (200,000 units/year) as additional finished products to be manufactured under FTZ procedures at the Smyrna facility. The following foreign-origin materials and components (representing about 31% of the value of the finished products) would be used in the manufacture of the electric passenger vehicles and lithium-ion batteries: Acid-based additives, wash fluid (acrylic/

vinyl polymers), brake fluid, coolant, electrolytes (chemical), labels and film, separators (plastic), plastic fittings/gaskets/grommets/emblems, v-belts, tires, tool sets, glass, mirrors, fasteners, tabs, locks, springs, rings, insulators, electrodes (anode, cathode), gaskets, valves, bearings, oil coolers, flywheels, pulleys, shaft couplings, sprockets, spacers, motors, battery chargers, magnets, batteries and related parts, electrical components, electronic controllers and modules, audio components, sensors, antennas, cables, wiring sets, connectors, brake parts (wireless), knobs, and junction boxes (duty rate range: Free—9.0%).

Expanded FTZ procedures could exempt NNA from customs duty payments on the foreign-origin components used in electric passenger vehicles and lithium-ion batteries manufactured for export. On its domestic shipments, NNA would be able to choose the duty rate during customs entry procedures that applies to electric passenger vehicles (duty rate — 2.5%) and lithium-ion batteries (3.4%) for the foreign inputs noted above. Customs duties also could possibly be deferred or reduced on foreign status production equipment. NNA would also be exempt from duty payments on foreign inputs that become scrap during the production process.

In accordance with the Board's regulations, Pierre Duy of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002. The closing period for receipt of comments is August 12, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 29, 2011.

A copy of the application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at the address listed above and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.*

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: June 7, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–14574 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1766]

Reorganization and Expansion of Foreign-Trade Zone 153 Under Alternative Site Framework, San Diego, CA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09; 75 FR 71069–71070, 11/22/10) as an option for the establishment or reorganization of general-purpose zones;

Whereas, the City of San Diego, California, grantee of Foreign-Trade Zone 153, submitted an application to the Board (FTZ Docket 1–2011, filed 01/03/2011) for authority to reorganize and expand under the ASF with a service area of the City and County of San Diego and a portion of Riverside County, California, within and adjacent to the San Diego U.S. Customs and Border Protection port of entry, FTZ 153's existing Sites 2–10 would be categorized as magnet sites, Sites 6 and 10 would be reduced in size, existing Site 14 would be categorized as a usage-driven site, and the grantee proposes three additional usage-driven sites (Sites 11–13);

Whereas, notice inviting public comment was given in the **Federal Register** (76 FR 1132–1133, 01/07/2011) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 153 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, to a five-year ASF sunset provision for magnet sites that would terminate authority for Sites 2–10 if not activated by June 30, 2016, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Sites 11–14 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by June 30, 2014.

Signed at Washington, DC, this 3rd day of June 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 2011–14577 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–901]

Certain Lined Paper Products From the People's Republic of China; Notice of Preliminary Intent To Rescind the Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") is conducting the fourth administrative review of the antidumping duty order on certain lined paper products ("lined paper") from the People's Republic of China ("PRC") with respect to three producers/exporters for the period September 1, 2009, through August 31, 2010. We are preliminarily rescinding the review with respect to Shanghai Lian Li Paper Products Co. Ltd. ("Lian Li"); Leo's Quality Products Co., Ltd./Denmax Plastic Stationery Factory ("Leo/Denmax"); and the Watanabe Group (consisting of Watanabe Paper Products (Shanghai) Co., Ltd. ("Watanabe Shanghai"); Watanabe Paper Products (Linqing) Co., Ltd. ("Watanabe Linqing"); and Hotrock Stationery (Shenzhen) Co., Ltd. ("Hotrock Shenzhen") (hereafter referred to as "Watanabe" or the "Watanabe Group")).

Interested parties are invited to comment on these preliminary results. We intend to issue the final results no later than 120 days from the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act").

DATES: *Effective Date:* June 13, 2011.

FOR FURTHER INFORMATION CONTACT: Joy Zhang or Victoria Cho, AD/CVD Operations, Office 3, Import Administration, International Trade

Administration, Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–1168 or (202) 482–5075, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2010, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on lined paper from the PRC, for the period September 1, 2009, through August 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review,* 75 FR 53635 (September 1, 2010). On September 30, 2010, we received a request from petitioner [1] to review the following four companies: Lian Li, Hwa Fuh Plastics Co., Ltd./Li Teng Plastics (Shenzhen) Co., Ltd. ("Hwa Fuh/Li Teng"),[2] Leo/Denmax; and the Watanabe Group (consisting of Watanabe Shanghai, Watanabe Linqing, and Hotrock Shenzhen). On October 28, 2010, we published in the **Federal Register** the notice of initiation of this antidumping duty administrative review with respect to Lian Li, Leo/Denmax, and the Watanabe Group. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 75 FR 66349 (October 28, 2010) ("*Initiation Notice*").

On November 12, 2010, we issued the non-market economy antidumping questionnaire to Leo/Denmax, Lian Li, and the Watanabe Group via FedEx Express.

Scope of the Order

The scope of this order includes certain lined paper products, typically school supplies (for purposes of this scope definition, the actual use of or labeling these products as school supplies or non-school supplies is not a defining characteristic) composed of or including paper that incorporates straight horizontal and/or vertical lines on ten or more paper sheets (there shall be no minimum page requirement for looseleaf filler paper) including but not limited to such products as single- and multi-subject notebooks, composition books, wireless notebooks, looseleaf or glued filler paper, graph paper, and laboratory notebooks, and with the smaller dimension of the paper measuring 6 inches to 15 inches (inclusive) and the larger dimension of the paper measuring 8¾ inches to 15 inches (inclusive). Page dimensions are measured size (not advertised, stated, or "tear-out" size), and are measured as they appear in the product (*i.e.,* stitched and folded pages in a notebook are measured by the size of the page as it appears in the notebook page, not the size of the unfolded paper). However, for measurement purposes, pages with tapered or rounded edges shall be measured at their longest and widest points. Subject lined paper products may be loose, packaged or bound using any binding method (other than case bound through the inclusion of binders board, a spine strip, and cover wrap). Subject merchandise may or may not contain any combination of a front cover, a rear cover, and/or backing of any composition, regardless of the inclusion of images or graphics on the cover, backing, or paper. Subject merchandise is within the scope of this order whether or not the lined paper and/or cover are hole punched, drilled, perforated, and/or reinforced. Subject merchandise may contain accessory or informational items including but not limited to pockets, tabs, dividers, closure devices, index cards, stencils, protractors, writing implements, reference materials such as mathematical tables, or printed items such as sticker sheets or miniature calendars, if such items are physically incorporated, included with, or attached to the product, cover and/or backing thereto.

Specifically excluded from the scope of this order are:

- Unlined copy machine paper;
- Writing pads with a backing (including but not limited to products commonly known as "tablets," "note pads," "legal pads," and "quadrille pads"), provided that they do not have a front cover (whether permanent or removable). This exclusion does not apply to such writing pads if they consist of hole-punched or drilled filler paper;
- Three-ring or multiple-ring binders, or notebook organizers incorporating such a ring binder provided that they do not include subject paper;
- Index cards;
- Printed books and other books that are case bound through the inclusion of binders board, a spine strip, and cover wrap;
- Newspapers;
- Pictures and photographs;
- Desk and wall calendars and organizers (including but not limited to such products generally known as "office planners," "time books," and "appointment books");
- Telephone logs;
- Address books;
- Columnar pads & tablets, with or without covers, primarily suited for the recording of written numerical business data;
- Lined business or office forms, including but not limited to: pre-printed business forms, lined invoice pads and paper, mailing and address labels, manifests, and shipping log books;
- Lined continuous computer paper;
- Boxed or packaged writing stationery (including but not limited to products commonly known as "fine business paper," "parchment paper", and "letterhead"), whether or not containing a lined header or decorative lines;
- Stenographic pads ("steno pads"), Gregg ruled ("Gregg ruling" consists of a single- or double-margin vertical ruling line down the center of the page. For a six-inch by nine-inch stenographic pad, the ruling would be located approximately three inches from the left of the book.), measuring 6 inches by 9 inches;

Also excluded from the scope of this order are the following trademarked products:

- Fly ™ lined paper products: A notebook, notebook organizer, loose or glued note paper, with papers that are printed with infrared reflective inks and readable only by a Fly ™ pen-top computer. The product must bear the valid trademark Fly ™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).
- Zwipes ™: A notebook or notebook organizer made with a blended polyolefin writing surface as the cover and pocket surfaces of the notebook, suitable for writing using a specially-developed permanent marker and erase system (known as a Zwipes ™ pen). This system allows the marker portion to mark the writing surface with a permanent ink. The eraser portion of the marker dispenses a solvent capable of solubilizing the permanent ink allowing the ink to be removed. The product must bear the valid trademark Zwipes ™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).
- FiveStar®Advance ™: A notebook or notebook organizer bound by a continuous spiral, or helical, wire and with plastic front and rear covers made of a blended polyolefin plastic material joined by 300 denier polyester, coated

[1] The petitioner is the Association of American School Paper Suppliers ("AASPS").

[2] The Department was unable to locate Hwa Fuh/Li Teng in prior segments. The petitioner did not provide any new information as to Hwa Fuh/Li Teng's location in its review request letter. Accordingly, pursuant to 19 CFR 351.303(f)(3)(ii), the Department did not accept a request for an administrative review of Hwa Fuh/Li Teng.

on the backside with PVC (poly vinyl chloride) coating, and extending the entire length of the spiral or helical wire. The polyolefin plastic covers are of specific thickness; front cover is 0.019 inches (within normal manufacturing tolerances) and rear cover is 0.028 inches (within normal manufacturing tolerances). Integral with the stitching that attaches the polyester spine covering, is captured both ends of a 1″ wide elastic fabric band. This band is located 2-⅜″ from the top of the front plastic cover and provides pen or pencil storage. Both ends of the spiral wire are cut and then bent backwards to overlap with the previous coil but specifically outside the coil diameter but inside the polyester covering. During construction, the polyester covering is sewn to the front and rear covers face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. The flexible polyester material forms a covering over the spiral wire to protect it and provide a comfortable grip on the product. The product must bear the valid trademarks FiveStar®Advance™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).

- FiveStar Flex™: A notebook, a notebook organizer, or binder with plastic polyolefin front and rear covers joined by 300 denier polyester spine cover extending the entire length of the spine and bound by a 3-ring plastic fixture. The polyolefin plastic covers are of a specific thickness; front cover is 0.019 inches (within normal manufacturing tolerances) and rear cover is 0.028 inches (within normal manufacturing tolerances). During construction, the polyester covering is sewn to the front cover face to face (outside to outside) so that when the book is closed, the stitching is concealed from the outside. During construction, the polyester cover is sewn to the back cover with the outside of the polyester spine cover to the inside back cover. Both free ends (the ends not sewn to the cover and back) are stitched with a turned edge construction. Each ring within the fixture is comprised of a flexible strap portion that snaps into a stationary post which forms a closed binding ring. The ring fixture is riveted with six metal rivets and sewn to the back plastic cover and is specifically positioned on the outside back cover. The product must bear the valid trademark FiveStar Flex™ (products found to be bearing an invalidly licensed or used trademark are not excluded from the scope).

Merchandise subject to this order is typically imported under headings 4820.10.2050, 4810.22.5044, 4811.90.9090, 4820.10.2010, 4820.10.2020 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The HTSUS headings are provided for convenience and customs purposes; however, the written description of the scope of this order is dispositive.

Preliminary Intent To Rescind the Administrative Review

On December 15 and December 22, 2010, Lian Li and the Watanabe Group submitted letters, respectively, certifying that they did not export the subject merchandise to the United States during the period of review ("POR"). On December 22, 2010, the petitioner submitted a letter pointing out that Lian Li's certification referenced the incorrect POR. On December 27, 2010, Lian Li submitted a letter clarifying the correct POR. On January 03, 2011, Leo/Denmax also certified that it did not export the subject merchandise to the United States during the POR. Both Lian Li and Leo/Denmax requested that the Department rescind the administrative review with respect to each company. On January 5, 2011, the petitioner submitted a letter questioning the Watanabe Group's no shipment claim. The petitioner requested that the Department obtain from U.S. Customs and Border Protection ("CBP") copies of any entry documents during the POR that list any Watanabe Group companies as the exporter of record.

On February 7, 2011, we conducted an internal query of the CBP entry data with respect to the three companies. The CBP data entry confirms the claims of no shipments from Lian Li, Leo/Denmax and the Watanabe Group, and we issued a memorandum explaining our analysis.[3] We did not receive any comments regarding these CBP data results. On May 18, 2011, the Department sent an inquiry to CBP requesting notification as to whether it had information indicating that there were shipments of subject merchandise into the United States by Watanabe, Lian Li, or Leo/Denmax during the POR. The Department did not receive notification from CBP indicating that there were any shipments by the Watanabe Group, Lian Li, or Leo/Denmax during the POR.

In this case, as stated above, the Watanabe Group, Lian Li and Leo/Denmax certified that they had no shipments and the Department has confirmed through its examination of data from CBP that there were no shipments of subject merchandise during the POR by the Watanabe Group and/or Lian Li and/or Leo/Denmax.

Therefore, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are preliminarily rescinding this review of the antidumping duty order on lined paper from the PRC, for the period September 1, 2009, through August 31, 2010. If the rescission is confirmed in our final results, the cash deposit rate for the Watanabe Group, Lian Li, and Leo/Denmax will continue to be the rate established in the most recently completed segment of this proceeding.

Comments

In accordance with 19 CFR 351.301(c)(1), for the final results of these NSRs, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record.[4]

Interested parties may submit case briefs and/or written comments for consideration in the Department's final results not later than 30 days after publication of this notice. *See* 19 CFR 351.309(c). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be submitted not later than five days following submission of the comments. *See* 19 CFR 351.309(d). All written comments must be submitted in accordance with 19 CFR 351.303, and must be served on interested parties on the Department's service list in accordance with 19 CFR 351.303(f)(3).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room 1117,

[3] *See* Memorandum to the File, through Melissa Skinner, Office Director and James Terpstra, Program Manager, AD/CVD Operations, Office 3, from Joy Zhang, Case Analyst, titled "Certain Lined Paper Products from the People's Republic of China—Customs and Border Protection ("CBP") Data for Corroboration of Claims of No Shipments," dated April 6, 2011.

[4] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *Id.* Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of the preliminary results, and will publish these results in the **Federal Register**.

Assessment Rates

The Department will instruct CBP to assess antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of this review.

Notification of Interested Parties

This notice also serves as a preliminary reminder to importers of their responsibility under 19 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: June 2, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–14573 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before July 5, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 10–073. *Applicant:* University of Chicago Argonne, LLC, 9700 South Cass Avenue, Argonne, IL 60439. *Instrument:* Chemical Mechanical Polishing (CMP) Tool. *Manufacturer:* Logitech Ltd., UK. *Intended Use:* The CMP will be installed in the Center for Nanoscale Materials for performing lithography and fabricating atomically smooth surfaces on various materials, such as ultrananocrystalline diamond and gold films. *Justification for Duty-Free Entry:* Instruments of the same general category being manufactured in the United States do not meet the technical requirements within the available budget. *Application accepted by Commissioner of Customs:* May 13, 2011.

Docket Number: 11–013. *Applicant:* Wichita State University, 1845 Fairmont Street, Wichita, KS 67260. *Instrument:* Field emission scanning electron microscope. *Manufacturer:* Carl Zeiss SMT, Germany. *Intended Use:* The instrument will be used to examine the morphology and composition of metals, composites and nanocomposites, and for training undergraduate and graduate students in optical microscopy. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* May 26, 2011.

Docket Number: 11–029. *Applicant:* University of California, Santa Barbara, CA 93106. *Instrument:* Josephson Junction Deposition System (Electron Beam Evaporation Unit with Load Lock Model MEB 550S). *Manufacturer:* Plassys Bestek SAS, France. *Intended Use:* The system will be incorporated into a superconducting quantum bit device, and will be used to deposit and grow Josephson junctions as part of students' research requirements in the physics Ph.D program. *Justification for Duty-Free Entry:* There are no instruments of the same general category being manufactured in the United States. *Application accepted by Commissioner of Customs:* May 26, 2011.

Dated: June 7, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office. Office of Policy, Import Administration.

[FR Doc. 2011–14576 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–928]

Uncovered Innerspring Units From the People's Republic of China: Extension of Preliminary Results of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the "Department") is extending the time limit for the preliminary results of the new shipper review of uncovered innerspring units ("innersprings") from the People's Republic of China ("PRC"). The period of review for this review is February 1, 2010 through August 4, 2010.

DATES: *Effective Date:* June 13, 2011.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone*: (202) 482–0413.

Background

On October 7, 2010 the Department published a notice of initiation of the new shipper review in the antidumping duty order on innersprings from the PRC for Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory ("Quan Li") and Foshan Yongnuo Import & Export Co., Ltd. ("Yongnuo").[1] On March 28, 2011, the Department extended the deadline for the preliminary results of this review to June 1, 2011.[2]

Statutory Time Limits

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the "Act"), and

[1] *See Uncovered Innerspring Units from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 75 FR 62107 (October 7, 2010).

[2] *See Uncovered Innerspring Units from the People's Republic of China: Extension of Preliminary Results of Antidumping Duty New Shipper Review*, 76 FR 17107 (March 28, 2011).

section 351.214(i)(1) of the Department's regulations require the Department to issue the preliminary results of a new shipper review within 180 days after the date on which the new shipper review was initiated and final results within 90 days after the date on which the preliminary results are issued. However, the Department may extend the deadline for completion of the preliminary results of a new shipper review to 300 days if it determines that the case is extraordinarily complicated.[3]

Extension of Time Limit for Preliminary Results of Review

The Department has determined that the review is extraordinarily complicated as the Department must issue, and analyze the responses to, additional supplemental questionnaires concerning Quan Li's and Yongnuo's sales practices and factors of production. Moreover, the Department needs additional time to analyze the *bona fide* nature of Quan Li's and Yongnuo's sales, which includes gathering data from U.S. Customs and Border Protection. Based on the timing of the case and the additional information that must be gathered, the preliminary results of this new shipper review cannot be completed within 180 days.

Therefore, the Department is extending the time limit for completion of the preliminary results of this new shipper review by an additional 44 days from the June 1, 2011, deadline. As a result, the preliminary results will now be due no later than July 15, 2011. The final results continue to be due 90 days after the issuance of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(2)(B)(iv) and 777(i) of the Act.

Dated: June 1, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–14575 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–DS–P

[3] *See* section 751(a)(2)(B)(iv) of the Act; *see also* section 351.214(i)(2) of the Department's regulations.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

NIST Designation of Cannon Instrument Company as the Responsible Organization for U.S. National Standards for Certified Liquid Viscosity Reference Standards for Purposes of the CIPM MRA

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST), as the National Metrology Institute (NMI) of the U.S., is signatory to the Mutual Recognition Arrangement (MRA) of the Comité International des Poids et Mesures (CIPM). Section 6.1 of the MRA provides for cases in which an NMI may designate a laboratory other than itself to participate in CIPM key comparisons on behalf of its nation and to be responsible for disseminating the national measurement standards relevant to that particular measurand. This notice announces that NIST has designated the Cannon Instrument Company (State College, PA) pursuant to the MRA for the measurements of viscosity until January 1, 2013.

DATES: NIST's designation of the Cannon Instrument Company for the measurements of viscosity will expire on January 1, 2013. NIST will consider comments received by that date.

ADDRESSES: Comments regarding NIST's designation of Cannon may be sent to Dr. James Olthoff, National Institute of Standards and Technology, Deputy Director for Measurement Services, Physical Measurement Laboratory, 100 Bureau Drive, Gaithersburg, MD 20899–8100, or by telephone (301) 975–2220, or by e-mail at *james.olthoff@nist.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. James Olthoff, National Institute of Standards and Technology, Deputy Director for Measurement Services, Physical Measurement Laboratory, 100 Bureau Drive, Gaithersburg, MD 20899–8100, or by telephone (301) 975–2220, or by e-mail at *james.olthoff@nist.gov*.

SUPPLEMENTARY INFORMATION: The MRA established by the CIPM under the authority of the Metre Convention has the following objectives:

- To establish the degree of equivalence of national measurement standards maintained by NMIs;
- To provide for the mutual recognition of Calibration and Measurement Capability (CMCs) issued by NMIs;
- Thereby to provide governments and other parties with a secure technical foundation for wider agreements related to international trade, commerce, and regulatory affairs.

The process established to support these objectives includes:

- Comparisons of measurement capabilities of participating NMIs and Designated Institutes (DIs), either through CIPM or Regional Metrology Organizations (RMOs) Key Comparisons (KCs); and
- Quality systems supporting the continued validity and recognition of CMCs in order to establish mutual confidence in measurements performed by NMIs or their DIs.

Signatories to the MRA, which include the U.S., provide information on their nation's calibration and measurement capabilities to the International Bureau of Weights and Measures (BIPM), which publishes these in a database for use by the international community. The results of key or supplementary comparisons provide quantitative demonstration of the degree of equivalence among participating NMIs and DIs. Such demonstrations provide quantitative evidence of the claims constituted by CMCs.

NIST may designate for recognition by the CIPM another U.S. institution that is willing and has the capability to discharge the responsibilities for a specific measurement parameter or parameter range under the terms of the MRA. In designating an institution, an NMI should consider:

- Whether the institution is impartial;
- Whether the institution offers calibration or other appropriate services in the field to all customers that may request such services;
- Whether the institution is prepared to share results of comparisons and internal processes that relate for example to equipment used, environmental conditions, laboratory staff, technical procedures, etc. to appropriate experts in Consultative Committees and/or RMOs technical committees; and
- Whether the institution is prepared to provide information on the processes that have been set up for review of Quality Systems and on-site peer review visits.

An institution designated by NIST to serve as a U.S. DI will:

- Participate, in partnership with NIST, in activities of the CIPM MRA and be bound by the requirements of the MRA under the same conditions under which NIST itself participates in such efforts;

• Provide the U.S. national measurement standards for a specific measurand;

• Disseminate standards for that measurand to U.S. industry, government, and academia.

Cannon Instrument Company of State College, Pennsylvania has served as the U.S. DI for viscosity measurements since 2003. After considering the criteria listed above, NIST has designated Cannon Instrument Company as the U.S. DI for viscosity until January 1, 2013.

Dated: June 1, 2011.

Charles H. Romine,

Acting Associate Director for Laboratory Programs.

[FR Doc. 2011–14434 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA486

International Whaling Commission; 63rd Annual Meeting; Nominations

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

ACTION: Notice; request for nominations.

SUMMARY: This notice is a call for nominees for the U.S. Delegation to the July 2011 International Whaling Commission (IWC) annual meeting. The non-federal representative(s) selected as a result of this nomination process is(are) responsible for providing input and recommendations to the U.S. IWC Commissioner representing the positions of non-governmental organizations. Generally, only one non-governmental position is selected for the U.S. Delegation.

DATES: The IWC is holding its 63rd annual meeting July 11–15, 2011, in Jersey, United Kingdom. All written nominations for the U.S. Delegation to the IWC annual meeting must be received by June 24th, 2011.

ADDRESSES: All nominations for the U.S. Delegation to the IWC annual meeting should be addressed to Ms. Monica Medina, U.S. Commissioner to the IWC, and sent via post to: Ryan Wulff, National Marine Fisheries Service, Office of International Affairs, 1315 East-West Highway, SSMC3 Room 12620, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Ryan Wulff, 202–482–3689.

SUPPLEMENTARY INFORMATION: The Secretary of Commerce is charged with the responsibility of discharging the domestic obligations of the United States under the International Convention for the Regulation of Whaling, 1946. The U.S. IWC Commissioner has responsibility for the preparation and negotiation of U.S. positions on international issues concerning whaling and for all matters involving the IWC. He is staffed by the Department of Commerce and assisted by the Department of State, the Department of the Interior, the Marine Mammal Commission, and by other agencies. The non-federal representative(s) selected as a result of this nomination process is(are) responsible for providing input and recommendations to the U.S. IWC Commissioner representing the positions of non-governmental organizations. Generally, only one non-governmental position is selected for the U.S. Delegation.

Dated: June 7, 2011.

Christopher Rogers,

Acting Director, Office of International Affairs, National Marine Fisheries Service.

[FR Doc. 2011–14623 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA450

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

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

ACTION: Notice of public workshops.

SUMMARY: Free Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops will be held in July, August, and September of 2011. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Protected Species Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and who have also been issued shark or swordfish limited access permits. Additional free workshops will be conducted during 2011.

DATES: The Atlantic Shark Identification Workshops will be held July 14, July 21, August 11, September 8, and September 22, 2011.

The Protected Species Safe Handling, Release, and Identification Workshops will be held on July 13, July 20, August 17, August 24, September 14, and September 21, 2011.

See **SUPPLEMENTARY INFORMATION** for further details.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Wilmington, NC; Port Orange, FL; Dania Beach, FL; Panama City, FL; and Port Orange, FL.

The Protected Species Safe Handling, Release, and Identification Workshops will be held in Manahawkin, NJ; Gulfport, MS; Myrtle Beach, SC; Daytona Beach, FL; Panama City, FL; and Warwick, RI.

See **SUPPLEMENTARY INFORMATION** for further details on workshop locations.

FOR FURTHER INFORMATION CONTACT: Richard A. Pearson by phone: (727) 824–5399, or by fax: (727) 824–5398.

SUPPLEMENTARY INFORMATION: The workshop schedules, registration information, and a list of frequently asked questions regarding these workshops are posted on the Internet at: *http://www.nmfs.noaa.gov/sfa/hms/workshops/.*

Atlantic Shark Identification Workshops

Since January 1, 2008, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit which first receives Atlantic sharks (71 FR 58057; October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for 3 years. Approximately 60 free Atlantic Shark Identification Workshops have been conducted since January 2007.

Currently permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit which first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the

identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and who fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location which first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, trucks or other conveyances which are extensions of a dealer's place of business must possess a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate.

Workshop Dates, Times, and Locations

1. July 14, 2011, 12 p.m.–4 p.m., Comfort Inn University, 151 South College Road, Wilmington, NC 28403.
2. July 21, 2011, 12 p.m.–4 p.m., LaQuinta Inn & Suites, 1791 Dunlawton Avenue, Port Orange, FL 32127.
3. August 11, 2011, 12 p.m.–4 p.m., Nova Southeastern Oceanographic Center, Modular Classroom 1, 8000 North Ocean Drive, Dania Beach, FL 33004.
4. September 8, 2011, 12 p.m.–4 p.m., National Marine Fisheries Service Laboratory, 3500 Delwood Beach Road, Panama City, FL 32408.
5. September 22, 2011, 12 p.m.–4 p.m., La Quinta Inn & Suites, 1791 Dunlawton Avenue, Port Orange, FL 32127.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander at *esander@peoplepc.com* or at (386) 852–8588.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring specific items to the workshop:

- Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.
- Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

Workshop Objectives

The Atlantic Shark Identification Workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Protected Species Safe Handling, Release, and Identification Workshops

Since January 1, 2007, shark limited-access and swordfish limited-access permit holders who fish with longline or gillnet gear have been required to submit a copy of their Protected Species Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057; October 2, 2006). These certificate(s) are valid for 3 years. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire prior to the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited-access permits. Additionally, new shark and swordfish limited-access permit applicants who intend to fish with longline or gillnet gear must attend a Protected Species Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued. Approximately 112 free Protected Species Safe Handling, Release, and Identification Workshops have been conducted since 2006.

In addition to certifying vessel owners, at least one operator on board vessels issued a limited-access swordfish or shark permit that uses longline or gillnet gear is required to attend a Protected Species Safe Handling, Release, and Identification Workshop and receive a certificate. Vessels that have been issued a limited-access swordfish or shark permit and that use longline or gillnet gear may not fish unless both the vessel owner and operator have valid workshop certificates onboard at all times. These certificate(s) are valid for 3 years. As such, vessel operators who have not already attended a workshop and received a NMFS certificate, or vessel operators whose certificate(s) will expire prior to their next fishing trip, must attend a workshop to operate a vessel with swordfish and shark limited-access permits that uses with longline or gillnet gear.

Workshop Dates, Times, and Locations

1. July 13, 2011, 9 a.m.–5 p.m., Holiday Inn, 151 Route 72 East, Manahawkin, NJ 08050.
2. July 20, 2011, 9 a.m.–5 p.m., Holiday Inn, 9515 Highway 49, Gulfport, MS 39503.
3. August 17, 2011, 9 a.m.–5 p.m., Embassy Suites, 9800 Queensway Boulevard, Myrtle Beach, SC 29572.
4. August 24, 2011, 9 a.m.–5 p.m., Holiday Inn, 137 Automall Circle, Daytona Beach, FL 32124.
5. September 14, 2011, 9 a.m.–5 p.m., Holiday Inn Select, 2001 Cove Boulevard, Panama City, FL 32405.
6. September 21, 2011, 9 a.m.–5 p.m., Hilton Garden Inn, 1 Thurber Street, Warwick, RI 02886.

Registration

To register for a scheduled Protected Species Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at (386) 682–0158.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring specific items with them to the workshop:

- Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification.
- Representatives of a business owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification.
- Vessel operators must bring proof of identification.

Workshop Objectives

The Protected Species Safe Handling, Release, and Identification Workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, and smalltooth sawfish. In an effort to improve reporting, the proper identification of protected species will also be taught at these workshops. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species, which

may prevent additional regulations on these fisheries in the future.

Dated: June 8, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–14622 Filed 6–10–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for the Proposed Kennecott Utah Copper LLC Tailings Expansion Project, Near Magna, Salt Lake County, UT, Permit Application Number SPK–2009–1213

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of Intent.

SUMMARY: The U.S. Army Corps of Engineers, Sacramento District (Corps), will prepare an Environmental Impact Statement (EIS) for the proposed Kennecott Utah Copper Tailings Expansion Project, an expansion of an active commercial mining operation near Magna, Salt Lake County, UT. Kennecott Utah Copper LLC (KUC) has applied for a Department of the Army (DA) permit to fill approximately 721 acres of waters of the United States, including wetlands, to construct the project. The basic project purpose is surface mining. The overall project purpose is to increase tailings storage capacity for future mine life extensions.

ADDRESSES: Please send written comments to John Urbanic, U.S. Army Corps of Engineers, Sacramento District, 533 West 2600 South, Suite 150, Bountiful, UT 84010.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and EIS can be answered by John Urbanic, (801) 295–8380, extension 11; *e-mail: john.e.urbanic@usace.army.mil.* Please refer to identification number SPK–2009–01213.

SUPPLEMENTARY INFORMATION: KUC has applied for a DA permit under Section 404 of the Clean Water Act to expand their existing tailings impoundment and to construct an additional tailings storage facility (TSF) and related infrastructure on a 1992-acre parcel approximately ten miles west of Salt Lake City near the community of Magna, UT. The proposed action involves two phases that, according to the applicant, would provide the necessary tailings storage capacity to extend the life of the Bingham Canyon Mine (Mine) through 2039. In Phase 1 KUC would continue using the existing North TSF while increasing the height of the North TSF impoundment beyond the currently permitted design. KUC would also construct and begin using a new impoundment, the Northeast TSF, on adjacent KUC property to the east. In Phase 2 KUC would extend tailings deposition from the North TSF onto a portion of the existing South TSF. Ancillary work that would occur includes: the relocation of existing utilities (power, fiber optic, etc.), ditches, secondary or tertiary roads, and a 4-mile long segment of a railroad line; preparation of the foundation and placement of drainage blanket material under the embankment footprint for the Northeast TSF; construction of engineered structures (prior to placing tailings on the South TSF), dikes and ditches for the facilities; and modification of the tailings distribution and return water systems.

Approximately 774 acres of waters of the United States (waters), including wetlands, have been identified on the proposed project site. The area of impacted wetlands includes 488 acres of vegetated saline playa and 76.9 acres of emergent wetlands. Impacted non-wetland waters include 139.8 acres of unvegetated (< 5% vegetative cover) saline playa and 16.1 acres of other jurisdictional waters and drainages. In total, the applicant has applied for a DA permit to fill 565 acres of wetlands and 156 acres of non-wetland waters. In addition, the Corps will be evaluating supplemental delineation information characterizing approximately 200 additional acres of potential waters that may be impacted by ancillary work.

The EIS will include an evaluation of a reasonable range of alternatives. Currently, the following alternatives are expected to be analyzed in detail: (1) The no action alternative (no permit issued) and (2) the applicant's preferred project (proposed action). The no action alternative assumes limited development would occur on the site with all waters of the United States avoided. In addition to the proposed action, the Corps anticipates evaluating additional on-site and off-site alternatives for potential detailed analysis.

The Corps' scoping process for the EIS includes a public involvement program with several opportunities to provide oral and written comments. In addition to public meetings and notifications in the **Federal Register**, the Corps will issue public notices when the draft and final EISs are available. Affected federal, state, and local agencies, Native American tribes, and other interested private organizations and parties are invited to participate.

Potentially significant issues to be analyzed in the EIS include, but are not limited to impacts to waters, hydrology, water supply, water quality, cultural resources, biological resources, traffic and transportation, and air quality.

The Corps is the lead federal agency for preparation of the EIS under the requirements of the National Environmental Policy Act (NEPA). The Corps may invite other Federal, State, local agencies, and tribes to be cooperating agencies.

Other environmental review and consultation requirements for the proposed action include the need for the applicant to obtain water quality certification under Section 401 of the Clean Water Act from the Utah Division of Water Quality. The proposed project will not affect any federally listed threatened or endangered species; however, it may affect state-listed special status species. Once a habitat assessment of the areas has been completed, the Corps will consult with state and Federal wildlife agencies. In addition, the Corps will also be consulting with the State Historic Preservation Officer under Section 106 of the National Historic Preservation Act concerning properties listed, or potentially eligible for listing, on the National Register of Historic Places.

Interested parties may register for the Corps' public notice e-mail notification lists at: *http://www.spk.usace.army.mil/regulatory/pnlist.html.*

Public Scoping Meetings. The Corps will hold four public scoping meetings in several communities with proximity to the mining operation. The first meeting will be held on June 21, 2011, from 6–8:30 p.m. at the Webster Community Center, 8952 West 2700 South, Magna, Utah. The second meeting will be held on June 22, 2011, from 6–8:30 p.m. at Malouf Hall, Room 201, Westminster College, 1840 South 1300 East, Salt Lake City, Utah. The third meeting will be held on June 29, 2011, from 6–8:30 p.m. Hampton Inn and Suites, 3923 West Center Park Drive, West Jordan, Utah. The fourth meeting will be held on June 30, 2011, from 6–8:30 p.m. at Stansbury Park High School, 5300 North Aberdeen, Stansbury Park, Utah. Interested parties can provide oral and written comments at the meetings. Interested parties may also submit written comments on this notice. Scoping comments may be submitted at any time prior to publication of the Draft EIS.

Dated: June 2, 2011.

Andrew B. Kiger,

Lieutenant Colonel, U.S. Army, District Engineer.

[FR Doc. 2011–14560 Filed 6–10–11; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Availability of a Final General Conformity Determination and Record of Decision for the San Pedro Waterfront Project, Port of Los Angeles, Los Angeles County, CA

AGENCY: Department of the Army—U.S. Army Corps of Engineers, DoD.

ACTION: Notice of availability.

SUMMARY: In September 2009, the Los Angeles District of the U.S. Army Corps of Engineers (Corps) and the Los Angeles Harbor Department published a joint final Environmental Impact Statement/Environmental Impact Report (EIS/EIR), including the Corps' draft general conformity determination (Section 3.2 and Appendix D.7), for the Federal action associated with the San Pedro Waterfront Project (Project) in the Port of Los Angeles, Los Angeles County, California. Comments were received on the final EIS/EIR and included draft general conformity determination until October 29, 2009. A general conformity determination was necessary because Project construction would require Federal action (*i.e.,* issuance of a Corps permit for work and structures in and over navigable waters, discharges of fill into waters of the U.S., and transport and disposal of dredged material in ocean waters) and not all the Federal action's direct and indirect emissions would be below specified de minimis thresholds (40 CFR 93.153(b)). On May 9, 2011 and May 11, 2011, the Corps made a final general conformity determination and completed its environmental review and executed the Record of Decision (ROD), respectively, for the Federal action associated with the Project. The Corps considered and responded to all comments received in making the final general conformity determination and executing the ROD.

The public can request copies of the final general conformity determination document or the ROD from the Corps at the address listed below, or can view or download the final general conformity determination document from the Corps' Web site (*http://www.spl.usace.army.mil/regulatory/POLA.htm,* scroll down to the link under San Pedro Waterfront [formerly Bridge to Breakwater]) or the Port of Los Angeles' Web site (*http://www.portoflosangeles.org/environment/public_notices.asp,* scroll down to link under San Pedro Waterfront Project). In addition, copies of the final general conformity document are available for review during the next 30 days at the following libraries: L.A. Public Library, Central Branch, 630 West 5th Street, Los Angeles California; L.A. Public Library, San Pedro Branch, 931 South Gaffey Street, San Pedro, California; and L.A. Public Library, Wilmington Branch, 1300 North Avalon, Wilmington, California.

FOR FURTHER INFORMATION CONTACT: Questions or comments concerning the final general conformity determination or the ROD should be directed to Dr. Spencer D. MacNeil, Chief of the Transportation and Special Projects Branch, Regulatory Division, U.S. Army Corps of Engineers, 2151 Alessandro Drive, Suite 110, Ventura, California 93001, (805) 585–2152.

SUPPLEMENTARY INFORMATION: None

Dated: June 3, 2011.

David J. Castanon,

Chief, Regulatory Division, Los Angeles District.

[FR Doc. 2011–14587 Filed 6–10–11; 8:45 am]

BILLING CODE 3710–58–P

DEPARTMENT OF ENERGY

[FE Docket No. 11–59–LNG]

Lake Charles Exports, LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on May 6, 2011, and amended on May 26, 2011, by Lake Charles Exports, LLC (LCE), requesting long-term, multi-contract authorization to export up to 15 million metric tons per annum (mmtpa) of domestic natural gas as liquefied natural gas (LNG) for a 25-year period, commencing the earlier of the date of first export or ten years from the date of issuance of the requested authorization. LCE seeks authorization to export LNG from the terminal in Lake Charles, Louisiana ("Lake Charles Terminal") [1] to: (1) Any country with which the United States currently has, or in the future may enter into, a free trade agreement (FTA) requiring national treatment for trade in natural gas; [2] and (2) any country with which the United States does not have an FTA requiring national treatment for trade in natural gas with which trade is not prohibited by United States law or policy. The Application was filed under Section 3 of the Natural Gas Act, as amended by section 201 of the Energy Policy Act of 1992 (NGA). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section of this notice no later than 4:30 p.m., eastern time, August 12, 2011.

ADDRESSES:

Electronic Filing

E-mail: *fergas@hq.doe.gov.*

Regular Mail

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.)

U.S. Department of Energy (FE–34), Office of Natural Gas Regulatory Activities, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Lisa Tracy, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9478; (202) 586–4523.

Edward Myers, U.S. Department of Energy, Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6B–256, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

[1] The Lake Charles Terminal is an existing LNG import facility located in Cameron Parish, Louisiana, that is owned by Trunkline LNG Company, LLC (Trunkline LNG), a wholly-owned subsidiary of Southern Union Company.

[2] The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Nicaragua, Mexico, Morocco, Oman, Peru, and Singapore.

Background

LCE is a Delaware limited liability company and a jointly-owned subsidiary of BG Group plc (BG) and Southern Union Company (SUG), with its principal place of business in Houston, Texas. BG LNG Services, LLC (BGLS), an affiliate of LCE, is an importer of LNG into the United States. BGLS and Trunkline LNG, a subsidiary of SUG, are jointly developing plans to install liquefaction facilities to enable export of domestically produced LNG at the Lake Charles Terminal.

The Lake Charles Terminal was certificated by the Federal Energy Regulatory Commission (FERC or Commission) in 1977, and original construction was completed in July 1981. In 2001, BGLS entered into a firm terminalling services agreement under which it subscribed all of the capacity of the Lake Charles Terminal to receive, store, and vaporize LNG. In cooperation with BGLS, Trunkline LNG has expanded and enhanced the terminal through the construction of additional storage capacity, additional gas-fired vaporization capacity, an additional marine berth, ambient air vaporization equipment, and natural gas liquids extraction capability. At present, the terminal has a firm sustained sendout capacity of 1.8 billion cubic feet per day (Bcf/d) (13.7 mmtpa) and a peak sendout capacity of 2.1 Bcf/d. The terminal has four LNG storage tanks with a combined capacity of approximately 2.7 million barrels (425,000 cubic meters) of LNG, or approximately 9.0 Bcf of gas. In addition, the terminal's natural gas liquids processing facilities allow the extraction of ethane and other heavier hydrocarbons from the LNG stream.

Existing Long-Term and Blanket Authorizations

LCE's affiliate, BGLS, currently holds nine active long-term and blanket authorizations from DOE to import LNG at the Lake Charles Terminal and the LNG terminal at Elba Island, Georgia, including: DOE/FE Order No. 2917 (issued February 17, 2011); DOE/FE Order No. 2756 (issued March 8, 2010); DOE/FE Order No. 2527 (issued August 14, 2008); DOE/FE Order No. 2288 (issued November 17, 2006); DOE/FE Order No. 2285 (issued November 17, 2006); DOE/FE Order No. 2199 (issued May 22, 2006); DOE/FE Order No. 1977–B (issued May 22, 2006); DOE/FE Order No. 2286 (issued November 17, 2006); and DOE/FE Order No. 1932 (issued December 30, 2003).

Current Application

In the instant Application, as amended, LCE seeks long-term authorization to export up to 15 mmtpa of LNG for a 25-year period, commencing the earlier of the date of first export or ten years from the date of issuance of the requested authorization. LCE seeks authorization to export LNG from the Lake Charles Terminal to: (1) Any country with which the United States currently has, or in the future may enter into, a free trade agreement (FTA) requiring national treatment for trade in natural gas; and (2) any country with which the United States does not have an FTA requiring national treatment for trade in natural gas with which trade is not prohibited by United States law or policy.

Trunkline LNG and BGLS are currently developing plans to: (1) Modify the existing facilities at the Lake Charles Terminal to permit LNG to be loaded from the terminal's storage tanks onto vessels berthed at the existing marine facility; and (2) install liquefaction facilities that would permit gas to be received by pipeline at the terminal and liquefied for subsequent export. The liquefaction and export facilities would be subject to an additional services agreement between Trunkline LNG and BGLS. LCE states that it would purchase LNG produced by the proposed liquefaction facility at the Lake Charles Terminal from BGLS prior to export. LCE notes that any modifications to the Lake Charles Terminal would be subject to FERC approval and that, following the modifications, the Lake Charles Terminal would be bi-directional, and its peak and sustained sendout capabilities will not be affected.

LCE stated in the Application that it will enter into a long-term export contract with BGLS on a date that is closer to the date of first export. LCE also stated in the Application that the export contract would have a 20 year term and that it will purchase LNG from BGLS at the point of export at the Lake Charles Terminal for delivery to markets around the world.

In the Amendment to the Application, filed on May 26, 2011, LCE revised its request by specifying that it seeks authority to export LNG on its own behalf or as agent for BGLS. The Amendment also clarified that LCE intends that its long-term LNG export agreement with BGLS will run for 25 years concurrent with the export authority sought in the original Application. Also in the Amendment, LCE stated that it prefers to take title to the LNG destined for export from BGLS at the point of export and that it seeks a waiver by DOE/FE of the non-binding policy announced in *The Dow Chemical Company,* DOE/FE Order No. 2859 (Oct. 5, 2010), which requires the authorization holder to have title of gas at the time of export. In the event that DOE/FE declines to grant a waiver of the non-binding policy, LCE intends to use the requested export authorization on behalf of BGLS.

LCE plans to export natural gas sourced from the Texas and Louisiana producing regions as well as other producing regions in the Lower 48 States.

Public Interest Considerations

LCE contends that the authorization would not be inconsistent with the public interest and should be granted by DOE/FE under the individual statutory provisions that apply separately to exporting LNG to FTA and non-FTA countries. LCE asserts that the portion of the Application that seeks authorization to export LNG to FTA countries should be reviewed pursuant to the public interest standard in Section 3(c) of the Natural Gas Act (NGA).[3]

With regard to exports of LNG to non-FTA countries, LCE states that Section 3(a) of the NGA sets forth the general standard for review applicable to such export applications[4] and that DOE has consistently ruled that Section 3(a) of the NGA creates a rebuttable presumption that proposed exports of natural gas are in the public interest.[5] LCE asserts that to overcome this rebuttable presumption, an opponent must affirmatively demonstrate that the proposal is inconsistent with the public interest.[6] Furthermore, the focus of DOE/FE's public interest analysis, according to LCE, is the projected domestic need for the gas to be exported.

In this regard, LCE states that the portion of its Application to export domestically produced LNG to non-FTA countries is not inconsistent with the public interest as demonstrated by the following:

First, LCE contends that recoverable natural gas resources in the United States are abundant, cheap and sufficient to meet long-term demand for both domestic consumption and LCE's proposed LNG exports. LCE asserts that recent improvements in natural gas exploration and production technology

[3] 15 U.S.C. 717b(c).

[4] 15 U.S.C. 717b(a).

[5] *Sabine Pass Liquefaction, LLC,* FE Docket 10–111–LNG, Opinion and Order Denying Request for Review Under Section 3(c) of the NGA (Oct. 21, 2010) (Sabine Section 3(c) Order)

[6] Application at 7.

have changed the outlook for the U.S. natural gas market. LCE states that technical and efficiency improvements in horizontal drilling and hydraulic fracturing have combined to reduce the cost of producing natural gas from shale resources, making shale gas economically viable. LCE asserts that shale gas reached 23% of U.S. total natural gas production in 2010 and that the share of shale gas production is expected to double to 46% by 2035. LCE also contends that the export of domestic LNG, as proposed by LCE, should be considered to be in the public interest since U.S. natural gas available for supply far exceeds demand.

Based on an internal analysis of potential exports of domestically produced LNG from various U.S. LNG terminals that could have liquefaction capacity installed, LCE estimated both the impact of the proposed exports and also the effect of other U.S. LNG exports from 2015 through 2035. LCE prepared two scenarios. In a base export case, LCE shows the impact of LNG reaching a total of 6 Bcf/d; in a high (stress) export case, it reaches a total of 12 Bcf/d. LCE asserts that EIA's current estimate of 2,251 trillion cubic feet of technically recoverable dry gas resources in the Lower 48 States indicates that recoverable resources are more than adequate in the long run to meet domestic demand as well as LNG exports as high as 12 Bcf/d. LCE concludes that the natural gas to be exported pursuant to this Application will not be needed to meet U.S. demand, and its permitting would not be inconsistent with the public interest.

Second, LCE states that its analysis shows that the proposed export, as well as the likely level of total LNG exports during the term of the proposed authorization, will not have a significant impact on domestic natural gas prices. LCE states that the surge in shale gas production and recoverable resource estimates has had a bearish effect on domestic natural gas prices over the last two years. LCE considers LNG exports from the United States as an additional demand element in the market. To fully understand the impact of future long-term gas prices, LCE performed internal and external assessments that examined the recoverable resource potential and production costs of natural gas for 2011 through 2035.[7] LCE's conclusion is that the LNG exports in the requested authorization will not have a material impact on domestic natural gas prices, and that accordingly, the proposed export is not inconsistent with the public interest.

Third, LCE contends that the requested authorization will benefit local, regional, and national economies, and is in the public interest. LCE asserts that the development of new resources creates new jobs and new opportunities for American workers and is consistent with President Obama's National Export Initiative signed in 2010.[8] LCE asserts that the construction of modifications to the terminal would directly benefit the local economy by supporting high paying construction and engineering jobs. LCE asserts that granting the requested authorization would also positively impact the U.S. balance of trade and would help to improve economic trade and ties between the United States and the destination countries, which could include key industrialized nations in Europe and Asia as well as developing nations in Asia, South America, the Middle East and the Caribbean. LCE contends that it would be inconsistent with U.S. obligations under World Trade Organization Agreements to restrict exports of LNG to other WTO countries except in certain narrow circumstances not applicable here.

Fourth, LCE contends that LNG exports can have significant environmental benefits due to the cleaner burning qualities of natural gas, and that an increased supply of natural gas made possible through LNG export can help countries break their dependence on less environmentally friendly fuels.

Environmental Impact

LCE states that, currently, the Lake Charles Terminal is equipped for and authorized only to receive imports of LNG. LCE further states that Trunkline LNG will file an application with FERC for authorization to modify the existing authorized facilities for exports in accordance with NGA Section 3 and subpart B of part 153 of the Commission's Regulations, 18 CFR Sec. 153.4, *et seq.* Regarding the proposed exports to FTA countries, LCE notes that these exports fall within NGA Section 3(c), as amended, and therefore, must be granted without delay or modification. With regard to the proposed export to non-FTA countries, LCE requests that DOE/FE issue the authorization conditioned on FERC's review under the National Energy Policy Act (NEPA) and approval of the facility construction.

DOE/FE Evaluation

Pursuant to NGA Section 3(a), the portion of the Application seeking authorization to export LNG to countries that have entered into FTAs with the United States calling for national treatment of trade in natural gas is deemed to be in the public interest and, as requested by LCE, shall be granted without modification or delay. A separate order shall be issued to this end.

The balance of the export Application, which seeks authorization to export LNG to non-FTA nations, will be reviewed pursuant to Section 3(c) of the Natural Gas Act, as amended; DOE Delegation Order No. 00–002.00L (Apr. 29, 2011); and DOE Redelegation Order No. 00–002.04E (Apr. 29, 2011). In reviewing this non-FTA portion of the Application, DOE will consider any issues required by law or policy. To the extent determined to be necessary or appropriate, these issues will include the impact of LNG exports associated with this Application, and the cumulative impact of any other application(s) previously approved, on domestic need for the gas proposed to be exported, energy security, and any other issues, including the impact on U.S. gross domestic product, consumers, industry, U.S. balance of trade, jobs creation, as well as whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose this Application should comment in their responses on these issues, as well as any other issues deemed relevant to the Application.

NEPA requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Due to the complexity of the issues raised by the Applicants, interested persons will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, notices of intervention, or motions for additional procedures.

Public Comment Procedures

In response to this notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention, as applicable. The filing of comments or a

[7] Application at 16.

[8] Executive Order No. 13534, 75 FR 12433 (March 11, 2010).

protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590.

Filings may be submitted using one of the following methods: (1) E-mailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 11–59–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office Natural Gas Regulatory Activities at the address listed in **ADDRESSES**; (3) hand delivering an original and three paper copies of the filing to the Office of Natural Gas Regulatory Activities at the address listed in **ADDRESSES**; or (4) submitting comments in electronic form on the Federal eRulemaking Portal at *http://www.regulations.gov,* by following the on-line instructions and submitting such comments under FE Docket No. 11–59–LNG. DOE/FE suggests that electronic filers carefully review information provided in their submissions and include only information that is intended to be publicly disclosed.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application filed by LCE is available for inspection and copying in the Office of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue, SW., Washington, DC 20585. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.* In addition, any electronic comments filed will also be available at: *http://www.regulations.gov.*

Issued in Washington, DC, on June 7, 2011.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. 2011–14554 Filed 6–10–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Department of Energy-Quadrennial Technology Review Capstone Workshop

AGENCY: Department of Energy (DOE).

ACTION: Notice of open meeting.

SUMMARY: DOE has initiated a Quadrennial Technology Review (DOE–QTR) of its energy technology policies and programs. The DOE–QTR Capstone Workshop is the culmination of the Department's public engagement phase of the review.

DATES: 8:30 a.m.–5:30 p.m., Wednesday, July 13, 2011.

ADDRESSES: The meeting will be held in the Washington, DC metro area. Attendance at the meeting is on a first-come, first-served basis, and pre-registration is required. The address of venue will be posted and registration information available at *http://energy.gov/QTR.*

FOR FURTHER INFORMATION CONTACT: Asa Hopkins, Office of the Under Secretary for Science at (202) 586–0505, or e-mail *asa.hopkins@science.doe.gov.*

SUPPLEMENTARY INFORMATION: The energy technology development and deployment programs of the Department of Energy include the Advanced Research Projects Agency–Energy (ARPA–E) and the Offices of Electricity Delivery & Energy Reliability, Energy Efficiency & Renewable Energy, Fossil Energy, and Nuclear Energy—a set of programs with an annual collected budget of about $4.3 billion. Additionally, the Department's Office of Science supports basic scientific research programs in materials and chemical sciences, biology, and computational sciences that are highly relevant for the energy technology programs considered within the DOE–Quadrennial Technology Review (QTR). The Department also administers loan guarantees to eligible clean energy projects and provides direct loans to eligible manufacturers of advanced technology vehicles and components.

DOE is undertaking development of a QTR, a component of a government-wide Quadrennial Energy Review as recommended by the President's Council of Advisors on Science & Technology. This Administration's national energy goals are to:

- Reduce energy-related greenhouse gas emissions by 17% by 2020 and 83% by 2050, from a 2005 baseline;
- Supply 80% of America's electricity from clean energy sources by 2035; and
- Support deployment of 1 million electric vehicles (EVs) on the road by 2015.

In a previous **Federal Register** notice [76 FR 13607 (March 3, 2011)], the Department requested public comment on the questions related to the DOE–QTR and the framing document. Comments received before April 15, 2011, have been posted on the project's Web site, *http://energy.gov/QTR.*

Purpose of the Meeting: The DOE–QTR Capstone Workshop will provide the public an opportunity to offer feedback on the broad outlines of our principles for the entry of a technology into the Department's energy technology research & development portfolio, the composition of activities within that portfolio, and approaches to prioritization of R&D programs within each of six strategies defined in our framing document: In the mobile sector, these are vehicle efficiency, electrification, and advanced fuels; and in the stationary sector, these are building and industrial efficiency, grid, and clean electricity supply. The Capstone Workshop builds on a set of workshops held on each of the QTR strategies: alternative fuels in Chicago, IL on April 26, 2011; vehicle efficiency and electrification in Knoxville, TN on May 4, 2011; building and industrial efficiency in Pittsburgh, PA on May 17, 2011; grid in Scottsdale, AZ on May 23, 2011; and clean electricity generation in Boulder, CO on June 7, 2011.

Tentative Agenda: The one day meeting will consist of four ninety minute panels: (1) the Department's mobile portfolio; (2) the Department's stationary portfolio; (3) technology policy and the role of demonstrations; and (4) balance within the mobile and stationary portfolios and between mobile and stationary portfolios. For each of these four sessions, panelists will be asked to discuss our draft entry, composition and prioritization principles for approximately thirty minutes. Then, approximately forty-five minutes will be reserved for public comments and questions for the panelists and DOE. The time allotted per speaker will depend on the number who wish to speak, but is not expected to exceed 5 minutes in order to allow maximum participation by attendees. Each panel will close with a summary by DOE of approximately fifteen minutes.

Public Participation: It is the policy of the Department to ensure that public participation is an integral and effective part of DOE activities, and that decisions are made with the benefit of significant public input and perspectives.

The Department recognizes the many benefits to be derived from public participation for both stakeholders and DOE. Public participation provides a means for DOE to gather a diverse collection of opinions, perspectives, and values from the broadest spectrum of the public, enabling the Department to make more informed decisions. Public participation benefits stakeholders by creating an opportunity to provide input on decisions that affect their communities and our nation.

Issued in Washington, DC, on June 8, 2011.

Steven E. Koonin,

Undersecretary for Science, Department of Energy.

[FR Doc. 2011–14565 Filed 6–10–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC11–521–001]

Commission Information Collection Activities (Ferc-521), Proposed Collection; Comment Request; Submitted for OMB Review

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3506(c) (2) (a) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments in consideration of the collection of information are due July 13, 2011.

ADDRESSES: Comments may be filed either electronically (eFiled) or in paper format, and should refer to Docket No. IC11–521–001. Documents must be prepared in an acceptable filing format and in compliance with Commission submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* eFiling instructions are available at: *http://www.ferc.gov/docs-filing/efiling.asp.* First time users must follow eRegister instructions at: *http://www.ferc.gov/docs-filing/eregistration.asp,* to establish a username and password before eFiling. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of eFiled comments. Commenters making an eFiling should not make a paper filing. Commenters that are not able to file electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

Users interested in receiving automatic notification of activity in this docket may do so through eSubscription at *http://www.ferc.gov/docs-filing/esubscription.asp.* In addition, all comments and FERC issuances may be viewed, printed or downloaded remotely through FERC's eLibrary at *http://www.ferc.gov/docs-filing/elibrary.asp,* by searching on Docket No. IC11–521. For user assistance, contact FERC Online Support by e-mail at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by e-mail at *DataClearance@FERC.gov,* telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–521, "Payments for Benefits from Headwater Benefits" (OMB No. 1902–0087), is used by the Commission to implement the statutory provisions of section 10(f) of the Federal Power Act (FPA) (16 U.S.C. 803). The FPA authorizes the Commission to determine headwater benefits received by downstream hydropower project owners. Headwater benefits is the additional energy production possible at a downstream hydropower project resulting from the regulation of river flows by an upstream storage reservoir.

When the Commission completes a study of a river basin, it determines headwater benefits charges that will be apportioned among the various downstream beneficiaries. A headwater benefits charge and the cost incurred by the Commission to complete an evaluation are paid by downstream hydropower project owners. In essence, the owners of non-federal hydropower projects that directly benefit from a headwater improvement must pay an equitable portion of the annual charges for interest, maintenance, and depreciation of the headwater project to the U.S. Treasury. The regulations provide for apportionment of these costs between the headwater project and downstream projects based on downstream energy gains and propose equitable apportionment methodology that can be applied to all rivers basins in which headwater improvements are built. The Commission requires owners of non-federal hydropower projects to file data for determining annual charges as outlined in 18 Code of Federal Regulations (CFR) part 11.

Action: The Commission is requesting a three-year extension of the current expiration date with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Data collection	Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) × (2) × (3)
FERC–521	3	1	40	120

Estimated cost burden to respondents is $8,214 (120 hours/2,080 hours [1] per year, times $142,372 [2] = $8,214). The cost per respondent is $2,738.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's 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 those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology *e.g.* permitting electronic submission of responses.

Dated: June 6, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–14509 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

[1] Estimated number of hours an employee works each year.

[2] Estimated average annual cost per employee.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. IC11–520–001; IC11–561–001; and IC11–566–001]

Commission Information Collection Activities, Proposed Collections; Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collections described below to the Office of Management and Budget (OMB) for review and an extension of the expiration date for these information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received one comment in response to an earlier **Federal Register** notice of March 4, 2011 (76FR12091) and has made this notation in its submission to OMB.

DATES: Comments on the collection of information are due by July 13, 2011.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira__submission@omb.eop.gov* and include the OMB Control Nos. as points of reference. For comments that pertain to only one or two of the collections, specify the appropriate collection(s) and OMB Control Number(s). The Desk Officer may be reached by telephone at 202–395–4638.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. For paper filings, such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket Nos. IC11–520–001; IC11–561–001; and IC11–566–001. (If comments apply to only one or two of the collections, indicate the corresponding docket and collection number(s).)

Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission's submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide/electronic-media.asp*. To file the document electronically, access the Commission's Web site and click on Documents & Filing, E–Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the eLibrary link. For user assistance, contact *ferconlinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION: Ellen Brown may be reached by e-mail at *DataClearance@ferc.gov,* by telephone at (202) 502–8663, by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Description

The supporting statement for the information collections submitted for

OMB review contains the following information.

1. *Collections of Information:*

Information collection No.	OMB No.	Information collection title
FERC–520	1902–0083	Application to Hold Interlocking Directorate Positions.
Form 561	1902–0099	Annual Report of Interlocking Directorates.
FERC–566	1902–0114	Annual Report of Twenty Largest Purchasers.

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Action:* The Commission is requesting that OMB approve these information collections with a three-year extension of the expiration dates, with no changes to the existing collections. The information filed with the Commission is mandatory.

4. *Necessity of the Collections of Information:* The Federal Power Act (FPA), as amended by the Public Utility Regulatory Policies Act of 1978 (PURPA), mandates federal oversight and approval of certain electric corporate activities to ensure that neither public nor private interests are adversely affected. Accordingly, the FPA prescribes related information filing requirements to achieve this goal. Such filing requirements are found in the Code of Federal Regulations (CFR), specifically in 18 CFR Parts 45, 46 and section 131.31 and serve as the basis for FERC–520, Form 561, and FERC–566. Most of the requirements are statutorily defined and cannot be changed. The Commission can initiate enforcement proceedings when violations and omissions of the Act's provisions occur.

The FERC–520 is divided into two types of applications: Full and abbreviated. The full application, as specified in section 45.8, implements the FPA requirement that it is unlawful for any person to concurrently hold the positions of officer or director of more than one public utility; or a public utility and a bank or financial institution that underwrites or markets public utility securities; or a public utility and an electrical equipment supplier to that public utility unless the Commission has authorized the interlocks to be held. Before assuming an interlocked position, an applicant must demonstrate that neither public nor private interests will be adversely affected by the holding of the position. The full application provides Commission staff with a list of certain information required from the applicant concerning the interlocking positions for which he/she seeks authorization. Information provided includes, but is not limited to, a description of duties, estimated time devoted to the position, and any indebtedness to the public utility.

The abbreviated application, as specified in 18 CFR 45.9 and otherwise known as an informational report, allows an applicant to receive automatic authorization for an interlock position upon receipt of filing with the FERC. The abbreviated application applies only to those individuals who seek authorization as an (1) Officer or director of two or more public utilities where the same holding company owns, directly or indirectly, wholly or in part, the other public utility; (2) an officer or director of two public utilities, if one utility is owned, wholly or in part, by the other; or (3) an officer or director of more than one public utility, if such person is already authorized under Part 45 to hold different positions where the interlock involves affiliated public utilities. Information required is on a much smaller scale than that which is required for the full application.

Pursuant to 18 CFR 45.5, in the event that an applicant resigns or withdraws from all Commission-authorized interlocked positions within a corporate structure or is not re-elected or re-appointed to any interlocked positions within that corporate structure, FERC requires that the applicant submit a notice of change within 30 days from the date of change.

The information the Commission collects with Form 561 ("Annual Report of Interlocking Positions") responds to the FPA requirements for annual reporting of similar types of positions public utility officers and directors hold with financial institutions, insurance companies, utility equipment and fuel providers, and with any of an electric utility's twenty largest purchasers of electric energy. The FPA specifically defines most of the information elements in the Form 561, including the information that must be filed, the required filers, the directive to make the information available to the public, and the filing deadline. The Commission determined administrative aspects of the Form 561 such as the filing format and instructions for filling out the form. The information collected by the Commission through the Form 561 is used to implement the FPA requirement that those who are authorized to hold interlocked directorates annually disclose all the interlocked positions they held the prior year. The Form 561 data identifies persons holding interlocking positions between public utilities and other entities, allows the Commission to review these and permits identification of possible conflicts of interest.

Finally, the FERC–566, "Annual Report of a Utility's Twenty Largest Purchasers," implements FPA requirements that each public utility annually publish a list of the purchasers of the twenty largest annual amounts of electric energy sold by such public utility during any one of three previous calendar years. Similar to the statutory detail in the FPA for the Form 561, the FPA identifies who must file the FERC–566 report and sets the filing deadline. The FPA specifies that those entities required to report who have a holding company system can calculate their total volumes of energy sold by including the amounts sold by utilities within their holding company system. The FERC details in its regulations special rules about the information to be provided in the FERC–566 report. For example, FERC allows required filers to file estimates of volumes based on actual information available to them if actual volumes are not available by the statutory due date. However, the FERC also requires revisions of those filed estimates with final numbers by March 1st. The public disclosure of this information provides officers and directors with the information necessary to determine whether any of the entities with whom they are related are any of the largest twenty purchasers of the public utility with which they are affiliated.

Together, these data collections provide views into complex electric corporate activities. They serve to safeguard public and private interests, as the FPA requires, by disclosing business relationships to both the public and the Commission for analyses. The public can file a complaint with the Commission if disclosures made under these data collections provide evidence of corporate behavior that violates Commission policy.

The Commission can use its enforcement authority when violations and omissions of FPA requirements occur.

5. *Summary of Public Comment and Agency Response to Comment:*

In accordance with OMB regulations in 5 CFR 1320.8(d), the Commission's Notice to renew its OMB approval of FERC–520, Form 561 and FERC–566 information collections was published in the **Federal Register** on March 4, 2011. The Commission received one comment in response to this notice from the Edison Electric Institute (EEI). A summary of the comment and the Commission's response follow.

EEI Comment. EEI suggests the Commission modify section 45.9 of its regulations to expand the scope of automatic authorizations issued for FERC–520 applications. EEI believes the Commission should permit automatic authorization of (i) all interlocks between affiliated companies within a holding company system that includes a public utility under section 305(b) of the Federal Power Act; (ii) all interlocks between public utilities that do not have captive customers or own or operate transmission facilities and unaffiliated companies; and (iii) all interlocks between franchised public utilities and unaffiliated companies that agree to adopt the Commission's restrictions on non-power goods and services transactions.

In its comments, EEI refers to various sections of the preamble to Order No. 446 as support for its request that automatic authorizations of certain "informational" applications would not adversely affect the public interest. EEI believes automatic reauthorizations would reduce both the reporting burden of filers and the processing burden on FERC staff resources.

In its comments, EEI also points out a calculation error in FERC's burden estimate. The FERC estimates the cost of preparing the FERC–566 as $68 per respondent per year, based on an estimated 6 hours per response, 434 respondents filing once per year, and an average annual staff salary of $142,372. However, using the stated information, the average cost per response would be $411 (*i.e.,* 6 hours per response/2080 hours per year × $142,372 average salary). Further, EEI states that one of its members has noted that it takes them 8 hours per response and not 6 hours. EEI indicates this would raise this average cost per response to $548 (i.e. (8 hours/6 hours) × $411).

FERC Response. FERC notes EEI comments and shares its interest in identifying and implementing burden reductions to the benefit of form filers as well as FERC staff. In fact, burden reduction has been the primary reason FERC has undertaken specific efforts over the last several years to make greater use of IT and electronic filing. Nevertheless, EEI's suggestions raise issues and implications that would require FERC to explore and address them more appropriately in a forum and process that is better suited to full public identification and deliberation of any possible proposed and planned changes to regulatory activities.

As a separate matter, FERC has made the arithmetic correction to the burden calculation in the March 2011 notice. However, FERC will not change the number of hours per response based on the information EEI provides. The EEI comment clearly states that it was only one of its members who has noted its filing time is 2 hours longer than the 6 hours FERC estimates it takes filers to comply with the requirements of FERC–566, on average. Because the estimate is an average, it is to be expected that some filers will have a higher reporting burden while others will have a lower one. Therefore, FERC does not see a reason to change the FERC–566 average completion time of 6 hours.

6. *Respondents, Estimated Burden and Estimated Cost Burden to Respondents:* [1]

FERC estimates for the annual burden follow.

FERC data collection	Number of respondents annually (average) (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) × (2) × (3)
FERC–520	[2] 406 (total)			12,680
○ Full	29	1	51.8	1,502
○ Informational	377	1	29.5	11,122
○ Notice of Change	222	1	.25	56
Form 561	2,431	1	.25	608
FERC–566	434	1	6	2,604
Total				15,892

Annual cost estimates for these collections follow.

FERC data collection	Annual cost burden per respondent	Total annual cost burden to respondents [3] [4]
FERC–520	$2,138	$867,922
FERC–561	17	41,616
FERC–566	411	178,239

7. *Reasons for Changes in Estimated Nos. of Annual Filings.* A concern developed in 2004 that FERC–520 applications for authorizations to hold interlocked positions were not being filed *before* individuals assumed the interlocked positions, as required. In response, the Commission issued its June 2004 interlocking directorate

[1] The figures may be rounded.

[2] This number of unique respondents corresponds to the number of filers of full applications plus the number of informational filers.

policy statement in Docket No. PL04–10–000 and Order No. 664 in September 2005. The burden estimate for the FERC–520 in this request is based on recent Commission experience and the actual number of FERC–520 filings made between 2008 and 2010.

The number of informational applications has increased steadily from 87 in 2004 to 335 in 2010. The Commission began to separate the FERC–520 filings by type of application in its OMB clearance estimates in 2008 because the number of each type of application filed had been changing significantly. Breaking the data out by type of filing allows these changes to be easily seen. The last OMB clearance package divided the FERC–520 filings only into two categories: full and informational filings. Decreases in the number of full and informational applications has necessitated the separate tracking and reporting of three types of possible applications and the burden hours each imposes. Therefore, this OMB clearance package adds Notice of Change filings, further breaking down the categories of FERC–520 to capture, convey and begin to analyze all types of FERC–520s.

The decrease in the number of FERC–520 applications may be due to directors retaining their positions longer because of the slow economy. The number of FERC–566 filings increased by 44% because in December 2007 FERC sent out notices to those who were expected to file a FERC–566 but did not during previous reporting years.

There is a change in the annual cost estimates since the last submission in 2008 due mainly to a decrease in the number of FERC–520 filers. However, the per-hour cost estimate for each collection has increased since 2008 because the Commission is using an updated salary estimate.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collections 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Dated: June 6, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–14508 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

[3] Estimated number of hours an employee works each year = 2,080. Estimated average annual cost per employee (including overhead and benefits) = $142,372.

[4] The estimated total cost to respondents for these three information collections is $1,087,777. In 2008, the estimated total annual cost for these three collections was $1,605,745.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4632–033]

Commissioners of Public Works of the City of Spartanburg, SC; Notice of Application for Surrender of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Surrender of License.

b. *Project No.:* 4632–033.

c. *Date Filed:* November 30, 2010 and supplemented on May 19, 2011.

d. *Applicant:* Commissioners of Public Works of the City of Spartanburg, South Carolina.

e. *Name of Project:* Clifton Mills #1 Hydroelectric Project.

f. *Location:* On the Pacolet River, in Spartanburg County, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ken Tuck, Director of Water Treatment, Spartanburg Water, 200 Commerce Street, P.O. Box 251, Spartanburg, SC 29304, (864) 580–5642, e-mail *ktuck@spartanburgwater.org* and Elizabeth W. Whittle, Nixon Peabody, LLP, 401 Ninth Street, NW., Suite 900, Washington, DC 20004, (202) 585–8338, e-mail: *ewhittle@nixonpeabody.com.*

i. *FERC Contact:* Jake Tung, (202) 502–8757, e-mail at *hong.tung@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protest:* July 6, 2011.

Comments, motions to intervene, and protests may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings, please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.*

k. *Description of Request:* The applicant proposes to surrender the license for the Clifton Mills #1 Hydroelectric Project and in addition, proposes to: (1) Install fences around the powerhouse to prevent entry, (2) remove the three tainter gates, (3) plug the penstocks with cement at the intake and forebay and abandon in place, and (4) transfer the regulation of the dam to the State of South Carolina after Commission approval of the surrender.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects.

For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents*—All filings must bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: June 6, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–14507 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2680–003.
Applicants: Puget Sound Energy, Inc.
Description: Puget Sound Energy, Inc. submits tariff filing per 35: OATT—Revision Schedule 3, 5, 6 & 13, to be effective 5/27/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5000.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER10–2721–002.
Applicants: El Paso Electric Company.
Description: Notice of El Paso Electric Company of Non-Material Change in Status.
Filed Date: 05/31/2011.
Accession Number: 20110531–5071.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–2186–001.
Applicants: Ameren Illinois Company.
Description: Ameren Illinois Company submits tariff filing per 35: Compliance Filing for Ameren Illinois—Rate Schedules 119 and 120 to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5011.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–2187–001.
Applicants: Ameren Illinois Company.
Description: Ameren Illinois Company submits tariff filing per 35: Compliance Filing for Ameren Illinois—Rate Schedules 126 and 133, to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5009.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–2191–001.
Applicants: Ameren Illinois Company.
Description: Ameren Illinois Company submits tariff filing per 35: Compliance Filing for Ameren Illinois—Rate Schedules 128 and 129 to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5007.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–2197–001.
Applicants: Ameren Illinois Company.
Description: Ameren Illinois Company submits tariff filing per 35: Compliance Filing for Ameren Illinois—Rate Schedules 123, 124, 132, to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5005.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–2977–002.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35: Compliance Filing to WDAT Revise Generator Interconnection Procedures to be effective 3/2/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5178.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3004–002.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35: Compliance Filing for WD Tariff: Generator Interconnection Procedures to be effective 3/3/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5165.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3547–001.
Applicants: RG Steel Sparrows Point LLC.
Description: RG Steel Sparrows Point LLC submits tariff filing per 35.17(b): RG Steel Revised Baseline MBRA ETariff to be effective 5/11/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5015.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3668–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Western WDT May 2011 Biannual Filing to be effective 2/14/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5003.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3669–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Western IA May 2011 Biannual Filing to be effective 2/14/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5004.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3670–000.
Applicants: ArcelorMittal USA LLC.
Description: ArcelorMittal USA LLC submits tariff filing per 35: AMU MBRA Compliance Filing, to be effective 5/31/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5014.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3671–000.
Applicants: California Independent System Operator Corporation.
Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–05–

31 CAISO Service Agreement 625 MSSA with Anaheim to be effective 7/28/2010.

Filed Date: 05/31/2011.

Accession Number: 20110531–5104.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3672–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 2158 Arkansas Valley Electric Cooperative Corp. NITSA NOA to be effective 5/1/2011.

Filed Date: 05/31/2011.

Accession Number: 20110531–5106.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3673–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue No. W3–063; Original Service Agreement No. 2923 to be effective 5/3/2011.

Filed Date: 05/31/2011.

Accession Number: 20110531–5116.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3674–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: NYISO Errata Filing re: 7/30/11 RLS filing Correcting Formula to be effective 10/21/2010.

Filed Date: 05/31/2011.

Accession Number: 20110531–5166.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3675–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii: 2011–05–31 CAISO Amendment 2 to MSSA with Anaheim to be effective 7/1/2011.

Filed Date: 05/31/2011.

Accession Number: 20110531–5167.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3676–000.

Applicants: New England Power Pool Participants Committee.

Description: New England Power Pool Participants Committee submits tariff filing per 35.13(a)(2)(iii: June 2011 Membership Filing to be effective 5/1/2011.

Filed Date: 05/31/2011.

Accession Number: 20110531–5186.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3677–000.

Applicants: CP Energy Marketing (US) Inc.

Description: CP Energy Marketing (US) Inc. submits tariff filing per 35: CP Energy Marketing (US) Inc.'s Notice of Change in Status Market-Based Rate Filing to be effective 4/29/2011.

Filed Date: 05/31/2011.

Accession Number: 20110531–5189.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–3678–000.

Applicants: Wisconsin Electric Power Company.

Description: Notice of Cancellation of Wisconsin Electric Power Company.

Filed Date: 05/31/2011.

Accession Number: 20110531–5196.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH11–14–000.

Applicants: NYSE Euronext, NYSE Blue.

Description: FERC–65A Notification of Exemption of NYSE Euronext, *et al.*

Filed Date: 05/31/2011.

Accession Number: 20110531–5060.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 3, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–14512 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2145–000.

Applicants: El Paso Natural Gas Company.

Description: El Paso Natural Gas Company submits Annual Penalty Crediting Report for calendar year 2010.

Filed Date: 05/31/2011.

Accession Number: 20110531–5069.

Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2146–000.
Applicants: CenterPoint Energy Gas Transmission Company, LLC.
Description: CenterPoint Energy Gas Transmission Company, LLC submits tariff filing per 154.204: CEGT LLC—Negotiated Rate—June 2011—AECC to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5079.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2147–000.
Applicants: Columbia Gulf Transmission Company.
Description: Columbia Gulf Transmission Company submits tariff filing per 154.203: Gas Quality Waiver—RP11–1892 Compliance Filing to be effective 7/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5091.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2148–000.
Applicants: Sea Robin Pipeline Company, LLC.
Description: Sea Robin Pipeline Company, LLC submits tariff filing per 154.204: Revise fuel percentage 5–31–11 to be effective 7/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5097.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2149–000.
Applicants: Big Sandy Pipeline, LLC.
Description: Big Sandy Pipeline, LLC submits tariff filing per 154.204: Big Sandy Negotiated Rate Service Agreement Filing to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5118.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2150–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.204: JPMorgan 156–1 Amendment to Negotiated Rate Agreement filing to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5140.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2151–000.
Applicants: Texas Eastern Transmission, LP.
Description: Texas Eastern Transmission, LP submits tariff filing per 154.204: Cashout Review to be effective 7/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5151.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2152–000.
Applicants: Maritimes & Northeast Pipeline, L.L.C.
Description: Maritimes & Northeast Pipeline, L.L.C. submits tariff filing per 154.204: Cashout Review to be effective 7/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5173.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Docket Numbers: RP11–2153–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: ETC 34688 to Texla Capacity Release Negotiated Rate Agreement to be effective 6/1/2011.
Filed Date: 05/31/2011.
Accession Number: 20110531–5188.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 3, 2011.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. 2011–14543 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–90–000.
Applicants: El Segundo Energy Center LLC.
Description: Notice of Self Certification of Exempt Wholesale Generator Status El Segundo Energy Center LLC.
Filed Date: 06/06/2011.
Accession Number: 20110606–5059.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: EG11–91–000.
Applicants: Mojave Solar LLC.
Description: Self-Certification of Mojave Solar LLC as an Exempt Wholesale Generator.
Filed Date: 06/03/2011.
Accession Number: 20110603–5383.
Comment Date: 5 p.m. Eastern Time on Friday, June 24, 2011.

Docket Numbers: EG11–92–000.
Applicants: Pocahontas Prairie Wind, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator of Pocahontas Prairie Wind, LLC.
Filed Date: 06/06/2011.
Accession Number: 20110606–5202.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: EG11–93–000.
Applicants: Pocahontas Prairie Wind, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Pocahontas Prairie Wind, LLC.
Filed Date: 06/06/2011.

Accession Number: 20110606–5203.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1556–003.
Applicants: Longview Power.
Description: Triennial Market Power Analysis and Notice of Change in Status of Longview Power, LLC.
Filed Date: 06/03/2011.
Accession Number: 20110603–5327.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 2, 2011.

Docket Numbers: ER10–2481–001.
Applicants: Ingenco Wholesale Power, L.L.C.
Description: Triennial Market Power Analysis Filing and Notice of Change in Status of Ingenco Wholesale Power, LLC.
Filed Date: 06/06/2011.
Accession Number: 20110606–5142.
Comment Date: 5 p.m. Eastern Time on Friday, August 5, 2011.

Docket Numbers: ER10–2776–002.
Applicants: Wells Fargo Commodities, LLC.
Description: Notice of Non-Material Change in Status of Wells Fargo Commodities, LLC.
Filed Date: 05/31/2011.
Accession Number: 20110531–5201.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 21, 2011.

Docket Numbers: ER11–2480–002.
Applicants: Green Valley Hydro, LLC.
Description: Green Valley Hydro, LLC submits tariff filing per 35: Green Valley ER11–2480 Correction to be effective 2/22/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5090.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3725–000.
Applicants: Central Maine Power Company.
Description: Central Maine Power Company submits tariff filing per 35.13(a)(2)(iii: Central Maine Power Company—Filing of Agreements to be effective 5/6/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5003.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3726–000.
Applicants: El Segundo Power II LLC.
Description: El Segundo Power II LLC submits tariff filing per 35.15: Cancellation of Market-Based Rate Tariff to be effective 8/5/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5039.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3727–000.
Applicants: El Segundo Energy Center LLC.
Description: El Segundo Energy Center LLC submits tariff filing per 35.12: MBR Application to be effective 8/5/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5042.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3729–000.
Applicants: Jump Power LLC.
Description: Jump Power LLC submits tariff filing per 35.15: Notice of Cancellation of MBR Tariff & Revised Tariff Sheets for Jump Power, LLC to be effective 6/7/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5081.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3730–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii: 42 Amendment to Exhibit A to be effective 7/1/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5087.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3731–000.
Applicants: LWP Lessee, LLC.
Description: LWP Lessee, LLC submits tariff filing per 35.12: Baseline MBR Application Filing to be effective 7/1/2011 under ER11–3731.
Filed Date: 06/06/2011.
Accession Number: 20110606–5089.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3732–000.
Applicants: Buchanan Generation, LLC.
Description: Buchanan Generation, LLC submits tariff filing per 35: Buchanan ER11–2478 Correction Filing to be effective 2/22/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5092.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3733–000.
Applicants: Monongahela Power Company.
Description: Monongahela Power Company submits tariff filing per 35: Allegheny Power ER11–2481 Correction to be effective 2/22/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5102.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3734–000.
Applicants: CPI Energy Services (US) LLC.
Description: CPI Energy Services (US) LLC submits tariff filing per 35: CPI Energy Services (US) LLC's Change of Status in Market-Based Rate Filing to be effective 4/29/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5131.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3735–000.
Applicants: Puget Sound Energy, Inc.
Description: Puget Sound Energy, Inc. submits tariff filing per 35.13(a)(1): Schedule 3 and 13 Wind Integration Filing to be effective 8/5/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5132.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3736–000.
Applicants: Pocahontas Prairie Wind, LLC.
Description: Pocahontas Prairie Wind, LLC submits tariff filing per 35.12: Pocahontas Prairie Wind, LLC MBR Tariff to be effective 8/5/2011.
Filed Date: 06/06/2011.
Accession Number: 20110606–5134.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3737–000.
Applicants: Kansas City Power & Light Company.
Description: Termination of Rate Schedules of Kansas City Power & Light Company.
Filed Date: 06/03/2011.
Accession Number: 20110603–5351.
Comment Date: 5 p.m. Eastern Time on Friday, June 24, 2011.

Docket Numbers: ER11–3738–000.
Applicants: Nevada Power Company.
Description: Nevada Power Company cancellation of FERC Electric Rate Schedule No. 36—Interconnection agreement with City of Anaheim.
Filed Date: 06/06/2011.
Accession Number: 20110606–5137.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Docket Numbers: ER11–3739–000.
Applicants: Nevada Power Company.
Description: Nevada Power Company Cancellation of FERC Electric Rate Schedule Nos. 49 (Interconnection Agreement) & 53 (Supplemental Power Service) with Lincoln Co. Power District No. 1.
Filed Date: 06/06/2011.
Accession Number: 20110606–5138.
Comment Date: 5 p.m. Eastern Time on Monday, June 27, 2011.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD11–5–000.
Applicants: North American Electric Reliability Corp.

Description: Petition of the North American Electric Reliability Corporation for Approval of Interpretations to Reliability Standard PRC–004–1 and PRC–005–1.

Filed Date: 04/15/2011.

Accession Number: 20110415–5288.

Comment Date: 5 p.m. Eastern Time on Friday, July 1, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 7, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–14545 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2162–000.

Applicants: MarkWest Pioneer, L.L.C.

Description: MarkWest Pioneer, L.L.C. submits tariff filing per 154.403(d)(2): MarkWest Pioneer, L.L.C.—Quarterly Fuel Adjustment Filing to be effective 7/1/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5012.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2163–000.

Applicants: Viking Gas Transmission Company.

Description: Viking Gas Transmission Company submits tariff filing per 154.204: Pro Forma Agreement updates to be effective 7/5/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5014.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2164–000.

Applicants: Guardian Pipeline, L.L.C.

Description: Guardian Pipeline, L.L.C. submits tariff filing per 154.204: Modification to Rate Schedule PAL to be effective 7/5/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5015.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2165–000.

Applicants: Southern LNG Company, L.L.C.

Description: Southern LNG Company, L.L.C. submits tariff filing per 154.203: Gas Interchangeability Settlement Compliance Filing to be effective 8/1/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5020.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2166–000.

Applicants: Kinder Morgan Interstate Gas Transmission L.L.C.

Description: Kinder Morgan Interstate Gas Transmission L.L.C. submits tariff filing per 154.204: Negotiated Rate 2011–05–31 Mieco to be effective 6/2/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5051.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2167–000.

Applicants: Discovery Gas Transmission L.L.C.

Description: Discovery Gas Transmission L.L.C. submits tariff filing per 154.403(d)(2): 2011 FL&U Submittal to be effective 7/1/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5079.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2168–000.

Applicants: Trailblazer Pipeline Company L.L.C.

Description: Trailblazer Pipeline Company LLC submits tariff filing per 154.403(d)(2): Tracking Filing to be effective 7/1/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5107.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2169–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: ONEOK 34951–65 Amendment to Negotiated Rate Agreement Filing to be effective 6/2/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5113.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2170–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Florida Gas Transmission Company, LLC submits tariff filing per 154.204: Future Contracting to be effective 7/5/2011.

Filed Date: 06/03/2011.

Accession Number: 20110603–5120.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2171–000.
Applicants: Trunkline Gas Company, LLC.
Description: Trunkline Gas Company, LLC submits tariff filing per 154.204: Negotiated Rates Filing–10 to be effective 6/3/2011.
Filed Date: 06/03/2011.
Accession Number: 20110603–5126.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2172–000.
Applicants: Gulf South Pipeline Company, LP.
Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: EnCana 37663–3 Amendment to Negotiated Rate Agreement Filing to be effective 6/3/2011.
Filed Date: 06/03/2011.
Accession Number: 20110603–5131.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2173–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: Algonquin Gas Transmission, LLC submits tariff filing per 154.204: ConEd 2011–06–01 Releases to be effective 6/1/2011.
Filed Date: 06/03/2011.
Accession Number: 20110603–5151.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–2174–000.
Applicants: High Island Offshore System, L.L.C.
Description: High Island Offshore System, L.L.C. submits tariff filing per 154.203: RP09–487 Settlement Compliance to be effective 9/30/2010.
Filed Date: 06/06/2011.
Accession Number: 20110606–5010.
Comment Date: 5 p.m. Eastern Time on Monday, June 20, 2011.

Docket Numbers: RP11–2175–000.
Applicants: Elba Express Company, L.L.C.
Description: Cashout True-Up Filing of Elba Express Company, L.L.C.
Filed Date: 06/03/2011.
Accession Number: 20110603–5219.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 6, 2011

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–14544 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1566–002.
Applicants: Tennessee Gas Pipeline Company.
Description: Tennessee Gas Pipeline Company submits tariff filing per 154.203: Redesignated Docket No. Compliance Motion Rate Case Sheets to be effective 6/1/2011. Filing Type: 580.
File Date: 05/27/2011.
Accession Number: 20110527–5261.
Comment Date: 5 p.m. Eastern Time on Friday, June 10, 2011.

Docket Numbers: RP11–2008–001.
Applicants: Texas Gas Transmission, LLC.
Description: Texas Gas Transmission, LLC submits tariff filing per 154.203: RP11–2008–001 Compliance Filing (Creditworthiness) to be effective 5/15/2011.
File Date: 05/27/2011.
Accession Number: 20110527–5144.
Comment Date: 5 p.m. Eastern Time on Friday, June 10, 2011.

Docket Numbers: RP99–106–017.
Applicants: TransColorado Gas Transmission Company LLC.
Description: Form of TransColorado Gas Transmission Company LLC Revenue Sharing Report.
File Date: 05/27/2011.
Accession Number: 20110527–5205.
Comment Date: 5 p.m. Eastern Time on Friday, June 10, 2011.

Docket Numbers: RP01–382–021.
Applicants: Northern Natural Gas Company.
Description: Northern Natural Gas submits for filing its annual report setting forth the Carlton Resolution buyout, surcharge and penalty dollars reimbursed to the Carlton Sourcers on their May reservation invoices for the 2010–2011 heating season.
File Date: 06/03/2011.
Accession Number: 20110603–5220.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–1435–003.
Applicants: Columbia Gulf Transmission Company.
Description: Columbia Gulf Transmission Company submits tariff filing per 154.203: Rate Case—Compliance Filing—Errata to be effective 5/1/2011.
File Date: 06/03/2011.
Accession Number: 20110603–5021.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 15, 2011.

Docket Numbers: RP11–1435–002.
Applicants: Columbia Gulf Transmission Company.
Description: Columbia Gulf Transmission Company submits tariff filing per 154.203: Rate Case—Compliance Filing to be effective 5/1/2011.
File Date: 05/31/2011.
Accession Number: 20110531–5182.
Comment Date: 5 p.m. Eastern Time on Monday, June 13, 2011.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of

Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before 5 p.m. Eastern time on the specified Comment Date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 6, 2011.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. 2011–14542 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Docket No. ER11–3615–000

Fred Meyer Stores, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Fred Meyer Stores, Inc.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is June 13, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 23, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–14511 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–3724–000]

TrueLight Commodities, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of TrueLight Commodities, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is June 27, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 7, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–14541 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–3723–000]

TrueLight Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of TrueLight Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is June 27, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: June 7, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–14546 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Project No. 2283–064

FPL Energy Maine Hydro, LLC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Supplement to recreation and land/trail management plan.

b. *Project No.:* 2283–064.

c. *Date Filed:* March 25, 2011.

d. *Applicant:* FPL Energy Maine Hydro, LLC.

e. *Name of Project:* Gulf Island-Deer Rips Hydroelectric Project.

f. *Location:* Androscoggin River in Androscoggin County, Maine.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ernest Deluca, (800) 371–7774, *ernest.m.deluca@nexteraenergy.com.*

i. *FERC Contact:* Mark Carter, (678) 245–3083, *mark.carter@ferc.gov.*

j. *Deadline for Filing Comments, Motions To Intervene, and Protests:* July 6, 2011.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. Please include the project number (P–2283–064) on any comments or motions filed.

k. *Description of Application:* Pursuant to the Commission's Order Modifying and Approving Recreation Plan and Land/Trail Management Plan issued March 25, 2010, FPL Energy Maine Hydro, LLC (licensee) filed an assessment of lands within 200 feet of the project impoundments with the goal of identifying additional lands needed for project purposes. As a result of its assessment, the licensee found that no additional lands are needed for project purposes and proposes no changes to the project boundary.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field (P–2283) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) Bear in all capital letters the title "Comments", "Protest", or "Motion To Intervene" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR

385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the amendment application. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: June 6, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–14510 Filed 6–10–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R03–SFUND–2011–0508; FRL–9317–3]

Notice of Proposed Prospective Purchaser Agreement Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; Request for Public Comment.

SUMMARY: Notice is hereby given that a proposed prospective purchaser agreement amendment ("PPA Amendment") associated with the Fischer & Porter Superfund Site in Warminster Township, Bucks County, Pennsylvania was executed by the Environmental Protection Agency ("EPA") and the Department of Justice and is now subject to public comment, after which the United States may modify or withdraw its consent if comments received disclose facts or considerations which indicate that the PPA Amendment is inappropriate, improper, or inadequate. The PPA Amendment would resolve certain potential EPA claims under Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 and 9607, against Blue Marlin Associates ("Purchasers"). In lieu of financial consideration, in exchange for EPA's covenant not to sue for response costs incurred at the Site, the settlement would require the Purchasers to, among other things, conduct a vapor intrusion study on their existing building located on the parcel adjacent to the property under consideration in the PPA Amendment, and, if any unacceptable risks from vapor intrusion were shown to be present, to take appropriate remedial measures as approved by EPA.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the PPA Amendment. The Agency's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, Region III Office, 1650 Arch Street, Philadelphia PA 19103.

DATES: Comments must be submitted on or before July 13, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–SFUND–2011–0508, by one of the following methods:

- *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *E-mail:* Elizabeth B. Lukens, Senior Assistant Regional Counsel at *lukens.elizabeth@epa.gov*.
- *Mail:* EPA–R03–SFUND–2011–0508, Elizabeth B. Lukens, Senior Assistant Regional Counsel (3RC44), U.S. EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103–2029.
- *Hand Delivery:* Elizabeth B. Lukens, Senior Assistant Regional Counsel (3RC44), U.S. EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103–2029. Phone: 215–814–2661. Business Hours: Monday through Friday 9 a.m. to 4 p.m. Such deliveries are accepted only during business hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–R03–SFUND–2011–0508. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index for docket ID no. EPA–R03–SFUND–2011–0508. The PPA Amendment itself displays a separate EPA internal docket number ("CERC–PPA–2000–0007") used for other purposes. Although listed in the index, some information may not be publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be available only in hard copy form.

Additionally, the PPA Amendment and additional background information are available for public inspection at the U.S. Environmental Protection Agency, Region III Office, 1650 Arch Street, Philadelphia, PA 19103. A copy of the PPA Amendment may be obtained from Lydia Guy (3RC00), Regional Hearing Clerk, U.S. Environmental Protection Agency, Region III Office, 1650 Arch Street, Philadelphia, PA 19103, or *guy.lydia@epa.gov*.

FOR FURTHER INFORMATION CONTACT: Elizabeth B. Lukens (3RC44), Senior Assistant Regional Counsel, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103,

Phone: (215) 814–2661.

SUPPLEMENTARY INFORMATION: This notice is given in accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as Amended by the Superfund Amendments and Reauthorization Act of 1986, ("CERCLA"), 42 U.S.C. 9601–9675.

Dated: June 2, 2011.

Kathryn A. Hodgkiss,

Acting Director, Hazardous Site Cleanup Division, Region III.

[FR Doc. 2011–14570 Filed 6–10–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Technological Advisory Council

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Technological Advisory Council will hold a meeting on Wednesday, June 29, 2011 in the Commission Meeting Room, from 1 p.m. to 4 p.m. at the Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

DATES: June 29, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Walter Johnston, Chief, Electromagnetic Compatibility Division, Office of Engineering and Technology 202–418–0807; *Walter.Johnston@FCC.gov*.

SUPPLEMENTARY INFORMATION: Technical Advisory Council members have been prioritizing and further developing technology issues discussed at the initial meeting on November 4, 2011. The Technical Advisory Council members will discuss this work, outline progress to date and discuss possible further work. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. Meetings are also broadcast live with open captioning over the internet from the FCC Live Web page at *http://www.fcc.gov/live/*. The public may submit written comments before the meeting to: Walter Johnston, the FCC's Designated Federal Officer for Technological Advisory Council by *e-mail: Walter.Johnston@fcc.gov* or U.S. Postal Service Mail (Walter Johnston, Federal Communications Commission, Room 7–A224, 445 12th Street, SW., Washington, DC 20554). Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to *fcc504@fcc.gov* or by calling the Office of Engineering and Technology at 202–418–2470 (voice), (202) 418–1944 (fax). Such requests should include a detailed description of the accommodation needed. In addition, please include your contact information.

Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2011–14586 Filed 6–10–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; Deletion of Agenda Item from June 9, 2011 Open Meeting

June 9, 2011.

The following item has been adopted by the Commission and deleted from the list of Agenda items scheduled for consideration at the Thursday, June 9, 2011, Open Meeting and previously listed in the Commission's Notice of June 2, 2011.

International Bureau

TITLE: The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3–17.7 GHz Frequency Band and at the 17.7–17.8 GHz Frequency Band Internationally, and at the 24.75–25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3–17.8 GHz Frequency Band (IB Docket No. 06–123)

SUMMARY: The Commission will consider a Second Report and Order adopting technical rules to mitigate space path interference between the 17/24 GHz Broadcasting-Satellite Service (BSS) space stations and current and future Direct Broadcasting Service (DBS) space stations that operate in the same frequency band.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–14641 Filed 6–10–11; 11:15 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10 a.m. on Tuesday, June 14, 2011, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of previous Board of Directors' Meetings.

Summary reports, status reports, reports of the Office of Inspector General, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Memorandum and resolution re: Enforcement and Transfer of Regulations of the Office of Thrift Supervision Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

Discussion Agenda:

Memorandum and resolution re: Final Rule on Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

This Board meeting will be Webcast live via the Internet and subsequently made available on-demand approximately one week after the event. Visit *http://www.vodium.com/goto/fdic/boardmeetings.asp* to view the event. If you need any technical assistance, please visit our Video Help page at: *http://www.fdic.gov/video.html.*

The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call 703–562–2404 (Voice) or 703–649–4354 (Video Phone) to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Ms. Valerie J. Best, Assistant Executive Secretary of the Corporation, at 202–898–7043.

Dated: June 7, 2011.

Federal Deposit Insurance Corporation

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2011–14709 Filed 6–9–11; 4:15 pm]

BILLING CODE 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 July 8, 2011.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. *Customers Bancorp, Inc.,* Phoenixville, Pennsylvania; to become a bank holding company as a result of the merger of New Century Interim Bank, with and into Customers Bank, both of Phoenixville, Pennsylvania.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *WCF Financial, M.H.C., and Webster City Federal Bancorp,* both of Webster City, Iowa; to become bank holding companies following the conversion Webster City Federal Savings Bank, Webster City, Iowa, from a federally chartered savings association to a state chartered bank.

Board of Governors of the Federal Reserve System, June 8, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–14533 Filed 6–10–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration (SAMHSA)

Advisory Committee for Women's Services; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of a Web-based meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Advisory Committee for Women's Services on June 24 from 3 p.m. to 5 p.m. The meeting is open to the public and will include dialogue on the way that SAMHSA's strategic Initiatives address behavioral health services to women and girls.

ACWS members, invited presenters, and members of the public will participate in this meeting through audio/Internet-based connection. On-site attendance by the public will be limited to space available. To obtain call-in numbers and access codes, to make arrangements to attend on-site, or to request special accommodations for persons with disabilities, please communicate with Ms. Nevine Gahed, Designated Federal Official (see contact information below) or register at the SAMHSA Committee's Web site at *https://nac.samhsa.gov/Registration/meetingsRegistration.aspx.*

Substantive meeting information and a roster of Committee members may be obtained either by accessing the SAMHSA Committee's Web site at *https://nac.samhsa.gov/WomenServices/index.aspx,* or by contacting Ms. Gahed. The transcript for the meeting will also be available on the SAMHSA Committee's Web site within three weeks after the meeting.

Committee Name: SAMHSA's Advisory Committee for Women's Services.

Dates/Time/Type: Friday, June 24, from 3 p.m. to 5 p.m. (E.S.T.): Open.

Place: 1 Choke Cherry Road, Room 8–1070, Rockville, Maryland 20857.

Contact: Nevine Gahed, Designated Federal Official, SAMHSA's Advisory Committee for Women's Services, 1 Choke Cherry Road, Room 8–1058, Rockville, Maryland 20857, *Telephone:* (240) 276–2331; *Fax:* (240) 276–2010, *E-mail: nevine.gahed@samhsa.hhs.gov.*

Kana Enomoto,

Director, Office of Policy, Planning, and Innovation, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2011–14504 Filed 6–10–11; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0041]

Agency Information Collection Activities: Submission for Review; Information Collection Request for the Department of Homeland Security (DHS), Science and Technology, External S&T Collaboration Site (E–STCS)

AGENCY: Science and Technology Directorate, DHS.

ACTION: 60-day notice and request for comment.

SUMMARY: The Department of Homeland Security (DHS), Science & Technology (S&T) Directorate invites the general public to comment on data collection forms for the External S&T Collaboration Site (E–STCS) program. E–STCS is responsible for providing a collaborative environment for practitioners from first responders, academia, organizations, law enforcement, and the private sector. This clearinghouse will enable its users to share information, best practices and lessons learned within a secure collaborative environment. Registration information will be collected only when needed for users who require further access beyond the E–STCS landing page. In order for a user to access this clearinghouse, he/she must complete a Registration Form to establish a user account. Initially, this will be accomplished by the sponsor contacting the user for their information. As the site matures, the information will be collected via an online Web form. The information collected is used by the DHS S&T E–STCS program to determine the authenticity and suitability of the practitioner requesting access. Once approved, users will utilize the collaborative environment to exchange information, network with other users, as well as post blogs and comments.

The DHS invites interested persons to comment on the following form and instructions (hereinafter "Forms Package") for the S&T E–STCS: (1) Request an E–STCS Account (DHS Form 10074). Interested persons may receive a copy of the Forms Package by

contacting the DHS S&T PRA Coordinator. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Comments are encouraged and will be accepted until August 12, 2011.

ADDRESSES: Interested persons are invited to submit comments, identified by docket number DHS–2011–0041, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments.
- *E-mail: Daniel.Purcell@dhs.gov.* Please include docket number DHS–2011–0041 in the subject line of the message.
- *Fax:* (202) 254–6171. (Not a toll-free number).
- *Mail:* Science and Technology Directorate, ATTN: Chief Information Office—Daniel Purcell, 245 Murray Drive, Mail Stop 0202, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: DHS S&T PRA Coordinator Daniel Purcell (202) 254–5664 (Not a toll free number).

SUPPLEMENTARY INFORMATION: The information will be collected via the DHS S&T E–STCS secure Web site at *https://eshare.st.dhs.gov.* The E–STCS Web site will only employ secure Web-based technology (*i.e.,* electronic registration form) to collect information from users to both reduce the burden and increase the efficiency of this collection.

The Department is committed to improving its information collection and urges all interested parties to suggest how these materials can further reduce burden while seeking necessary information under the Act.

DHS is particularly interested in comments that:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Suggest ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Suggest ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Information Collection.

(2) *Title of the Form/Collection:* Science and Technology, External S&T Collaboration Site (E–STCS) program.

(3) *Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Department of Homeland Security, Science & Technology Directorate—1) Request an E–STCS Account (DHS Form 10074).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals, consisting of Federal, state and local law enforcement, private sector and academia practitioners. The information collected will be leveraged to determine the authenticity and suitability of the practitioner requesting access. Once approved, users will utilize the collaborative environment to exchange information, network with other users, as well as post blogs and comments.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 1000.

b. *An estimate of the time for an average respondent to respond:* .083 burden hours.

c. *An estimate of the total public burden (in hours) associated with the collection:* 83 burden hours.

Dated: June 3, 2011.

Tara O'Toole,

Under Secretary for Science and Technology.

[FR Doc. 2011–14539 Filed 6–10–11; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0042]

Agency Information Collection Activities, Submission for Review; Information Collection Extension Request for the DHS S&T First Responders Community of Practice Program

AGENCY: Science and Technology Directorate, DHS.

ACTION: 30-day Notice and request for comment.

SUMMARY: The Department of Homeland Security (DHS) invites the general public to comment on the data collection form for the DHS Science & Technology (S&T) First Responders Community of Practice (FRCoP): User Registration Page (DHS Form 10059 (9/09)). The FRCoP web based tool collects profile information from first responders and select authorized non-first responder users to facilitate networking and formation of online communities. All users are required to authenticate prior to entering the site. In addition, the tool provides members the capability to create wikis, discussion threads, blogs, documents, *etc.,* allowing them to enter and upload content in accordance with the site's Rules of Behavior. Members are able to participate in threaded discussions and comment on other member's content. The DHS S&T FRCoP program is responsible for providing a collaborative environment for the first responder community to share information, best practices, and lessons learned. Section 313 of the Homeland Security Act of 2002 (Pub. L. 107–296) established this requirement. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Comments are encouraged and will be accepted until July 13, 2011.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to: Desk Officer for the Department of Homeland Security, Science and Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include docket number DHS–2011–0042 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: DHS S&T PRA Coordinator Daniel Purcell (202) 254–5664 (Not a toll-free number).

SUPPLEMENTARY INFORMATION: DHS S&T currently has approval to collect information utilizing the User Registration Form until July 31, 2011 with OMB approval number 1640–0016. The User Registration Form will be available on the First Responders Community of Practice Web site found at [*https://communities.firstresponder.gov/*]. The user will complete the form online and submit it through the Web site.

The Department is committed to improving its information collection and urges all interested parties to suggest how these materials can further reduce burden while seeking necessary information under the Act.

DHS is particularly interested in comments that:

(1) Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Suggest ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Suggest ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Overview of this Information Collection

(1) *Type of Information Collection:* Renewal of Information Collection.

(2) *Title of the Form/Collection:* First Responders Community of Practice: User Registration Form.

(3) *Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* DHS Science & Technology Directorate, DHS Form 10059 (09/09).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals; the data will be gathered from individual first responders who wish to participate in the First Responders Community of Practice.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 5000.

b. *An estimate of the time for an average respondent to respond:* 0.25 burden hours.

c. *An estimate of the total public burden (in hours) associated with the collection:* 2500 burden hours.

Dated: June 3, 2011.

Tara O'Toole,

Under Secretary for Science and Technology.

[FR Doc. 2011–14551 Filed 6–10–11; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0048]

Privacy Act of 1974; U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection—001 Alien File, Index, and National File Tracking System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Update and Reissuance of Privacy Act System of Records.

SUMMARY: The Department of Homeland Security is updating and re-publishing the previously established Privacy Act system of records notice published in the **Federal Register** on January 16, 2007 for the Department of Homeland Security U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, and the Customs and Border Protection Alien File, Index, and National File Tracking System of Records. This system of records contains information regarding transactions involving an individual as he/she passes through the U.S. immigration and inspection process, some of which may also be covered by separate systems of records notices. This system of records contains personally identifiable information such as the individual's name, Alien Registration Number, receipt file number, date and place of birth, date and port of entry, as well as the location of each official Alien File. It may also contain other personal identifiers such as an individual's social security number. The Department of Homeland Security is updating the Department of Homeland Security United States Citizenship and Immigration Services—001 Alien File and Central Index System to be renamed Department of Homeland Security U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection—001 Alien File, Index, and National File Tracking System of Records with the following substantive changes: (1) The addition of new routine uses to allow the Department of Homeland Security to share information from the system; (2) an update to the classification level of the system and to provide notice that the system may contain classified records; and (3) a proposed exemption from certain provisions of the Privacy Act for records that are classified. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice and improve the public's understanding of the system. To propose the additional exemption, the Department of Homeland Security is also giving concurrent notice of proposed rulemaking pursuant to the Privacy Act of 1974 for the Department of Homeland Security U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection—001 Alien File, Index, and National File Tracking System of Records. The legacy final rule exempting the Immigration and Naturalization Service Alien File and Central Index System, JUSTICE/INS–001A legacy system of records from certain portions of the Privacy Act remains in effect until publication of a final rule by the Department of Homeland Security.

DATES: Submit comments on or before July 13, 2011.

ADDRESSES: You may submit comments, identified by DHS–2011–0048 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include Department of Homeland Security as the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided by the submitter.
- Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Donald K. Hawkins (202–272–8000), Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Homeland Security (DHS) implements U.S. immigration law and policy through the U.S. Citizenship and Immigration Service's (USCIS) processing and adjudication of applications and petitions submitted for citizenship,

asylum, and other immigration benefits. USCIS also supports national security by preventing individuals from fraudulently obtaining immigration benefits and by denying applications from individuals who pose national security or public safety threats. U.S. immigration policy and law is also implemented through U.S. Immigration and Customs Enforcement's (ICE) law enforcement activities and U.S. Customs and Border Protection's (CBP) inspection and border protection processes.

The Alien File (A-File), Index, and National File Tracking System of Records is the official record system that contains information regarding transactions involving an individual as he/she passes through the U.S. immigration and inspection process. The DHS/USCIS–ICE–CBP–001 Alien File, Index, and National File Tracking System of Records contains personally identifiable information (PII) such as the individual's name, Alien Registration Number, receipt file number, date and place of birth, date and port of entry, as well as the location of each official A-File. It may also contain other personal identifiers such as an individual's Social Security Number (SSN), if the individual has one and it is in the A-File. Some records contained in the DHS/USCIS–ICE–CBP–001 A-Files are derived from separate systems of record, in which case the system of records notice pertaining to the originating system would govern the treatment of those records. Previously, the legacy agency Immigration and Naturalization Services (INS) collected and maintained information concerning all of these immigration and inspection interactions. Since the formation of DHS, however, immigration responsibilities have been divided among USCIS, ICE, and CBP. While USCIS is the custodian of the A-File, all three components create and use A-Files, hence this joint System of Records Notice.

A notice detailing this system of records was last published in the **Federal Register** on January 16, 2007, as the DHS/USCIS–001 Alien File and Central Index System (CIS), (72 FR 1755).

DHS is updating the DHS/USCIS–001 Alien File and Central Index System of Records to be renamed DHS/USCIS–ICE–CBP–001 Alien File, Index, and National File Tracking System of Records to include the following substantive changes: (1) The addition of thirteen routine uses and updates to other routine uses to allow DHS to share information from the system; (2) an update to the classification level of the system and to provide notice that the system may contain classified records; and (3) a proposed exemption from certain provisions of the Privacy Act for records that are classified.

DHS is renaming this system in order to provide a better description of the types of records that are maintained in this system of records. These records may be maintained in paper or electronic format, but the uses and protections outlined in the notice do not change because of the format or the specific IT system in which they are maintained. DHS has provided more explicit notice on the specific IT systems where these types of records may exist under "Location."

Below is a summary of the thirteen routine use additions or modifications with the letter in parentheses corresponding to the routine use impacted:

(A) Updated: To include DHS as an additional party for litigation in the release of information to the Department of Justice (DOJ);

(D) New: To an agency, organization, or individuals for the purpose of performing audits or oversight as authorized by law;

(F) Updated: To include interns and students working on assignments for DHS;

(I) New: To courts for immigration, civil, or criminal proceedings;

(K) New: To DOJ or other federal agencies when conducting litigation to assist in development of the agency's legal and/or policy position;

(L) Updated: To include sharing with international organizations about an alien or an enforcement operation with transnational implications;

(P) New: To a government organization in regards to hiring or retention of an individual where failure to disclose the information on an individual is likely to create a security risk;

(Q) Updated: Rewritten to provide better clarification on when information is released to current or prospective employers;

(T) New: To Congress during the private immigration relief legislation process;

(U) Updated: To government agencies to assist in the collection of debts;

(V) Updated: To third parties posting immigration bonds;

(BB) New: To third parties when an individual will be released from DHS custody to assist with arranging housing or medical care;

(CC) New: To domestic government agencies when an individual will be released from DHS custody and there are concerns related to health and safety;

(DD) New: To foreign governments to coordinate removal of individuals;

(EE) New: To law enforcement agencies for de-conflicting investigations and other coordination of law enforcement activities;

(FF) New: To custodial agencies to place an immigration detainer on an individual or to facilitate the transfer of custody of the individual from DHS to that agency;

(GG) New: To government agencies to confirm the location, custodial status, removal or voluntary departure of an alien in order to facilitate the custody, care and/or legal rights of the individual's minor children;

(HH) New: To government agencies to assist in making determinations of redress;

(II) New: To share information from the system on a case-by-case basis with the news media or public.

The latter sharing, to the news media or public, would be done only with the approval of the DHS Chief Privacy Officer, who will weigh the public interest in receiving the information against the privacy interests of the individual to whom the information pertains, when the disclosure is necessary to preserve confidence in the integrity of DHS or demonstrate the accountability of DHS personnel.

Classification level: DHS has updated the SORN to indicate that both classified and unclassified information may be maintained in the A-File, as such DHS is providing a concurrent notice of proposed rulemaking pursuant to the Privacy Act of 1974 for the DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records to include an exemption for classified information in addition to the existing law enforcement information exemption. The proposed rule extends the Privacy Act exemption to classified information and then re-publishes the existing exemptions claimed for the legacy JUSTICE/INS–001A A-File and CIS, (66 FR 46812). Generally, USCIS, ICE, and CBP are not the originators of the classified materials maintained in some A-Files. DHS therefore, would rely upon the Privacy Act exemptions claimed by the system of records from which the classified material originated. By issuing this particular exemption, DHS is providing further transparency about the existence of classified material in this system of records. All of the exemptions DHS is proposing are standard law enforcement and national security exemptions exercised by a large number of federal law enforcement and intelligence agencies. Until DHS

publishes a final rule exempting the system from certain portions of the Privacy Act, the legacy final rule exempting the JUSTICE/INS–001A A-File and CIS, (66 FR 46812) legacy system of records from certain portions of the Privacy Act remains in effect for this system of records.

Pursuant to Pub. L. No. 107–296, Homeland Security Act of 2002, Section 804 Savings Provisions, and by reference 28 CFR Appendix C to Part 16, Subpart E, pertaining to the JUSTICE/INS–001A A-File and CIS, (66 FR 46812) system of records notice, the records and information in this system are exempt from 5 U.S.C. 552a (c)(3) and (4), (d), (e)(1), (2), and (3), (e)(4)(G) and (H), (e)(5) and (8), and (g) of the Privacy Act. These exemptions apply only to the extent that records in the system are subject to exemption pursuant to 5 U.S.C. 552a (j)(2) and (k)(2).

Administrative changes: In addition to the above mentioned substantive changes to this system of records notice, DHS has updated the categories of individuals and categories of records so that they are more clearly defined.

Consistent with DHS's statutory information sharing mission, information stored in the DHS/USCIS–ICE–CBP—001 Alien File, Index, and National File Tracking System of Records may be shared with other DHS components, as well as appropriate federal, state, local, tribal, foreign, or international government agencies. This sharing will take place only after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the purposes of this system of records and the routine uses set forth in this system of records notice.

II. Privacy Act

The Privacy Act embodies Fair Information Principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors, and aliens. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to which their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/USCIS–ICE–CBP—001 A-File, Index, and National File Tracking system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this revised system of records to the Office of Management and Budget and to the Congress.

SYSTEM OF RECORDS:

DHS/USCIS–ICE–CBP—001.

SYSTEM NAME:

Department of Homeland Security U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection—001 Alien File, Index, and National File Tracking System of Records.

SECURITY CLASSIFICATION:

Unclassified, sensitive, for official use only, and classified.

SYSTEM LOCATION:

Alien Files (A-Files) are maintained in electronic and paper format throughout DHS. Digitized A-Files are located in the Enterprise Document Management System (EDMS). The Central Index System (CIS) maintains an index of the key personally identifiable information (PII) in the A-File which can be used to retrieve additional information through such applications as Enterprise Citizenship and Immigrations Services Centralized Operational Repository (eCISCOR), the Person Centric Query Service (PCQS) and the Micorfilm Digitization Application System (MiDAS). The National File Tracking System (NFTS) provides a tracking system of where the A-Files are physically located, including whether the file has been digitized.

The databases maintaining the above information are located within the DHS data center in the Washington, D.C. metropolitan area as well as throughout the country. Computer terminals providing electronic access are located at U.S. Citizenship and Immigration Services (USCIS) sites at Headquarters and in the Field throughout the United States and at appropriate facilities under the jurisdiction of the U.S. Department of Homeland Security (DHS) and other locations at which officers of DHS component agencies may be posted or operate to facilitate DHS's mission of homeland security. Hard copies of the A-Files are primarily located at the records centers in Lee Summit, Missouri; Suitland, Maryland; San Bruno, California; Seattle, Washington; and Dayton, Ohio. Hard copies may also be located at Headquarters, Regional, District, and other USCIS file control offices in the United States and foreign countries as detailed on the agency's Web site, *http://www.USCIS.gov.* Hard copies may also be located at the offices and facilities of U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include:

- Lawful Permanent Residents;
- Naturalized United States Citizens;
- United States Citizens when petitioning for benefits under the Immigration and Nationality Act (INA) on behalf of another individual;
- Individuals who received or petition for benefits under the INA;
- Individuals who are subject to the enforcement provisions of the INA;
- Individuals who are subject to the INA and:
  - Are under investigation by DHS for possible national security threats or threats to the public safety,
  - Were investigated by the DHS in the past,
  - Are suspected of violating immigration-related criminal or civil provisions of treaties, statutes, regulations, Executive Orders, and Presidential proclamations administered by DHS, or
  - Are witnesses and informants having knowledge of such violations;
- Relatives and associates of those individuals list above who are subject to the INA;
- Individuals who have renounced their U.S. Citizenship; or
- Preparers, Attorneys, and Representatives who assist individuals during benefit and enforcement proceedings under the INA.

Note: Individuals may fall within one or more of these categories.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

A. The hardcopy paper A-File, which contains the official record material about each individual for whom DHS has created a record under the Immigration and Nationality Act such as: Naturalization certificates; various documents and attachments (*e.g.,* birth and marriage certificates); applications and petitions for benefits under the immigration and nationality laws; reports of arrests and investigations; statements; other reports; records of proceedings before or filings made with the U.S. immigration courts and any administrative or federal district court or court of appeal; correspondence; and memoranda. Specific data elements may include:

- Alien Registration Number(s) (A-Numbers);
- Receipt file number(s);
- Full name and any aliases used;
- Physical and mailing addresses;
- Phone numbers and email addresses;
- Social Security Number;
- Date of birth;
- Place of birth (city, state, and country);
- Countries of citizenship;
- Gender;
- Physical characteristics (height, weight, race, eye and hair color, photographs, fingerprints);
- Government-issued identification information (*i.e.,* passport, driver's license):
  - Document type,
  - Issuing organization,
  - Document number, and
  - Expiration date;
- Military membership;
- Arrival/Departure information (record number, expiration date, class of admission, etc.);
- FBI Identification Number;
- Fingerprint Identification Number;
- Immigration enforcement history, including arrests and charges, immigration proceedings and appeals, and dispositions including removals or voluntary departures;
- Immigration status;
- Family history;
- Travel history;
- Education history;
- Employment history;
- Criminal history;
- Professional accreditation information;
- Medical information relevant to an individual's application for benefits under the Immigration and Nationality Act before the Department or the immigration court, an individual's removability from and/or admissibility to the United States, or an individual's competency before the immigration court;
- Specific benefit eligibility information as required by the benefit being sought; and
- Video or transcript of immigration interview.

B. EDMS maintains the electronic copy of the A-File (same information as above with the exception of material that cannot be scanned such as cassette tapes, CDs, or DVDs) if it was scanned from the paper file.

C. CIS contains information on those individuals who during their interactions with DHS have been assigned an A-Number. The system contains biographic information on those individuals allowing DHS employees to quickly review the individual's immigration status. The information in the system can then be used to retrieve additional information on the individual from other systems. The information in the system can be used to request the hard copy A-File from the DHS File Control Office that has custody of the file. Specific data elements may include:

- A-Number(s);
- Full name and any aliases used;
- Social Security Number;
- Date of birth;
- Place of birth (city, state, and country);
- Country of citizenship;
- Gender;
- Government issued identification information (*i.e.,* passport, driver's license):
  - Document type;
  - Issuing organization;
  - Document number; and
  - Expiration date;
- Arrival/Departure information (record number, expiration date, class of admission etc.);
- Immigration status;
- Father and Mother's first name;
- FBI Identification Number;
- Fingerprint Identification Number;
- Immigration enforcement history, including arrests and charges, immigration proceedings and appeals, and dispositions including removals or voluntary departures; and
- File Control Office location of the paper or electronic A-File.

D. NFTS contains the location of the A-File to a more detailed level within the DHS File Control Office. Specific data elements include:

- A-Number(s);
- Receipt File Number; and
- Location of the paper or electronic A-File and Receipt File at and within the DHS File Control Office, as well as the history of who has maintained the A-File, including the component, section and employee.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintaining this system is in Sections 103 and 290 of the INA, as amended (8 U.S.C. 1103 and 1360), and the regulations issued pursuant thereto; and Section 451 of the Homeland Security Act of 2002 (Pub. L. 107–296).

PURPOSE(S):

The purpose of this system of records is to carry out the provision of benefits under and the enforcement of the INA and related statutes. A-Files, EDMS, CIS, and NFTS are used primarily by DHS employees for immigration benefits processing, protection of national security, and administering and enforcing immigration and nationality laws and related statutes.

The purpose of the A-File is to document an individual's benefits and enforcement transactions as he/she passes through the U.S. immigration and inspection process.

The purpose of CIS is to provide a searchable central index of A-Files and to support the location and transfer of A-Files among DHS personnel and offices as needed in support of immigration benefits and enforcement transactions.

The purpose of NFTS is to accurately account for the specific physical location of A-Files and Receipt Files within a DHS File Control Office, and to track the request and transfer of all A-Files and Receipt Files.

These records assist the Department with processing applications for benefits under applicable immigration laws; detecting violations of these laws; supporting the referral of such violations for prosecution or other appropriate enforcement action; supporting law enforcement efforts and the inspection process; and supporting protection of the United States borders.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Note: Even when a valid routine use permits disclosure of information from this system of records to a third party, in some cases such disclosure may not be permissible because of confidentiality laws and policies that limit the sharing of information about the application for or award of certain immigration benefits. For example, information in this system of records contained in or pertaining to applications for asylum or refugee protection, information relating to persons who have pending or approved

petitions for protection under the Violence Against Women Act (VAWA), Seasonal Agricultural Worker or Legalization claims, the Temporary Protected Status of an individual, and information relating to S, T, or U visas should not be disclosed pursuant to a routine use unless disclosure is otherwise permissible under the confidentiality statutes, regulations, or policies applicable to that information. However, these confidentiality provisions do not prevent DHS from disclosing information to the U.S. Department of Justice and United States Attorneys' Offices as part of an ongoing criminal or civil investigation.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3).

ROUTINE USES, TO INCLUDE DISCLOSURES:

A. To the Department of Justice (including United States Attorneys' Offices) or other federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or other federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, organizations, and individuals when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS 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 DHS or another agency or entity) or harm to the individuals who rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, interns, trainees, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To appropriate federal, state, tribal, territorial, local, international, or foreign law enforcement agencies or other appropriate authorities charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To clerks and judges of courts exercising naturalization jurisdiction for the purpose of filing petitions for naturalization and to enable such courts to determine eligibility for naturalization or grounds for revocation of naturalization.

I. To courts, magistrates, administrative tribunals, opposing counsel, parties, and witnesses, in the course of immigration, civil, or criminal proceedings before a court or adjudicative body when:

1. DHS or any component thereof; or

2. Any employee of DHS in his or her official capacity; or

3. Any employee of DHS in his or her individual capacity where the agency has agreed to represent the employee; or

4. The United States, where DHS determines that litigation is likely to affect DHS or any of its components;

Is a party to litigation or has an interest in such litigation, and DHS determines that use of such records is relevant and necessary to the litigation, and that in each case, DHS determines that disclosure of the information to the recipient is a use of the information that is compatible with the purpose for which it was collected.

J. To an attorney or representative (as defined in 8 CFR 1.1(j)) who is acting on behalf of an individual covered by this system of records in connection with any proceeding before USCIS, ICE, or CBP or the Executive Office for Immigration Review.

K. To the Department of Justice (including United States Attorneys' Offices) or other federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, where necessary to assist in the development of such agency's legal and/or policy position.

L. To the Department of State in the processing of petitions or applications for benefits under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements; or when the Department of State requires information to consider and/or provide an informed response to a request for information from a foreign, international, or intergovernmental agency, authority, or organization about an alien or an enforcement operation with transnational implications.

M. To appropriate federal, state, local, tribal, territorial, or foreign governments, as well as to other individuals and organizations during the course of an investigation by DHS or the processing of a matter under DHS' jurisdiction, or during a proceeding within the purview of the immigration and nationality laws, when DHS deems that such disclosure is necessary to carry out its functions and statutory mandates to elicit information required by DHS to carry out its functions and statutory mandates.

N. To an appropriate federal, state, tribal, territorial, local, or foreign government agency or organization, or international organization, lawfully engaged in collecting law enforcement intelligence, whether civil or criminal, or charged with investigating, prosecuting, enforcing or implementing civil or criminal laws, related rules, regulations or orders, to enable these entities to carry out their law enforcement responsibilities, including the collection of law enforcement intelligence and the disclosure is

appropriate to the proper performance of the official duties of the person receiving the information.

O. To an appropriate federal, state, local, tribal, territorial, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit.

P. To an appropriate federal, state, local, tribal, territorial, foreign, or international agency, if DHS determines (1) The information is relevant and necessary to that agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, and (2) failure to disclose the information is likely to create a risk to government facilities, equipment, or personnel; sensitive information; critical infrastructure; or the public safety.

Q. To an individual's current employer to the extent necessary to determine employment eligibility or to a prospective employer or government agency to verify an individual is eligible for a government-issued credential that is a condition of employment.

R. To a former employee of DHS, in accordance with applicable regulations, for purposes of: responding to an official inquiry by a federal, state, or local government entity or professional licensing authority; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

S. To the Office of Management and Budget in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in the Circular.

T. To the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary when necessary to inform members of Congress about an alien who is being considered for private immigration relief.

U. To a federal, state, tribal, or local government agency and/or to domestic courts to assist such agencies in collecting the repayment of loans, or fraudulently or erroneously secured benefits, grants, or other debts owed to them or to the United States Government, or to obtain information that may assist DHS in collecting debts owed to the United States Government;

V. To an individual or entity seeking to post or arrange, or who has already posted or arranged, an immigration bond for an alien to aid the individual or entity in (1) Identifying the location of the alien, or (2) posting the bond, obtaining payments related to the bond, or conducting other administrative or financial management activities related to the bond.

W. To a coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

X. Consistent with the requirements of the INA, to the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or to any state or local health authorities, to:

1. Provide proper medical oversight of DHS-designated civil surgeons who perform medical examinations of both arriving aliens and of those requesting status as a lawful permanent resident; and

2. Ensure that all health issues potentially affecting public health and safety in the United States are being or have been, adequately addressed.

Y. To a federal, state, local, tribal, or territorial government agency seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.

Z. To the Social Security Administration (SSA) for the purpose of issuing a SSN and card to an alien who has made a request for a SSN as part of the immigration process and in accordance with any related agreements in effect between the SSA, DHS and the Department of State entered into pursuant to 20 CFR 422.103(b)(3); 422.103(c); and 422.106(a), or other relevant laws and regulations.

AA. To federal and foreign government intelligence or counterterrorism agencies or components where DHS becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to conduct national intelligence and security investigations or assist in anti-terrorism efforts.

BB. To third parties to facilitate placement or release of an individual (*e.g.,* at a group home, homeless shelter, etc.) who has been or is about to be released from DHS custody but only such information that is relevant and necessary to arrange housing or continuing medical care for the individual.

CC. To an appropriate domestic government agency or other appropriate authority for the purpose of providing information about an individual who has been or is about to be released from DHS custody who, due to a condition such as mental illness, may pose a health or safety risk to himself/herself or to the community. ICE will only disclose information about the individual that is relevant to the health or safety risk they may pose and/or the means to mitigate that risk (*e.g.,* the individual's need to remain on certain medication for a serious mental health condition).

DD. To foreign governments for the purpose of coordinating and conducting the removal of individuals to other nations under the INA; and to international, foreign, and intergovernmental agencies, authorities, and organizations in accordance with law and formal or informal international arrangements.

EE. To a federal, state, local, territorial, tribal, international, or foreign criminal, civil, or regulatory law enforcement authority when the information is necessary for collaboration, coordination and de-confliction of investigative matters, prosecutions, and/or other law enforcement actions to avoid duplicative or disruptive efforts and to ensure the safety of law enforcement officers who may be working on related law enforcement matters.

FF. To the DOJ Federal Bureau of Prisons and other federal, state, local, territorial, tribal and foreign law enforcement or custodial agencies for the purpose of placing an immigration detainer on an individual in that agency's custody, or to facilitate the transfer of custody of an individual from DHS to the other agency. This will include the transfer of information about unaccompanied minor children to HHS to facilitate the custodial transfer of such children from DHS to HHS.

GG. To federal, state, local, tribal, territorial, or foreign governmental or quasi-governmental agencies or courts to confirm the location, custodial status, removal or voluntary departure of an alien from the United States, in order to facilitate the recipients' exercise of responsibilities pertaining to the custody, care, or legal rights (including issuance of a U.S. passport) of the removed individual's minor children, or the adjudication or collection of child

support payments or other debts owed by the removed individual.

HH. To a federal, state, tribal, territorial, local, international, or foreign government agency or entity for the purpose of consulting with that agency or entity: (1) To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program; (2) for the purpose of verifying the identity of an individual seeking redress in connection with the operations of a DHS component or program; or (3) for the purpose of verifying the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

II. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on paper, magnetic disc, tape, CD–ROM, DVD, and other digital media.

RETRIEVABILITY:

Digitized A–Files maintained in EDMS can be searched and retrieved by any of the following fields alone or in any combination:

- A–Number;
- Last name;
- First name;
- Middle name;
- Aliases;
- Date of birth;
- Country of birth;
- Gender; and
- Through a full text-based search of records contained in the digitized A–File (based on optical character recognition of the scanned images).

The location of the paper record from which the digitized A–Files was produced can be searched in CIS using the following data:

- A–Number; or
- Full name; or
- Alias; or
- Sounds-like name with or without date of birth; or
- Certificate of Citizenship or Naturalization Certificate number; or
- Driver's License Number; or
- FBI Identification Number; or
- Fingerprint Identification Number; or
- I–94 admission number; or
- Passport number; or
- Social Security Number; or
- Travel document number.

The location of the paper or digitized record A–Files and Receipt Files can be searched in NFTS using the following data:

- A–Number; or
- Receipt File Number.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict physical and technical controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the hard copy records and computer systems containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

The A–File records are permanent whether hard copy or electronic. A–Files are transferred to the custody of the National Archives 100 years after the individual's date of birth. Newly-eligible files are transferred to the National Archives every five years. When a paper A–File is digitized, the digitized A–File maintained in EDMS becomes the official record and maintains the same retention schedule as the original paper A–File. The hard copy files are sent to the records center once the records have been digitized.

CIS records are permanently retained on-site because they are the index of where the physical A–File is and whether it has been transferred to the National Archives.

NFTS records are temporary and deleted when they are no longer needed for agency business. The records exist only as a reference to a physical or digital file, and exist for as long as the referenced file exists. NFTS records associated with an A–File will be retained on a permanent basis even after the A–File has been retired to NARA to retain accurate recordkeeping. Receipt Files with a shorter retention period will have the associated NFTS record destroyed or deleted once the file has been destroyed.

SYSTEM MANAGER AND ADDRESS:

The DHS system manager is the Chief, Records Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it contains classified and sensitive unclassified information related to intelligence, counterterrorism, homeland security, and law enforcement programs. These exemptions apply only to the extent that records in the system are subject to exemption. However, USCIS will consider individual requests to determine whether or not information may be released. Individuals must request access to their information by submitting a Freedom of Information (FOIA) or Privacy Act request to USCIS in writing clearly marked "Privacy Act Request" or "FOIA Request" to the following address: National Records Center, U.S. Citizenship and Immigration Services, FOIA/PA Office, P.O. Box 64064–8010, Lee's Summit, MO 64064–8010.

When seeking records about yourself from this system of records or any other Departmental system of records, your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, which permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief FOIA Officer, *http://www.dhs.gov/FOIA* or 1–866–431–0486. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;

• Specify when you believe the records would have been created;

• Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information, USCIS may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See "Notification procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification procedure" above.

RECORD SOURCE CATEGORIES:

Basic information contained in DHS records is supplied by individuals on Department of State and DHS applications and forms. Other information comes from inquiries or complaints from members of the general public and members of Congress; referrals of inquiries or complaints directed to the President or Secretary of Homeland Security; reports of investigations, sworn statements, correspondence, official reports, memoranda, and written referrals from other entities, including federal, state, and local governments, various courts and regulatory agencies, foreign government agencies and international organizations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (c)(4): (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (e)(12); (f); (g)(1); and (h) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

Dated: May 27, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–14489 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–0225]

Chemical Transportation Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Committee Management; Notice of Committee Establishment.

SUMMARY: The Secretary of Homeland Security has determined that the establishment of the Chemical Transportation Advisory Committee (CTAC) is necessary and in the public interest in connection with the performance of duties of the U. S. Coast Guard.

Name of Committee: Chemical Transportation Advisory Committee.

ADDRESSES: If you desire to submit comments on this action, they must be submitted by July 13, 2011. Comments must be identified by (USCG–2011–0225) and may be submitted by using one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on the establishment of the CTAC, call or e-mail LT Sean Peterson, Commandant (CG–5223), Attention CTAC, U.S. Coast Guard, 2100 Second St., SW. STOP 7126, Washington, DC 20593–7126; *e-mail: sean.m.peterson@uscg.mil; fax:* (202) 372–1926. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this notice (USCG–2011–0225), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Notice" and insert "USCG–2011–0225" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0225" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140

on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Establishment of the Committee

For the reasons set forth below, the Secretary of Homeland Security has determined that the establishment of the CTAC is necessary and in the public interest. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

The CTAC is being established in accordance with the provisions of the Federal Advisory Committee Act (FACA) 5 U.S.C. App. (Pub. L. 92–463). The CTAC will act in an advisory capacity to the Secretary of the Department of Homeland Security through the Commandant of the Coast Guard and the Deputy Commandant for Operations on matters concerning the safe and secure marine transportation of hazardous materials in bulk. The CTAC will be responsive to specific assignments and may conduct studies, inquiries, workshops, and seminars as the Commandant may authorize or direct. The Committee's unique industry perspective will provide critical support to the Coast Guard's efforts to ensure the safety of the U.S. merchant marine. This information would otherwise have to be drawn from the broad population involved in marine chemical transportation. There is no other current entity which can provide the level of technical expertise and experience that is afforded by this advisory committee.

Balanced Membership Plans

CTAC will consist of not more than twenty-five (25) members who are appointed and serve at the pleasure of the Secretary of Homeland Security. All members must represent one of the following special groups associated with marine transportation of hazardous materials in bulk: chemical manufacturing companies, companies that handle or transport chemicals in the marine environment, vessel design and construction companies, marine safety or security companies and marine environmental protection groups. Members will be chosen to assure a balanced representation from these special groups. Members are appointed to represent the interest of their respective authority, association, and/or organization and are not Special Government Employees as defined in Title 18, United States Code, section 202(a).

Duration: Continuing.

Responsible DHS Officials: CTAC will provide advice and recommendations to the Secretary of the Department of Homeland Security through the Deputy Commandant for Operations, United States Coast Guard and the Commandant of the Coast Guard.

Dated: June 7, 2011.

F.J. Sturm,

Acting Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2011–14513 Filed 6–10–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1984–DR; Docket ID FEMA–2011–0001]

South Dakota; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of South Dakota (FEMA–1984–DR), dated May 13, 2011, and related determinations.

DATES: *Effective Date:* May 31, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of South Dakota is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 13, 2011.

Stanley County for Public Assistance, including direct Federal assistance.

Clay, Union, and Yankton Counties for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14487 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3319–EM; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 2 to Notice of an Emergency Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Alabama (FEMA–3319–EM), dated April 27, 2011, and related determinations.

DATES: *Effective Date:* May 31, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective May 31, 2011.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster

Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14492 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1977–DR; Docket ID FEMA–2011–0001]

Iowa; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Iowa (FEMA–1977–DR), dated May 5, 2011, and related determinations.

DATES: *Effective Date:* May 5, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated May 5, 2011, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Iowa resulting from severe storms, tornadoes, and straight-line winds during the period of April 9–10, 2011, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Iowa.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael R. Scott, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Iowa have been designated as adversely affected by this major disaster:

Buena Vista, Cherokee, Ida, Monona, Pocahontas, and Sac Counties for Public Assistance.

All counties within the State of Iowa are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14495 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1980–DR; Docket ID FEMA–2011–0001]

Missouri; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Missouri (FEMA–1980–DR), dated May 9, 2011, and related determinations.

DATES: *Effective Date:* May 27, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Missouri is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 9, 2011.

Dunklin, Pemiscot, Phelps, and St. Francois Counties for Individual Assistance.

Bollinger and Reynolds Counties for Individual Assistance and Public Assistance, including direct Federal assistance.

Butler, Howell, McDonald, Scott, Stoddard, and Taney Counties for Public Assistance, including direct Federal assistance (already designated for Individual Assistance).

Iron, Madison, Perry, Ste. Genevieve and Wayne Counties for Public Assistance, including direct Federal assistance.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14483 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 16 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), dated April 28, 2011, and related determinations.

DATES: *Effective Date:* June 1, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Alabama is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 28, 2011.

Escambia County for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

Greene and Perry Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct Federal assistance, under the Public Assistance program).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14490 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 17 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1971–DR), dated April 28, 2011, and related determinations.

DATES: *Effective Date:* May 31, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective May 31, 2011.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14493 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1972–DR; Docket ID FEMA–2011–0001]

Mississippi; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Mississippi (FEMA–1972–DR), dated April 29, 2011, and related determinations.

DATES: *Effective Date:* May 5, 2011.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3834.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, on May 5, 2011, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I authorize as a pilot project a 90 percent Federal cost share until June 12, 2011 (45 days from the date of declaration) for Direct Federal Assistance for debris removal for those areas within counties designated for Public Assistance that are within, Or immediately adjacent to, areas of "extensive" or "catastrophic" damage as determined and depicted by the National Geospatial Intelligence Agency. Further, under this pilot program, FEMA shall obtain any applicable private insurance payments for debris removal to reimburse Federal costs to the fullest extent of the law.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

June 6, 2011.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14580 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 14 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Alabama (FEMA–1971–DR), dated April 28, 2011, and related determinations.

DATES: *Effective Date:* May 5, 2011.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3834.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, on May 5, 2011, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I authorize as a pilot project a 90 percent Federal cost share until June 12, 2011 (45 days from the date of declaration) for Direct Federal Assistance for debris removal for those areas within counties designated for Public Assistance that are within, Or immediately adjacent to, areas of "extensive" or "catastrophic" damage as determined and depicted by the National Geospatial Intelligence Agency. Further, under this pilot program, FEMA shall obtain any applicable private insurance payments for debris removal to reimburse Federal costs to the fullest extent of the law.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14562 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1980–DR; Docket ID FEMA–2011–0001]

Missouri; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Missouri (FEMA–1980–DR), dated May 9, 2011, and related determinations.

DATES: *Effective Date:* May 31, 2011.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3834.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, on May 31, 2011, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

A ninety percent (90%) Federal cost share for all debris removal, including direct Federal assistance, for those areas within counties designated for Public Assistance that are within, or immediately adjacent to, areas of "extensive" or "catastrophic" damage directly caused by the EF–5 tornado that struck Missouri on May 22, 2011, as determined by the Federal Coordinating Officer applying objective standards used by the National Geospatial-Intelligence Agency. I authorize this cost-share adjustment beginning May 22, 2011, through August 7, 2011. FEMA and the State of Missouri shall pursue any applicable private insurance payments for debris removal to reimburse Federal costs to the extent permitted by law.

This adjustment to State and local cost sharing applies only to Public Assistance costs, including direct Federal assistance, for eligible debris removal for those areas within counties designated for Public Assistance that are within, or immediately adjacent to, areas of "extensive" or "catastrophic" damage directly caused by the May 22, 2011, EF–5 tornado as determined above by the Federal Coordinating Officer. All other Public Assistance costs will continue to be reimbursed at 75 percent of total eligible costs. The law specifically prohibits a similar adjustment for funds provided to States for Other Needs Assistance (Section 408) and the Hazard Mitigation Grant Program (Section 404). These funds will continue to be reimbursed at 75 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Dated: June 6, 2011.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14581 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1971–DR; Docket ID FEMA–2011–0001]

Alabama; Amendment No. 15 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Alabama (FEMA–1971–DR), dated April 28, 2011, and related determinations.

DATES: *Effective Date:* May 25, 2011.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3834.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, on May 25, 2011, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

A pilot project at 90 percent Federal cost share for debris removal, including direct Federal assistance, for those areas within counties designated for Public Assistance that are within, or immediately adjacent to, areas of "extensive" or "catastrophic" damage as determined by the Federal Coordinating Officer applying objective standards used by the National Geospatial-Intelligence Agency. This cost-share adjustment is authorized beginning April 28, 2011, through July 12, 2011. FEMA and the State of Alabama shall continue to pursue any applicable private insurance payments for debris removal to reimburse Federal costs to the extent permitted by law.

This adjustment to State and local cost sharing applies only to Public Assistance costs, including direct Federal assistance, for eligible debris removal under the pilot project. All other Public Assistance costs will continue to be reimbursed at 75 percent of total eligible costs. The law specifically prohibits a similar adjustment for funds provided to States for Other Needs Assistance (Section 408) and the Hazard Mitigation Grant Program (Section 404). These funds will continue to be reimbursed at 75 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant;

97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

June 6, 2011.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14578 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1976–DR; Docket ID FEMA–2011–0001]

Kentucky; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–1976–DR), dated May 4, 2011, and related determinations.

DATES: *Effective Date:* June 1, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 4, 2011.

Christian, Hopkins, Menifee, Nelson, and Rowan Counties for Public Assistance, including direct Federal assistance.

McCracken County for Public Assistance, including direct Federal assistance (already designated for emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–14488 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Petition for Remission or Mitigation of Forfeitures and Penalties Incurred

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing collection of information: 1651–0100.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Petition for Remission or Mitigation of Forfeitures and Penalties Incurred. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before August 12, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The comments should address: (a) Whether the 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 estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Petition for Remission or Mitigation of Forfeitures and Penalties Incurred.

OMB Number: 1651–0100.

Form Number: CBP Form 4609.

Abstract: CBP Form 4609, *Petition for Remission of Forfeitures and Penalties Incurred,* is completed and filed with the CBP Port Director by individuals who have been found to be in violation of one or more provisions of the Tariff Act of 1930, or other laws administered by the CBP. Persons who violate the Tariff Act are entitled to file a petition seeking mitigation of any statutory penalty imposed or remission of a statutory forfeiture incurred. This petition is submitted on CBP Form 4609. The information provided on this form is used by CBP personnel as a basis for granting relief from forfeiture or penalty. CBP Form 4609 is authorized by 19 U.S.C. 1618 and provided for by 19 CFR 171.11. It is accessible at *http://forms.cbp.gov/pdf/CBP_Form_4609.pdf.*

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information being collected.

Type of Review: Extension (without change).

Affected Public: Businesses, Travelers.

Estimated Number of Respondents: 28,000.

Estimated Total Annual Responses: 28,000.

Estimated Time per Respondent: 14 minutes.

Estimated Total Annual Burden Hours: 6,500.

Dated: June 6, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–14503 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Automated Commercial Environment (ACE); Announcement of National Customs Automation Program Test of Automated Procedures for In-Bond Shipments Transiting Through the United States From One Point in Canada to Another Point in Canada

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that U.S. Customs and Border Protection (CBP) plans to conduct a National Customs Automation Program (NCAP) test relating to highway movements of commercial goods that are transported in-bond through the United States from one point in Canada to another point in Canada. The NCAP test designates a new filing code in CBP's Automated Commercial Environment (ACE) Truck Manifest System to identify the shipment as being part of a joint CBP and Canada Border Services Agency (CBSA) In-Transit Project and requires test participants to transmit the manifest electronically and to submit an additional data element. The new filing code and additional data element will enable CBP and the CBSA to better track the movement of these goods, to share information about the in-bond movement and to streamline procedures for test participants. This notice provides a description of the NCAP test process, sets forth eligibility requirements for participation, and invites public comment on any aspect of the planned test.

DATES: The test will commence no earlier than July 13, 2011. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period.

ADDRESSES: Written comments concerning program, policy and technical issues should be submitted to Mr. Gary Schreffler, Chief, Cargo Control Branch, Office of Field Operations, U.S. Customs and Border Protection, via e-mail at *Gary.R.Schreffler@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The National Customs Automation Program (NCAP) was established in Subtitle B of Title VI—Customs Modernization, in the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (Customs Modernization Act). *See* 19 U.S.C. 1411. The Customs Modernization Act provides the Commissioner of CBP with authority to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. This test is authorized pursuant to § 101.9(b) of the CBP Regulations (19 CFR 101.9(b)) which provides for the testing of NCAP programs or procedures. See T.D. 95–21.

Section 343(a) of the Trade Act of 2002, as amended (the Trade Act; 19 U.S.C. 2071 note), requires CBP to promulgate regulations providing for the mandatory transmission of electronic cargo information by way of a CBP approved electronic data interchange (EDI) system before the cargo is brought into or departs the United States by any mode of commercial transportation (sea, air, rail or truck). The required cargo information is that which is reasonably necessary to enable high-risk shipments to be identified for purposes of ensuring cargo safety and security and preventing smuggling pursuant to the laws enforced and administered by CBP.

On December 5, 2003, CBP published a final rule in the **Federal Register** (68 FR 68140) to effectuate the provisions of the Trade Act. In particular, a new § 123.92 (19 CFR 123.92) was added to the title 19 regulations to implement the requirements for cargo brought into the United States by truck. As provided in § 123.92, for any inbound truck required to report its arrival under § 123.1(b) that will have commercial cargo aboard, CBP must electronically receive certain information regarding that cargo through a CBP-approved EDI system no later than either 30 minutes or one hour prior to the carrier's reaching the first port of arrival in the United States. As explained in the preamble of the 2003 final rule, the 30 minute time frame applies to truck carriers arriving with shipments qualified for clearance under the FAST (Free and Secure Trade) program.

In a notice published in the **Federal Register** on October 27, 2006 (71 FR 62922), CBP designated the ACE Truck Manifest System as the approved system for receipt of EDI transmissions of required land border crossing manifest data. ACE was phased in as the required transmission system over a six month period at various ports of entry and CBP now requires ACE to be used for the transmission of advance electronic truck cargo information at every land border port in which CBP had planned to require the use of ACE. See, 72 FR 53789, September 20, 2007.

Highway movements of commercial goods that are transported through the United States from one point in Canada to another point in Canada must be transported in-bond and processed as Transportation and Exportation (T&E) entries. The procedures for these in-bond shipments are addressed in 19 CFR 123.42. Among other things, this regulation requires the filing of a manifest and various reports to CBP and the CBSA regarding the movement of the goods. Although reference is made to a paper manifest, CBP's in-bond process for T&E entries is supported in the ACE Truck Manifest System. The ACE Truck Manifest System enables carriers to submit T&E entries by filing an e-Manifest. This NCAP test requires participants to file their T&E entries using an e-Manifest in the ACE Truck Manifest System and eliminates one of the reporting requirements.

Arrangement Between the Canada Border Services Agency and the Department of Homeland Security, United States Customs and Border Protection Regarding the Highway In-Transit Project

On March 10, 2011, CBP and the CBSA finalized a memorandum of understanding (MOU) titled, "Arrangement Between the Canada Border Services Agency and the Department of Homeland Security, United States Customs and Border Protection Regarding the Highway In-Transit Project." In the MOU, CBP and the CBSA state their intention to implement the Highway In-Transit Project (In-Transit Project) on a pilot basis for shipments transiting through the United States (from one point in Canada to another point in Canada) and to later jointly assess whether to begin implementing the In-Transit Project on a pilot basis for shipments transiting through Canada (from one point in the United States to another point in the United States), or on a permanent basis for one or both types of transit movements. The MOU provides for the automation of the reporting of in-transit highway movements of commercial goods between Canada and the United States. The MOU specifies the criteria that highway carriers must meet in order to participate in the In-Transit

Project and provides for the transmission of pre-arrival cargo (manifest) and conveyance information using mutually identified electronic data interchange (EDI) highway cargo (manifest) and conveyance transaction sets. The MOU further allows for the confidential electronic sharing between the CBSA and CBP of certain manifest information to be used for the purposes of risk assessment and tracking of in-transit highway movement of commercial goods between Canada and the United States.

Implementation of the NCAP Test

In order to facilitate implementation of the In-Transit Project for shipments transiting the United States from one point in Canada to another point in Canada, CBP is implementing this NCAP test to designate a new filing code in the ACE Truck Manifest System for truck carriers participating in the In-Transit Project to indicate that their shipments are being shipped as part of the In-Transit Project. Additionally, under the NCAP test, carriers will file an additional data element, the Canadian Cargo Control Number (CCN), consisting of a CBSA-issued carrier code and a unique reference number assigned by the carrier. The CCN will allow the CBSA and CBP to track in-bond shipments being transported under the NCAP test and will facilitate the closing out of these T&E entries. Carriers will only be required to report their arrival to CBP at the United States port of export and the CBSA will notify CBP when the shipment enters into Canada. At that point, the T&E will be updated in the system as exported.

Eligibility and Acceptance

To participate in this NCAP test, a truck carrier must be a bonded carrier with CBP and the CBSA, be accepted by the CBSA to participate in the In-Transit Project, and must be able to transmit an e-Manifest using the American National Standards Institute (ANSI) X12 format to CBP. For information on how to participate in the In-Transit Project go to the CBSA Web site at: *http://www.cbsa-asfc.gc.ca/prog/manif/transit-eng.html*.

Carriers that wish to participate in this NCAP test should send a letter or e-mail to CBP stating that they meet the eligibility requirements and that they wish to participate in the NCAP Test of Automated Procedures for Canada-United States-Canada In-Transit Movements. The letter or e-mail must include (1) The carrier's name, (2) Internal Revenue Service number (IRS number), and (3) proof of acceptance by the CBSA to participate in the In-Transit Project. CBP will accept the first nine eligible carriers that apply and will notify the carriers that they have been accepted to participate in the NCAP test. Applications can be submitted at any time during the test and should be submitted to Gary Schreffler, Chief, Cargo Control Branch, Office of Field Operations, U.S. Customs and Border Protection, via e-mail at *Gary.R.Schreffler@dhs.gov*.

Method of Transmission of Advance Data and Content

Truck carriers participating in this NCAP test will be required to file a T&E entry for the in-bond movement by submitting a complete e-Manifest to CBP using the ANSI X12 format (referred to as a 309 manifest) no later than either 30 minutes or one hour (as applicable) before entering the United States. A complete e-Manifest using the ANSI X12 format includes the following components: Trip, crew, conveyance, equipment, and complete shipment data. At this time, the ACE Secure Data Portal and the United Nations/Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT) are not available for use.

New Filing Code and Data Element

Carriers will indicate that the T&E entry is being filed as part of the In-Transit Project by designating the entry as a type 70 filing. Type 62 filings are currently used for Canadian T&E entries transiting the United States. Additionally, carriers will file an additional data element, the CCN, issued by the CBSA when the shipment leaves Canada. The CCN consists of a CBSA-issued carrier code and a unique reference number assigned by the carrier. The CCN is not required under CBP's current process. The CCN will be used by CBP to notify the CBSA when the shipment crosses into the United States and by the CBSA to notify CBP when the shipment is exported back into Canada.

Processing and Tracking the In-Bond Shipment

The 309 manifest will be processed and retained in ACE as a normal manifest. Upon arrival in the United States, CBP will generate a "transit movement authorized" message (referred to as a 350 message) that will be sent to the carrier and to the CBSA. The shipment will then be able to transit the United States and proceed to the United States port of export as a T&E entry. When the shipment arrives at the United States port of export, the carrier will report the arrival of the shipment to CBP via an EDI message or through their ACE portal account. When the shipment exits the United States and arrives in Canada, the CBSA will transmit a message (referred to as a 353 message) notifying CBP that the shipment has entered Canada. CBP will generate another 350 message and send it to the carrier notifying the carrier that the shipment has entered Canada and that the T&E entry status is exported. At this point the T&E entry will be closed with CBP.

No Diversions of In-Bond Shipment Permitted

Carriers transporting a shipment through the United States as part of this NCAP test will be required to complete the T&E entry by exporting their shipment to Canada. Carriers will not be allowed to divert these shipments to a port that is not a land crossing port between the United States and Canada.

Future Expansion of the Test

Any future expansion in ACE to include a new in-bond filing code for in-transit movements through Canada and back to the United States (U.S-Canada-U.S) or expansion of this test to include other transmission methods, i.e., UN/EDIFACT or ACE Secure Data Portal, will be announced via a separate **Federal Register** Notice.

Regulatory Provisions Affected

Regulations that conflict with the terms and conditions of this test, namely regulations contained in parts 18 and 123, including section 123.42, are suspended and overridden to the extent of the conflict for the duration of this test for those participants in this test and only to the extent of their participation in this test.

Misconduct

If a test participant fails to abide by the rules, procedures, or term and conditions of this and all other applicable **Federal Register** Notices, fails to exercise reasonable care in the execution of participant obligations, or otherwise fails to comply with all applicable laws and regulations, then the participant may be suspended from participation in this test and/or subjected to penalties, liquidated damages, and/or other administrative or judicial sanction. Additionally, CBP has the right to suspend a test participant based on a determination that an unacceptable compliance risk exists. Any decision proposing suspension may be appealed in writing to the Assistant Commissioner (Office of Field Operations) within 15 days of the decision date. Such proposed suspension will apprise the participant

of the facts or conduct warranting suspension. Should the participant appeal the notice of proposed suspension, the participant should address the facts or conduct charges contained in the notice and state how he has or will achieve compliance. However, in the case of willfulness or where public health interests are concerned, the suspension may be effective immediately.

Test Evaluation Criteria

All interested parties are invited to comment on any aspect of this test at any time. To ensure adequate feedback, participants are required to take part in an evaluation of this test. CBP needs comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter, expand, limit, continue, end or implement this program by regulation. The final results of the evaluation will be published in the **Federal Register** and the Customs Bulletin as required by section 101.9 of the CBP Regulations.

Paperwork Reduction Act

As noted above, CBP will be accepting only nine participants in the NCAP test. This means that fewer than ten persons will be subject to any information collections under the NCAP test. Accordingly, collections of information encompassed within this notice are exempted from the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3502 and 3507).

Dated: June 7, 2011.

Thomas Winkowski,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 2011–14536 Filed 6–10–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Equestrian Stables at Meadowood Special Recreation Management Area, VA; Information Sharing Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: The Bureau of Land Management Eastern States has scheduled a public meeting to share information about the condition of the equestrian stables at Meadowood Special Recreation Management Area (SRMA), located in Lorton, VA, and collect comments, suggestions and ideas from the public pertaining to the future of the structure. The meeting agenda includes an overview of current options for making repairs to a 34-year-old barn currently used as a boarding facility for private horses, while accommodating therapeutic riding and riding lessons that are available to the public.

DATES: The meeting is scheduled as follows: June 28, 2011; 7 p.m., local time.

ADDRESSES: Laurel Hill Golf Course Clubhouse, 8701 Laurel Crest Dr., Lorton, VA 22079.

FOR FURTHER INFORMATION CONTACT: E. Lynn Burkett, BLM–ES Lower Potomac Field Station Manager; *phone:* 703–339–3461. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The meeting will begin with an overview of the status of equestrian activities at the Meadowood SRMA. Comments, suggestions and ideas will be accepted from the public via the U.S. Postal Service, or by e-mail to: *ES_Meadowood@es.blm.gov.* The public is also invited to write their comments at the meeting.

Marie Stewart,

Acting State Director.

[FR Doc. 2011–14524 Filed 6–10–11; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–FHC–2011–N116; 81331–1334–8TWG–W4]

Trinity Adaptive Management Working Group

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: The Trinity Adaptive Management Working Group (TAMWG) affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the Trinity Management Council (TMC). The TMC interprets and recommends policy, coordinates and reviews management actions, and provides organizational budget oversight. This notice announces a joint TAMWG and TMC meeting, which is open to the public.

DATES: TAMWG–TMC will meet from 9:30 a.m. to 5 p.m. on Wednesday, June 29, 2011.

ADDRESSES: The meeting will be held at the Trinity Alps Resort, 1750 Trinity Alps Road, Trinity Center, CA 96091.

FOR FURTHER INFORMATION CONTACT: *Meeting Information:* Randy A. Brown, TAMWG Designated Federal Officer, U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521; telephone: (707) 822–7201. *Trinity River Restoration Program (TRRP) Information:* Robin Schrock, Executive Director, Trinity River Restoration Program, P.O. Box 1300, 1313 South Main Street, Weaverville, CA 96093; telephone: (530) 623–1800; e-mail: *rschrock@usbr.gov.*

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces a joint meeting of the TAMWG–TMC. The meeting will include discussion of the following topics:

- Interests and perspectives of members of the TMC and TAMWG,
- Possible improvements in operations and implementation of the TRRP,
- Possible improvements in TAMWG–TMC relations.

Completion of the agenda is dependent on the amount of time each item takes. The meeting could end early if the agenda has been completed.

Dated: June 7, 2011.

Randy A. Brown,

Deputy Field Supervisor, Arcata Fish and Wildlife Office, Arcata, CA.

[FR Doc. 2011–14523 Filed 6–10–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14936–A, F–14936–A2; LLAK965000–L14100000–KC0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to The Kuskokwim Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act. The subsurface estate in these lands will be conveyed to Calista

Corporation when the surface estate is conveyed to The Kuskokwim Corporation, Successor in Interest to Sleetmute Limited. The lands are in the vicinity of Sleetmute, Alaska, and are located in:

Seward Meridian, Alaska

T. 17 N., R. 43 W.,
Secs. 13 and 23;
Secs. 24, 25, and 26.
Containing approximately 2,873 acres.

T. 18 N., R. 43 W.,
Secs. 30, 32, and 36.
Containing 1,891.83 acres.

T. 19 N., R. 43 W.,
Secs. 31, 33, and 34.
Containing 1,304.92 acres.

T. 18 N., R. 44 W.,
Sec. 25.
Containing 640 acres.
Aggregating approximately 6,710 acres.

Notice of the decision will also be published four times in the *Tundra Drums*.

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until July 13, 2011 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

3. Notices of appeal transmitted by electronic means, such as facsimile or e-mail, will not be accepted as timely filed.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION, CONTACT: The BLM by phone at 907–271–5960 or by e-mail at *ak.blm.conveyance@blm.gov*. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Barbara Opp Waldal,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2011–14497 Filed 6–10–11; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM01000 L16100000 DO0000]

Notice of Intent To Prepare a Resource Management Plan Amendment/ Environmental Assessment for the Farmington Field Office Visual Resources

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 (NEPA), as amended, and the Federal Land Policy and Management Act (FLPMA) of 1976, as amended, the Bureau of Land Management (BLM) Farmington Field Office (Field Office), Farmington, New Mexico, intends to amend the 2003 Farmington Resource Management Plan (RMP) and prepare an associated Environmental Assessment (EA) to address the Visual Resource Management (VRM) in the planning area. By this Notice, the Field Office is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This Notice initiates the public scoping process for the RMP amendment and associated EA. Comments on issues may be submitted in writing until July 13, 2011. The date(s), time(s), and location(s) of any scoping meetings will be announced at least 15 days in advance through local media, newspapers and the BLM Web site at: *http://www.blm.gov/nm/st/en.html.* In order to be included in the Draft RMP amendment/EA, all comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. The Field Office will provide additional opportunities for public participation upon publication of the Draft RMP amendment/EA.

ADDRESSES: You may submit comments on issues and planning criteria related to the Farmington Visual Resource Management RMP amendment/EA by any of the following methods:

- *Web Site: http://www.blm.gov/nm/st/en.html.*
- *E-mail: FFO_Comments@blm.gov.*
- *Fax:* 505–599–8999 *Attn:* VRM ID Team.
- *Mail:* BLM Farmington Field Office, *Attn:* VRM ID Team, 1235 La Plata Highway, Farmington, New Mexico 87401.

Documents pertinent to this proposal may be examined at the Farmington Field Office.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Janelle Alleman, Outdoor Recreation Planner; telephone 505–599–8944; address 1235 La Plata Highway, Farmington, New Mexico 87401; e-mail at *FFO_Comments@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM Farmington Field Office, Farmington, New Mexico, intends to prepare an RMP amendment and associated EA to address the visual resource management in the planning area. The planning area is located in San Juan, Rio Arriba, and Sandoval Counties, New Mexico, and encompasses 1.4 million acres of public land in these counties. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. The RMP completed in 2003 directs the Field Office to conduct a review of VRM objectives upon the completion of a new visual resource inventory. That inventory was completed in March of 2009. The purpose of this RMP amendment/EA is to address the need to update the VRM objectives in the 2003 RMP.

The BLM is required to manage public lands in such a manner as to protect the quality of the scenic (visual) values of these lands. The RMP amendment/EA will determine if, over time, changes in the condition of the visual resources within the planning area warrant changes to VRM management objectives, and to what degree. VRM objectives (or classes) provide the basic visual management standards for design and development of surface disturbing projects on public lands and are determined through careful analysis and consideration of other land uses, needs and demands. VRM Classes I through IV are designated in the RMP and establish

the allowable threshold of detectable visual modification. The associated management objectives dictate the level of protection, which range from preservation with a VRM Class I designation to major modification with a VRM Class IV.

The BLM will use an interdisciplinary approach to develop the plan in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: Rangeland management, minerals and geology, outdoor recreation, archaeology, paleontology, wildlife, lands and realty, hydrology, soils, sociology, economics, and wilderness.

At present, the BLM has identified the following preliminary planning issues: (1) How should visual resources be managed to address areas of scenic quality in contrast to increasing development? (2) How should changes in the visual resource inventory be used to address modifications to the visual resource management classes? (3) What type of protective management prescriptions should be considered to address visual resources?

Proposed planning criteria include the following:

1. The RMP amendment/EA will comply with FLPMA, NEPA, and all other applicable laws, regulations, and policies;
2. For program-specific guidance for decisions at the land use planning level, the process will follow the BLM's policies in the Land Use Planning Handbook, H–1601–1;
3. Public participation and collaboration will be an integral part of the planning process;
4. The BLM will strive to make decisions in the plan compatible with the existing plans and policies of adjacent local, state, and Federal agencies and local American Indian tribes, as long as the decisions are consistent with the purposes, policies, Federal laws, and regulations applicable to public lands;
5. The RMP amendment/EA will recognize valid existing rights;
6. The RMP amendment/EA will incorporate, where applicable, management decisions brought forward from existing planning documents;
7. The BLM staff will work cooperatively and collaboratively with cooperating agencies and all other interested groups, agencies, and individuals;
8. The BLM and cooperating agencies will jointly develop alternatives for resolution of resource management issues and management concerns;
9. GIS and metadata information will meet Federal Geographic Data Committee standards, as required by Executive Order 12906 and all other applicable BLM data standards will be followed;
10. The planning process will provide for ongoing consultation with American Indian tribes to identify strategies for protecting recognized traditional uses;
11. Planning and management direction will focus on the relative values of resources and not the combination of uses that will give the greatest economic return or economic output;
12. The BLM will consider the quantity and quality of non-commodity resource values;
13. Where practicable and timely for the planning effort, the best available scientific information, research, and new technologies will be used;
14. Actions must comply with all applicable regulations and must be reasonable, achievable, and allow for flexibility while supporting adaptive management principles; and
15. The Economic Profile System will be used as one source of demographic and economic data for the planning process, which will provide baseline data and contribute to estimates of existing and projected social and economic conditions.

The BLM will utilize and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American tribal consultations will be conducted in accordance with policy, and tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, and local agencies, along with other stakeholders that may be interested in or affected by the BLM's decision on this project are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency. You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above.

Please note that public comments and information submitted including names, street addresses, and e-mail addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1501.7, 43 CFR 1610.2.

Linda S. C. Rundell,

State Director.

[FR Doc. 2011–14491 Filed 6–10–11; 8:45 am]

BILLING CODE 4310–VB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L16100000.DU0000]

Notice of Intent To Prepare an Environmental Assessment for the Proposed Gila Lower Box Area of Critical Environmental Concern, Hidalgo and Grant Counties, New Mexico and Possible Land Use Plan Amendment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Las Cruces District Office, Las Cruces, New Mexico, intends to prepare an Environmental Assessment (EA) and a possible amendment to the 1993 Mimbres Resource Management Plan (RMP), and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues and planning criteria.

DATES: This notice initiates the public scoping process for the EA. Comments on issues may be submitted in writing until July 13, 2011. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local media, newspapers, and the BLM Web site at: *http://www.blm.gov/nm/st/en/fo/Las_Cruces_District_Office.html.* To be included in the EA, all comments must be received prior to the close of the scoping period. We will provide additional opportunities for public participation upon publication of the Draft EA.

ADDRESSES: You may submit comments on issues and planning criteria related to the EA by any of the following methods:

- *Web site: http://www.blm.gov/nm/st/en/fo/Las_Cruces_District_Office/LCDO_Planning.html.*
- *E-mail: Jennifer_Montoya@nm.blm.gov.*
- *Fax:* 575–525–4412.
- *Mail:* 1800 Marquess Street, Las Cruces, New Mexico 88005.

Documents pertinent to this proposal may be examined at the Las Cruces District Office.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Jennifer Montoya, telephone 575–525–4316; address 1800 Marquess Street, Las Cruces, New Mexico 88005; e-mail *Jennifer_Montoya@nm.blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Las Cruces District Office intends to prepare an EA and possible land use plan amendment for the Mimbres Planning Area, announces the beginning of the scoping process, and seeks public input on issues and planning criteria.

The BLM is currently considering expanding the boundary of the Gila Lower Box Area of Critical Environmental Concern (ACEC), which would allow the BLM to provide special management to an area with significant scenic, cultural, and biological resources.

The public land proposed for management as an ACEC is currently not part of the ACEC and is managed in accordance with the 1993 Mimbres RMP. Therefore, the RMP may need to be amended to identify the public land as suitable for ACEC designation. The public land is a portion of and within the following areas:

New Mexico Principal Meridian

T. 19 S, R. 19 W.

T. 19 S, R. 20 W.

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EA. At present, the BLM has identified the following preliminary issues:

1. How should the BLM design management to enhance the watershed?
2. What management is needed to address the significant cultural resources that occur in the watershed?
3. How should the BLM address land tenure in the area considering the RMP directs the Las Cruces District Office to acquire all State trust and private land in-holdings through exchange or purchase from willing sellers?
4. How should the BLM address increased interest in renewable energy development in the area?
5. How should the BLM address the eligibility of the Gila Lower Box as a Wild and Scenic River?
6. Which lands would be appropriate for ACEC designation and what management prescriptions should apply?
7. What potential impacts would this proposed action have on neighboring private landowners?
8. What effects would this proposed action have on recreation and tourism in the area?
9. What effects would this proposed action have on agricultural activities in the area?
10. Which species will benefit from an expanded ACEC?

Authorization of this proposal requires amendment of the 1993 Mimbres RMP. By this notice, the BLM is complying with requirements in 43 CFR 1610.2(c) to notify the public of potential amendments to land use plans, predicated on the findings of the EA. If a land use plan amendment is necessary, the BLM will integrate the land use planning process with the NEPA process for this project.

The BLM will utilize and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, as provided for in 36 CFR 800.2(d)(3). Native American tribal consultations will be conducted in accordance with policy, and tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1501.7; 43 CFR 1610.2.

William Childress,

District Manager, Las Cruces.

[FR Doc. 2011–14496 Filed 6–10–11; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV9230000 L13100000.FI0000 241A; NVN–77187; 11–08807; MO#4500021279; TAS: 14x1109]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Pursuant to the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b), the Bureau of Land Management (BLM) received a petition for reinstatement from Makoil Inc., for competitive oil and gas lease NVN–77187 on land in Nye County, Nevada. The petition was timely filed and was accompanied by rental due since the lease terminated under the law. No valid leases have been issued affecting the lands.

FOR FURTHER INFORMATION CONTACT: Atanda Clark, BLM Nevada State Office, 775–861–6632, or e-mail: *Atanda_Clark@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rental and royalties at rates of $10 per acre or fraction thereof per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and has reimbursed the Department for the cost of this **Federal Register** notice. The lessee has met all of the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral

Leasing Act of 1920 (30 U.S.C. 188). The BLM is proposing to reinstate the lease effective July 1, 2009 under the original terms and conditions of the lease and the increased rental and royalty rate cited above. The BLM has not issued a lease affecting the lands encumbered by the lease to any other interest in the interim.

Authority: 43 CFR 3108.2–3(a).

Gary Johnson,

Deputy State Director, Minerals Management.

[FR Doc. 2011–14494 Filed 6–10–11; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Portland Cement Association

Notice is hereby given that, on May 12, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq. ("the Act"), Portland Cement Association ("PCA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Drake Cement, LLC, Scottsdale, AZ; Argos USA Corporation, Houston, TX; Penta Engineering Corporation, St. Louis, MO; and Schreiber Yonley Associates, Ashland, MO, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PCA intends to file additional written notifications disclosing all changes in membership.

On January 7, 1985, PCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 5, 1985 (50 FR 5015).

The last notification was filed with the Department on February 2, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 7, 2011 (76 FR 12370).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–14506 Filed 6–10–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; IMS Global Learning Consortium, Inc.

Notice is hereby given that, on May 9, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), IMS Global Learning Consortium, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Florida State College at Jacksonville, Jacksonville, FL; LCTCS Online, Baton Rouge, LA; and Norwegian Centre for ICT in Education, Hamar, Norway, have been added as parties to this venture. Also, CTUnion, Seoul, Republic of Korea, and Digital Spirit, Berlin, Germany, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and IMS Global Learning Consortium, Inc. intends to file additional written notifications disclosing all changes in membership.

On April 7, 2000, IMS Global Learning Consortium, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 13, 2000 (65 FR 55283).

The last notification was filed with the Department on March 3, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 5, 2011 (76 FR 18797).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–14514 Filed 6–10–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; ASTM International Standards

Notice is hereby given that, on May 11, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), ASTM International Standards ("ASTM") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between February 2011 and May 2011 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on February 4, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 7, 2011 (76 FR 12370).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–14515 Filed 6–10–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Re-Establishment of the Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO)

AGENCY: Veterans' Employment and Training Service, Labor.

ACTION: Notice.

SUMMARY: The Advisory Committee on Veterans' Employment, Training, and Employer Outreach (ACVETEO) was reestablished on March 30, 2011 as a federal advisory committee within the Department of Labor.

The ACVETEO's authorizing legislation is codified at 38 U.S.C. 4110. It is established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, as amended.

The ACVETEO is responsible for assessing employment and training needs of Veterans and their integration into the workforce; determining the extent to which the programs and activities of the Department of Labor (DOL) are meeting such needs; assisting the Assistant Secretary of Veterans' Employment and Training (ASVET) in outreach to employers regarding training and skills of Veterans and advantages afforded employers by hiring Veterans; making recommendations to the Secretary of Labor, through the ASVET, with respect for outreach activities and the employment and training of Veterans; and carrying out such other activities necessary to making required reports and recommendations. The statute requires the ACVETEO to meet at least quarterly and to submit an annual report by December 31 of each year on the prior year's activities to the Secretary and the Committees on Veterans' Affairs of the House of Representatives and the Senate.

SUPPLEMENTARY INFORMATION: As established by statute, the membership of the ACVETEO must consist of at least 12, but no more than 16, individuals appointed by the Secretary of Labor:

- Seven individuals, one each from among representatives nominated by each of the following service organizations: the Society for Human Resource Management, the Business Roundtable, the National Association of State Workforce Agencies, the United States Chamber of Commerce, the National Federation of Independent Business, a nationally recognized labor union or organization, and the National Governors Association.
- Not more than five individuals from among representatives nominated by veterans' service organizations that have a national employment program.
- No more than five individuals who are recognized authorities in the fields of business, employment, training, rehabilitation, or labor and who are not employees of the Department of Labor.

In addition, the following, or their representatives, are ex-officio, non-voting members: Secretaries of Veterans Affairs and Defense; Director of the Office of Personnel Management; Assistant Secretary of Labor for Veterans' Employment and Training; the Assistant Secretary of Labor for Employment and Training; and the Administrator of the Small Business Administration.

The ACVETEO is a non-discretionary advisory committee required by law and provides valuable advice to the Secretary of Labor. Therefore, the Department has determined that it is necessary and in the public interest to reestablish the committee.

FOR FURTHER INFORMATION CONTACT: The Veterans' Employment and Training Service (VETS) is responsible for providing the necessary support for the ACVETEO. The Director, Strategic Outreach and Legislative Affairs within VETS will serve as the Designated Federal Official (DFO). Individuals requesting further information should contact Nancy Hogan, Designated Federal Official, at (202) 693–4700.

Signed in Washington, DC, this 7th day of June 2011.

John McWilliam,

Deputy Assistant Secretary. Veterans' Employment and Training Service.

[FR Doc. 2011–14579 Filed 6–10–11; 8:45 am]

BILLING CODE 4510– 79–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: D–11632, 2011–10, William W. Etherington IRA (the Plan); D–11642, 2011–11, H–E–B Brand Savings and Retirement Plan (the Plan) and H.E. Butt Grocery Company (the Company); L–11625, 2011–12, The International Union of Painters and Allied Trades Finishing Trades Institute (the Plan or the Applicants); and L–11641, 2011–13, Ford Motor Company (the Applicant)

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

William W. Etherington IRA (the IRA); Located in Park City, Utah; [Prohibited Transaction Exemption 2011–10; Exemption Application No. D–11632]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) by the IRA to William W. Etherington and his wife, Paula D. Etherington (the Applicants), disqualified persons with respect to the IRA,[1] of the IRA's 80% interest (the Interest) in certain residential real property (the Property); provided that:

(a) The terms and conditions of the Sale are at least as favorable to the IRA

[1] Pursuant to 29 CFR 2510.3–2(d), the IRA is not within the jurisdiction of Title I of the Employee Retirement Income Security Act of 1974 (the Act). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

as those obtainable in an arm's length transaction with an unrelated party;

(b) The Sale is a one-time transaction for cash;

(c) As consideration, the IRA receives the fair market value of the Interest as determined by a qualified, independent appraiser, in an updated appraisal on the date of Sale; and

(d) The IRA pays no real estate commissions, costs, fees, or other expenses with respect to the Sale.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption on or before April 14, 2011. During the comment period, the Department received one written comment from the Applicants, which was submitted by Mr. Etherington, the owner of the IRA. The Department received no hearing requests.

The Applicants' Comment

The Applicants' comment concerned their desire to use a different qualified, independent appraiser than Mary Mau of Second Opinion Appraisal, Inc. (the Appraiser), the individual who performed the original appraisal (the Appraisal) of the Property on February 10, 2010, in order to determine the fair market value of the Interest. Condition (c) of the proposed exemption provides that the Interest's appraised value, which is based on the underlying value of the Property, must be updated on the date of Sale.[2] Because the date of the Sale will have occurred in excess of one year after the Property's Appraisal, the Department is requiring the Applicants to obtain an updated appraisal (the Update) on or before the date of Sale in order to satisfy the requirements of Condition (c) of the proposal. To the extent that the Update is obtained prior to the Sale, the Appraiser must provide a confirmation (either orally or in writing) that the fair market value of the Property on the date of the Sale has not changed. If the Appraiser determines that there has been a change in the fair market value of the Property on the date of the Sale, then they must provide an additional Update (either orally or in writing) setting forth the fair market value of the Property. This will ensure that the Applicants will purchase the Interest from the IRA at fair market value. Mr. Etherington has requested that the Applicants be allowed to obtain the Update, including any confirmation or additional Update of the Property's fair market value on the date of the Sale, using a qualified, independent appraiser other than the Appraiser.

In conversations with the Department, Mr. Etherington stated that he was dissatisfied with the responsiveness of the Appraiser and the cost of her services. In this regard, Mr. Etherington represented that, after the Appraisal was conducted, it took the Appraiser in excess of three months to submit additional representations concerning her status as a qualified independent appraiser, along with copies of supporting documentation, which had been requested by the Department. Mr. Etherington stated that, during this period, he had attempted to contact the Appraiser on numerous occasions to request that the submission of the additional information be expedited, but the Appraiser was unresponsive to his inquiries. Furthermore, the Appraiser requested an additional fee for such submission, which Mr. Etherington viewed as unreasonable because he did not believe that the Applicants should be forced to pay an extra fee for information that was requested by the Department in connection with the Appraisal.[3] Finally, according to Mr. Etherington, the Appraiser has requested a $600 fee to perform the Update and an additional fee for a verbal confirmation as to the Property's value on the date of the Sale, to be negotiated at such time.

Accordingly, the Applicants have retained Mr. Don Baxter of the Baxter Realty Group, located in Kailua, Hawaii, to perform the Update on the Property. According to Mr. Etherington, Mr. Baxter is a Certified Residential Appraiser, licensed under the State of Hawaii, and has no personal relationship with the Applicants or any interest in the Property or the Sale. In his comment, Mr. Etherington states that Mr. Baxter will charge $575.92 for the Update and will provide a verbal confirmation of the Property's value on the date of Sale for free, if the Property's fair market value has not changed. According to Mr. Etherington, if the Property's value has changed on the date of Sale, then Mr. Baxter will provide an additional Update, at a fee to be determined at the time. Finally, in his comment letter, Mr. Etherington represents that Mr. Baxter will earn less than 1% of his annual income from the Applicants and he understands that the Update will be used for the purpose of obtaining an exemption from the Department for the Sale.

The Department's Response

It is the Department's understanding that the Update, and any necessary verbal confirmation at the time of the Sale, will be conducted by a qualified, independent appraiser, as required under the Department's policies and exemption procedures, and in compliance with Condition (c) of the proposal. Therefore, based on Mr. Etherington's comment letter, the Department concurs with the Applicants' request to retain a new qualified, independent appraiser to perform the Update, and takes note of any corresponding changes to the proposed exemption.

After giving full consideration to the entire record, including the Applicants' written comment, the Department has decided to grant the exemption, as described above. The complete application file is made available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the proposed exemption published in the **Federal Register** on March 15, 2011 at 76 FR 14090.

FOR FURTHER INFORMATION CONTACT: Mr. Warren Blinder of the Department at (202) 693–8553. (This is not a toll-free number.)

H–E–B Brand Savings and Retirement Plan (the Plan) and H.E. Butt Grocery Company (the Company); Located in San Antonio, Texas.; [Prohibited Transaction Exemption No. 2011–11; Application No. D–11642]

Exemption

The restrictions of section 406(a), section 406(b)(1), and section 406(b)(2) of the Act and the sanctions resulting from the application of 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the sale of real property (the Property) by the Plan to the Company, a party in interest with respect to the Plan; provided the following conditions are satisfied:

(a) The sale of the Property is a one-time transaction for cash;

(b) The Plan will receive from the proceeds of the sale of the Property a sales price in the amount of $2,762,566, plus an amount equal to $432,618 (the

[2] Representations 27–30 of the notice of proposed exemption describe the Appraisal and the approaches considered by the Appraiser.

[3] Mr. Etherington stated that he was charged approximately $600 for the Appraisal and $300 for an additional one page written submission that was requested by the Department.

total of all real estate taxes and expenses incurred by the Plan as a result of holding the Property from the date the Plan purchased the Property through December 31, 2009), plus an additional amount equal to the total of all real estate taxes and expenses from January 1, 2010, to the date of the sale of the Property to the Company;

(c) The terms and conditions of the sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party; and

(d) The Plan pays no fees, commissions, or other expenses in connection with the sale of the Property to the Company; and

(e) Prior to entering into the subject transaction, the trustees of the Plan determine that the sale of the Property is feasible, protective of, and in the interest of the Plan and its participants and beneficiaries.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice of Proposed Exemption published on March 15, 2011, at 76 FR 14094.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

The International Union of Painters and Allied Trades Finishing Trades Institute (the Plan or the Applicant); Located in Hanover, Maryland; [Prohibited Transaction Exemption 2011–12; Exemption Application No. L–11625]

Exemption

The restrictions of sections 406(a)(1)(A), (C) and (D), 406(b)(1), and 406(b)(2) of the Act shall not apply to the payment for lodging and meals by the Plan to the International Union of Painters and Allied Trades, AFL–CIO (the Union), a party in interest with respect to the Plan, in a residence hall (the Residence Hall) owned by the Union through its wholly-owned entity IUPAT Building Corporation LLC (the Building Corporation), provided that the following conditions are satisfied:

(a) An independent, qualified fiduciary (the I/F), acting on behalf of the Plan, determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of the Plan;

(b) Before the Plan enters into the proposed transaction, the I/F reviews the transaction, ensures that the terms of the transaction are at least as favorable to the Plan as an arm's length transaction with an unrelated party, and determines whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act;

(c) The I/F monitors compliance with the terms and conditions of this exemption, as described herein, and ensures that such terms and conditions are at all times satisfied;

(d) The I/F monitors compliance with the terms of the written agreement (the Agreement) between the Plan and the Union, and takes any and all steps necessary to ensure that the Plan is protected, including, but not limited to, agreeing to extend the Agreement on an annual basis or exercising his authority to terminate the Agreement on 30 days' written notice;

(e) The payments by the Plan for the lodging at the Residence Hall and for the meals provided under the Agreement and under the terms of any subsequent extension of the Agreement are at no time greater than their fair market value, as determined by the I/F;

(f) The subject transaction is on terms and at all times remains on terms that are at least as favorable to the Plan as those that would have been negotiated under similar circumstances at arm's-length with an unrelated third party;

(g) The Applicant's independent auditor will perform an annual audit for the Plan to verify whether the Plan paid the proper amounts with respect to the subject transaction. In this regard, the written audit report for each year must identify, as applicable, any errors or irregularities relating to such payments, any internal control weaknesses that must be addressed under generally accepted auditing standards, and any recordkeeping matters that would impede the auditor from properly auditing such payments. To the extent there are any discrepancies as to the foregoing matters, the independent auditor will promptly communicate them to the Board of Trustees of the Plan (the Trustees), who will, in turn, promptly notify the I/F about such discrepancies.[4]

(h) The transaction is appropriate and helpful in carrying out the purposes for which the Plan is established or maintained;

(i) The Trustees maintain, or cause to be maintained within the United States for a period of six (6) years in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described, below, in paragraph (j)(1) of this exemption to determine whether the conditions of this exemption have been met; except that—

(1) If the records necessary to enable the persons described, below, in paragraph (j)(1) of this exemption to determine whether the conditions of this exemption have been met are lost or destroyed, due to circumstances beyond the control of the Trustees, then a separate prohibited transaction will not be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the Trustees, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (i) of this exemption; and

(j)(1) Except as provided, below, in paragraph (j)(2) of this exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (i) of this exemption are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or any other applicable federal or state regulatory agency;

(B) Any fiduciary of the Plan, or any duly authorized representative of such fiduciary;

(C) Any contributing employer to the Plan and any employee organization whose members are covered by the Plan, or any duly authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described, above, in paragraph (j)(1)(B)–(D) of this exemption are authorized to examine trade secrets or commercial or financial information that is privileged or confidential.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on March 15, 2011 at 76 FR 14096. The Department received no comments or hearing requests with respect to the Notice.

For Further Information Contact: Gary H. Lefkowitz of the Department, telephone (202) 693–8546 (This is not a toll-free number.)

[4] To the extent that the independent auditor raises issues with respect to the payments, the Trustees have an obligation to address them in a manner consistent with their fiduciary responsibilities pursuant to section 404 of the Act.

Ford Motor Company (the Applicant); Located in Detroit, MI; [Prohibited Transaction Exemption (PTE) 2011–13; Exemption Application No. L–11641]

Exemption

Section I. Covered Transactions [5]

(a) The restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2) and 407(a) of ERISA shall not apply to the following transactions:

(1) The acquisition by the UAW Ford Retirees Medical Benefits Plan (the Ford VEBA Plan) and its funding vehicle, the UAW Retiree Medical Benefits Trust (the VEBA Trust) of: (i) The LLC Interests; (ii) New Note A; (iii) New Note B (together with New Note A, the New Notes); and (iv) Warrants, transferred by Ford and deposited in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust.

(2) The acquisition by the Ford VEBA Plan of shares of Ford Common Stock pursuant to Ford's right to settle its payment obligations under New Note B in shares of Ford Common Stock (*i.e.,* Payment Shares), consistent with the 2009 Settlement Agreement;

(3) The acquisition by the Ford VEBA Plan of shares of Ford Common Stock pursuant to (i) The Independent Fiduciary's exercise of all or a pro rata portion of the Warrants, consistent with the 2009 Settlement Agreement and (ii) an adjustment, substitution, conversion, or other modification of Ford Common Stock in connection with a reorganization, restructuring, recapitalization, merger, or similar corporate transaction, provided that each holder of Ford Common Stock is treated in an identical manner;

(4) The holding by the Ford VEBA Plan of the aforementioned Securities in the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust, consistent with the 2009 Settlement Agreement;

(5) The deferred payment of any amounts due under New Note B by Ford pursuant to the terms thereunder;

(6) The disposition of the Securities by the Independent Fiduciary; and

(7) The amendment of New Note B pursuant to the execution of the Note Agreement.

(b) The restrictions of sections 406(a)(1)(A), 406(b)(1), and 406(b)(2) of ERISA shall not apply to the sale of Ford Common Stock or Warrants held by the Ford VEBA Plan to Ford in accordance with the Right of First Offer or a Ford self-tender under the Securityholder and Registration Rights Agreement.

(c) The restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA shall not apply to:

(1) The extension of credit or transfer of assets by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan in payment of a benefit claim that was the responsibility and legal obligation, under the terms of the applicable plan documents, of one of the other parties listed in this paragraph;

(2) The reimbursement by Ford, the Ford Retiree Health Plan, or the Ford VEBA Plan, of a benefit claim that was paid by another party listed in this paragraph, which was not legally responsible for the payment of such claim, plus interest;

(3) The retention of an amount by Ford until payment to the Ford VEBA Plan resulting from an overaccrual of pre-transfer expenses attributable to the TAA or the retention of an amount by the Ford VEBA Plan until payment to Ford resulting from an underaccrual of pre-transfer expense attributable to the TAA; and

(4) The Ford VEBA Plan's payment to Ford of an amount equal to any underaccrual by Ford of pre-transfer expenses attributable to the TAA or the payment by Ford to the Ford VEBA Plan of an amount equal to any overaccrual by Ford of pre-transfer expenses attributable to the TAA.

(d) The restrictions of sections 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of ERISA shall not apply to the return to Ford of assets deposited or transferred to the Ford VEBA Plan by mistake, plus interest.

Section II. Conditions Applicable to Section I(a) and I(b)

(a) The Committee appoints a qualified Independent Fiduciary to act on behalf of the Ford VEBA Plan for all purposes related to the transfer of the Securities to the Ford VEBA Plan for the duration of the Ford VEBA Plan's holding of the Securities. Such Independent Fiduciary will have sole discretionary responsibility relating to the holding, ongoing management and disposition of the Securities, except for the voting of the Ford Common Stock. The Independent Fiduciary has determined or will determine, before taking any actions regarding the Securities, that each such action or transaction is in the interest of the Ford VEBA Plan.

(b) In the event that the same Independent Fiduciary is appointed to represent the interests of one or more of the other plans comprising the VEBA Trust (*i.e.,* the UAW Chrysler Retiree Medical Benefits Plan and/or the UAW General Motors Company Retiree Medical Benefits Plan) with respect to employer securities deposited into the VEBA Trust, the Committee takes the following steps to identify, monitor and address any conflict of interest that may arise with respect to the Independent Fiduciary's performance of its responsibilities:

(1) The Committee appoints a "conflicts monitor" to: (i) Develop a process for identifying potential conflicts; (ii) Regularly review the Independent Fiduciary reports, investment banker reports, and public information regarding the companies, to identify the presence of factors that could lead to a conflict; and (iii) Further question the Independent Fiduciary when appropriate.

(2) The Committee adopts procedures to facilitate prompt replacement of the Independent Fiduciary if the Committee in its sole discretion determines such replacement is necessary due to a conflict of interest.

(3) The Committee requires the Independent Fiduciary to adopt a written policy regarding conflicts of interest. Such policy shall require that, as part of the Independent Fiduciary's periodic reporting to the Committee, the Independent Fiduciary includes a discussion of actual or potential conflicts identified by the Independent Fiduciary and options for avoiding or resolving the conflicts.

(c) The Independent Fiduciary authorizes the trustee of the Ford VEBA Plan to dispose of the Ford Common Stock (including any Payment Shares or any shares of Ford Common Stock acquired pursuant to exercise of the Warrants), the LLC Interests, the New Notes, or exercise the Warrants, only after the Independent Fiduciary determines, at the time of the transaction, that the transaction is feasible, in the interest of the Ford VEBA Plan, and protective of the participants and beneficiaries of the Ford VEBA Plan.

(d) The Independent Fiduciary negotiates and approves on behalf of the Ford VEBA Plan any transactions between the Ford VEBA Plan and any party in interest involving the Securities that may be necessary in connection with the subject transactions (including but not limited to the registration of the Securities contributed to the Ford VEBA Plan).

(e) Any contract between the Independent Fiduciary and an investment banker includes an

[5] Because the Ford VEBA Plan is not qualified under section 401 of the Code, there is no jurisdiction under Title II of the Act pursuant to section 4975 of the Code. However, there is jurisdiction under Title I of the Act.

acknowledgement by the investment banker that the investment banker's ultimate client is an ERISA plan.

(f) The Independent Fiduciary discharges its duties consistent with the terms of the Ford VEBA Plan, the Trust Agreement, the Independent Fiduciary Agreement, and any other documents governing the Securities, such as the Registration Rights Agreement.

(g) The Ford VEBA Plan incurs no fees, costs or other charges (other than described in the Trust Agreement, the 2009 Settlement Agreement, and the Securityholder and Registration Rights Agreement) as a result of the transactions exempted herein.

(h) The terms of any transaction exempted herein are no less favorable to the Ford VEBA Plan than the terms negotiated at arms' length under similar circumstances between unrelated parties.

Section III. Conditions Applicable to Section I(c)(1) and I(c)(2)

(a) The Committee and the Ford VEBA Plan's third party administrator will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the Ford VEBA Plan's independent auditor. The results of this review will be made available to Ford.

(b) Ford and the applicable third party administrator of the Ford Active Health Plan will review the benefits paid during the transition period and determine the dollar amount of mispayments made, subject to the review of the plan's independent auditor. The results of this review will be made available to the Committee.

(c) Interest on any reimbursed mispayment will accrue from the date of the mispayment to the date of the reimbursement.

(d) Interest will be determined using the applicable 6 month published LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a reimbursement payment, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

Section IV. Conditions Applicable to Section I(c)(3) and I(c)(4)

(a) Ford and the Committee will cooperate in the calculation and review of the amounts of expense accruals related to the TAA, and the amount of any overaccrual shall be made subject to the review of an independent auditor selected by Ford and the amount of any underaccrual shall be made subject to the review of the Ford VEBA Plan's independent auditor.

(b) Ford must make a claim for any underaccrual to the Committee, and the Committee must make a claim for any overaccrual to Ford, as applicable, within the Verification Time Period, as defined in Section VII(cc).

(c) Interest on any true-up payment will accrue from the date of transfer of the assets in the TAA (or the LLC containing the TAA) for the amount in respect of the overaccrual or underaccrual, as applicable, until the date of payment of such true-up amount.

(d) Interest will be determined using the published six month LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a true-up payment in respect of TAA expenses, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

Section V. Conditions Applicable to Section I(d)

(a) Ford must make a claim to the Committee regarding the specific deposit or transfer made in error or made in an amount greater than that to which the Ford VEBA Plan was entitled.

(b) The claim is made within the Verification Time Period, as defined in Section VII(cc).

(c) Interest on any mistaken deposit or transfer will accrue from the date of the mistaken deposit or transfer to the date of the repayment.

(d) Interest will be determined using the published six month LIBOR rate.

(e) If there is a dispute as to the amount, timing or other feature of a mistaken payment, the parties will enter into the Dispute Resolution Procedure found in Section 26B of the 2009 Settlement Agreement and described further in Section VII(c) herein.

Section VI. Conditions Applicable to Section I

(a) The Committee and the Independent Fiduciary maintain for a period of six years from the date (i) The Securities are transferred to the Ford VEBA Plan, and (ii) the shares of Ford Common Stock are acquired by the Ford VEBA Plan through the exercise of the Warrants or Ford's delivery of Payment Shares in settlement of its payment obligations under New Note B, the records necessary to enable the persons described in paragraph (b) below to determine whether the conditions of this exemption have been met, provided that (i) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Committee and/or the Independent Fiduciary, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest other than the Committee or the Independent Fiduciary shall be subject to the civil penalty that may be assessed under ERISA section 502(i) if the records are not maintained, or are not available for examination as required by paragraph (b) below; and

(b) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of ERISA, the records referred to in paragraph (a) above shall be unconditionally available at their customary location during normal business hours to:

(1) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(2) The UAW or any duly authorized representative of the UAW;

(3) Ford or any duly authorized representative of Ford;

(4) The Independent Fiduciary or any duly authorized representative of the Independent Fiduciary;

(5) The Committee or any duly authorized representative of the Committee; and

(6) Any participant or beneficiary of the Ford VEBA Plan or any duly authorized representative of such participant or beneficiary.

(c) None of the persons described above in paragraphs (b)(2), (4)–(6) shall be authorized to examine trade secrets of Ford, or commercial or financial information which is privileged or confidential, and should Ford refuse to disclose information on the basis that such information is exempt from disclosure, Ford shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section VII. Definitions

(a) The term "affiliate" means: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (2) any officer, director, partner, or employee in any such person, or relative (as defined in section 3(15) of ERISA) of any such person; or (3) any corporation, partnership or other entity of which such person is an officer, director or partner. (For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(b) The "Committee" means the eleven individuals consisting of six independent members and five UAW appointed members who will serve as the plan administrator and named fiduciary of the Ford VEBA Plan.

(c) The term "Dispute Resolution Procedure" means the process found in Section 26B of the 2009 Settlement Agreement to effectuate the resolution of any dispute respecting the transactions described in Sections I(c)(1), (c)(2), (c)(3), (c)(4), and (d) herein, and which reads in pertinent part: (1) The aggrieved party shall provide the party alleged to have violated the 2009 Settlement Agreement (Dispute Party) with written notice of such dispute, which shall include a description of the alleged violation and identification of the Section(s) of the 2009 Settlement Agreement allegedly violated. Such notice shall be provided so that it is received by the Dispute Party no later than 180 calendar days from the date of the alleged violation or the date on which the aggrieved party knew or should have known of the facts that give rise to the alleged violation, whichever is later, but in no event longer than 3 years from the date of the alleged violation; and (2) If the Dispute Party fails to respond within 21 calendar days from its receipt of the notice, the aggrieved party may seek recourse to the District Court; provided however, that the aggrieved party waives all claims related to a particular dispute against the Dispute Party if the aggrieved party fails to bring the dispute before the District Court within 180 calendar days from the date of sending the notice. All the time periods in Section 26 of the 2009 Settlement Agreement may be extended by agreement of the parties to the particular dispute.

(d) The term "Exchange Agreement" means the Security Exchange Agreement among Ford, the subsidiary guarantors listed in Schedule I thereto and the LLC, dated as of December 11, 2009.

(e) The term "Ford" or the "Applicant" means Ford Motor Company, located in Detroit, MI, and its affiliates.

(f) The term "Ford Active Health Plan" means the medical benefits plan maintained by Ford to provide benefits to eligible active hourly employees of Ford and its participating subsidiaries.

(g) The term "Ford Common Stock" means the shares of common stock, par value $0.01 per share, issued by Ford.

(h) The term "Ford Credit" means Ford Motor Credit Company LLC, a Delaware limited liability company and an indirect, wholly owned subsidiary of Ford.

(i) The term "Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust" means the sub-account established in the Ford Separate Retiree Account of the VEBA Trust to hold Securities on behalf of the Ford VEBA Plan.

(j) The term "Ford Retiree Health Plan" means the retiree medical benefits plan maintained by Ford that provided benefits to, among others, those who will be covered by the Ford VEBA Plan.

(k) The term "IFS" means Independent Fiduciary Services, Inc., a Delaware corporation, appointed by the Committee to be the Independent Fiduciary.

(l) The term "Implementation Date" means December 31, 2009.

(m) The term "Independent Fiduciary" means a fiduciary that is (1) Independent of and unrelated to Ford, the UAW, the Committee, and their affiliates, and (2) appointed to act on behalf of the Ford VEBA Plan with respect to the holding, management and disposition of the Securities. In this regard, the fiduciary will be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates if (1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Ford, the UAW, the Committee or their affiliates, (2) such fiduciary directly or indirectly receives any compensation or other consideration from Ford, the UAW or any Committee member in his or her individual capacity in connection with any transaction contemplated in this exemption (except that an Independent Fiduciary may receive compensation from the Committee or the Ford VEBA Plan for services provided to the Ford VEBA Plan in connection with the transactions discussed herein if the amount or payment of such compensation is not contingent upon or in any way affected by the independent fiduciary's ultimate decision), and (3) the annual gross revenue received by the fiduciary, in any fiscal year, from Ford, the UAW or a member of the Committee in his or her individual capacity, exceeds 3% of the fiduciary's annual gross revenue from all sources (for federal income tax purposes) for its prior tax year.[6]

(n) The term "LLC" means the Ford-UAW Holdings LLC, established by Ford as a wholly owned LLC, and subsequently renamed VEBA–F Holdings LLC, established to hold the assets in the TAA and certain other assets required to be contributed to the VEBA under the 2008 Settlement Agreement, as amended by the 2009 Settlement Agreement.

(o) The term "LLC Interests" means Ford's wholly owned interest in the LLC.

(p) The term "New Note A" means the amortizing guaranteed secured note maturing on June 30, 2022, in the principal amount of $6,705,470,000, with payments to be made in cash, in annual installments from 2009 through 2022, issued by Ford and referred to in the Exchange Agreement.

(q) The term "New Note B" means the amortizing guaranteed secured note maturing June 30, 2022, in the principal amount of $6,511,850,000, with payments to be made in cash, Ford Common Stock, or a combination thereof, in annual installments from 2009 through 2022, unless prepaid, issued by Ford and referred to in the Exchange Agreement, and as amended by the Note Agreement, effective June 25, 2010.

(r) The term "Note Agreement" means the Agreement, dated as of June 25, 2010 by and among Ford, Ford Credit, and the VEBA Trust, acting by and through IFS, wherein the VEBA Trust will sell New Note A to Ford and Ford Credit and New Note B is amended to add provisions permitting Ford to prepay all or a portion of New Note B, in each case under the terms and conditions set forth therein.

(s) The term "Payment Shares" means any shares of Ford Common Stock issued by Ford to satisfy all or a portion of its payment obligation under New Note B, subject to the terms and conditions specified in New Note B.

(t) The term "published six month LIBOR rate" means the Official British Banker's Association Six Month London Interbank Offered Rate (LIBOR) 11 a.m. GMT "fixing" as reported on Bloomberg page "BBAM[7]".

(u) The term "Securities" means (1) New Note A; (2) New Note B; (3) the Warrants; (4) the LLC Interests, (5) any Payment Shares, and (6) additional shares of Ford Common Stock acquired in accordance with the transactions described in Sections I(a)(2) and (3) of this exemption.

[6] The Department notes that the preceding conditions are not exclusive, and that other circumstances may develop which cause the Independent Fiduciary to be deemed not to be independent of and unrelated to Ford, the UAW, the Committee, and their affiliates.

[7] LIBOR is calculated by Thomson Reuters and published by the British Bankers' Association after 11 a.m. (and generally around 11:45 a.m.) each day (London time). It is a trimmed average of inter-bank deposit rates offered by designated contributor banks, for maturities ranging from overnight to one year. The rates are a benchmark rather than a tradable rate; the actual rate at which banks will lend to one another continues to vary throughout the day.

(v) The term "Securityholder and Registration Rights Agreement" means the Securityholder and Registration Rights Agreement by and among Ford and the LLC, dated as of December 11, 2009.

(w) The term "2008 Settlement Agreement" means the settlement agreement, effective as of August 29, 2008, entered into by Ford, the UAW, and a class of retirees in the case of *Int'l Union, UAW, et al.* v. *Ford Motor Company,* Civil Action No. 07–14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008).

(x) The term "2009 Settlement Agreement" means the 2008 Settlement Agreement, as amended by an Amendment to such Settlement Agreement dated July 23, 2009, effective as of November 9, 2009, entered into by Ford, the UAW, and a class of retirees in the case of *Int'l Union, UAW, et al.* v. *Ford Motor Company,* Civil Action No. 07–14845, 2008 WL 4104329 (E.D. Mich. Aug. 29, 2008), *Order and Final Judgment Granted,* Civil Action No. 07–14845, Doc. #71, (E.D. Mich. Nov. 9, 2009).

(y) The term "TAA" means the temporary asset account established by Ford under the 2008 Settlement Agreement to serve as tangible evidence of the availability of Ford assets equal to Ford's obligation to the Ford VEBA Plan.

(z) The term "Trust Agreement" means the trust agreement for the VEBA Trust.

(aa) The term "UAW" means the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

(bb) The term "VEBA" means the Ford UAW Retirees Medical Benefits Plan (the Ford VEBA Plan) and its associated UAW Retiree Medical Benefits Trust (the VEBA Trust).

(cc) The term "Verification Time Period" means: (1) With respect to each of the Securities other than the payments in respect of the New Notes, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of any such Security to the Ford VEBA Plan) and ending 90 calendar days thereafter; (2) with respect to each payment pursuant to the New Notes, the period beginning on the date of the payment and ending 90 calendar days thereafter; and (3) with respect to the TAA, the period beginning on the date of publication of the final exemption in the **Federal Register** (or, if later, the date of the transfer of the assets in the TAA to the Ford VEBA Plan) and ending 180 calendar days thereafter.

(dd) The term "Warrants" means warrants issued by Ford to acquire 362,391,305 shares of Ford Common Stock at a strike price of $9.20 per share, expiring on January 1, 2013. For purposes of this definition, the term "Warrants" includes additional warrants to acquire Ford Common Stock acquired in partial or complete exchange for, or adjustment to, the warrants described in the preceding sentence, at the direction of the Independent Fiduciary or pursuant to a reorganization, restructuring or recapitalization of Ford as well as a merger or similar corporate transaction involving Ford (each, a corporate transaction), provided that, in such corporate transaction, similarly situated warrantholders, if any, will be treated the same to the extent that the terms of such warrants and/or rights of such warrantholders are the same.

Section VIII. Effective Date

This amendment to PTE 2010–08 is effective as of December 31, 2009, except with respect to Section I(a)(7), which is effective as of June 25, 2010.

Written Comments

The Department invited all interested persons to submit written comments with respect to the notice of proposed exemption on or before May 5, 2011. During the comment period, the Department received 2 telephone inquiries and 2 written comments from participants and/or beneficiaries in the Ford VEBA Plan, which generally concerned the commenters' difficulties in understanding the notice of proposed exemption and/or raised issues outside the scope of the exemption. Furthermore, the Department received a written comment from IFS, the Independent Fiduciary and investment manager of the Ford Employer Security Sub-Account of the Ford Separate Retiree Account of the VEBA Trust, which supported the exemption and suggested two clarifications regarding the Summary of Facts and Representations (the Summary) in the notice of proposed exemption.

Following is a discussion of the aforementioned comment. Any capitalized terms herein not otherwise defined have the meanings ascribed to them in the Summary.

IFS's Comment

IFS's comment generally relates to (1) The number of financial advisers retained by IFS, and (2) the original prepayment terms of New Note B.

A. Number of Financial Advisers Retained by IFS

In its comment, IFS states that the Summary incorrectly implies that it retained financial advisors other than Sutter. As described on page 14076 of the proposed exemption, "[a]fter considerable negotiation, during which it consulted extensively with its legal counsel, Proskauer Rose LLP (Proskauer Rose), and its financial advisers, including Sutter Securities Incorporated (Sutter), IFS states that it entered into an agreement * * *" IFS clarifies that the only financial adviser that it engaged and consulted with was Sutter. Further, IFS notes that, in making a decision whether to enter into the Note Agreement, it did consider the views expressed by the leading investment banking firms with which it met, but none of those firms served as a financial adviser to IFS besides Sutter.

In response to these comments, the Department takes note of the foregoing clarifications and updates to the Summary.

B. Original Prepayment Terms of New Note B

IFS states that Summary does not accurately reflect the original prepayment terms of New Note B. As the Summary describes on page 14078 of the proposed exemption, "[b]y contrast, IFS was aware that the original terms of New Note B did not require any advance notice of Ford's intent to make a prepayment, nor did they require that any prepayment must be made in cash." According to IFS, the original terms of New Note B did in fact require that any prepayments of New Note B were to be made in cash. IFS explains that Sections 2(c) and 2(e) of New Note B permitted Ford to elect to pay annual required principal installments in specific amounts on specific annual "Payment Dates" or, in certain cases with respect to a "Deferred Payment," on specific "Installment Payment Dates" (in each case, as defined in New Note B) in either cash or Ford Common Stock. IFS states that amounts payable under Sections 2(c) and 2(e), described above, were the only payments under New Note B that could be made other than in cash. By contrast, IFS points out, Section 2(g) of New Note B required that prepayments of New Note B on the specified Payment Dates be made in cash, unlike the principal installments under Section 2(c) or 2(e). Furthermore, IFS states that Section 2(b) of New Note B required that all other payments of New Note B be made in cash.

In response to these comments, the Department takes note of the foregoing

clarifications and updates to the Summary.

After giving full consideration to the entire record, including the written comments, the Department has decided to grant this exemption amending PTE 2010–08, as described above. The complete application file is made available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the proposed amendment, published in the **Federal Register** on March 15, 2011 at 76 FR 14074.

FOR FURTHER INFORMATION CONTACT: Warren Blinder of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 8th day of June, 2011.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–14521 Filed 6–10–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: D–11608, Russell Trust Company; and D–11659, Pacific Capital Bancorp Amended and Restated Incentive and Investment and Salary Savings Plan

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice.

ADDRESSES: Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No.____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffitt.betty@dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Russell Trust Company (RTC or the Applicant); Located in Seattle, Washington; [Exemption Application No. D–11608]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Covered Transactions

If the proposed exemption is granted—

(a) The restrictions of sections 406(a)(1)(A), (a)(1)(B), (a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (c)(1)(B), (c)(1)(D), and (c)(1)(E) of the Code, shall not apply, between September 14, 2009 and September 10, 2010, inclusive, to an arrangement involving the following transactions:

(1) The extension of credit, through a revised capital support agreement, to certain employee benefit plans (the Plans) invested, directly or indirectly, in the Russell Securities Lending Short-Term Investment Fund (the SecLending Fund) by the Frank Russell Company (FRC), the parent company of RTC and a party in interest with respect to the Plans, in connection with the SecLending Fund's holding of certain notes (the Notes) issued by Lehman Brothers Holdings Inc. or its affiliates (the Revised SecLending Fund CSA);

(2) The extension of credit, through a revised capital support agreement, to certain Plans invested, directly or indirectly, in the RTC Russell Liquidity Fund (the Liquidity Fund) by FRC in connection with the Liquidity Fund's holding of the Notes (the Revised Liquidity Fund CSA);

(3) The provision of a revised guarantee to FRC by its parent company, the Northwest Mutual Life Insurance Company (NML), a party in interest with respect to the Plans, in order to ensure FRC's foregoing capital support obligation to the SecLending Fund (the Revised SecLending Fund Guarantee);

(4) The provision of a revised guarantee to FRC by NML in order to ensure FRC's foregoing capital support obligation to the Liquidity Fund (the Revised Liquidity Fund Guarantee);

(5) The accrual and periodic payment of certain supplemental yield contributions by FRC to the SecLending Fund (the SecLending Fund Supplemental Yield Contributions); and

(6) The accrual and periodic payment of certain supplemental yield contributions by FRC to the Liquidity Fund (the Liquidity Fund Supplemental Yield Contributions);

(b) The restrictions of sections 406(a)(1)(A), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (E) of the Code shall not apply to the September 10, 2010 cash sale (the Sale) of all of the Notes held by both the SecLending Fund and the Liquidity Fund (taken together, the Funds) to FRC; provided that all of the conditions set forth below in Section II are satisfied.

Section II—Conditions

(a) With respect to the arrangement involving (i) The Revised SecLending Fund CSA and the Revised Liquidity Fund CSA transactions (together, the Revised CSAs), (ii) the Revised SecLending Fund Guarantee and the Revised Liquidity Fund Guarantee transactions (together, the Revised Guarantees), and (iii) the SecLending Fund Supplemental Yield Contributions and the Liquidity Fund Supplemental Yield Contribution transactions (together, the Supplemental Yield Contributions):

(1) The decision to enter into each of these transactions was made on behalf of the Funds (and the employee benefit plans invested, directly or indirectly, in the Funds) by an independent fiduciary (the Independent Fiduciary), who reviewed their terms and conditions of each of the foregoing transactions and determined that they were protective of, and in the interest of, the Funds and the Plans investing therein;

(2) The foregoing transactions were entered into pursuant to written agreements that contained all of the relevant terms and conditions relating to such transactions; and

(3) The Funds did not pay any fees, commissions or other expenses in connection with the foregoing transactions;

(b) With respect to the Sale of the Notes by each Fund to FRC:

(1) The Sale was a one-time transaction for cash;

(2) In connection with the Sale, the applicable Fund received an amount which was equal to the greater of: (i) The market value of the Notes being sold on the date of the Sale; or (ii) the sum of the amortized cost of such Notes, plus any accrued but unpaid interest on such Notes through the earlier of the maturity date of the applicable Note or September 14, 2009, in each case calculated at the contract rate;

(3) The Funds did not pay any fees, commissions or other expenses in connection with the Sale;

(4) The decision to sell all of the Notes held by the Funds to FRC was made by an Independent Fiduciary, who determined that the Sale of the Notes was appropriate for, and in the best interests of, each of the Funds and the Plans invested, directly or indirectly, in the Funds, at the time of the Sale transaction;

(5) The Independent Fiduciary has taken all appropriate actions necessary to safeguard the interests of the Funds, and of the employee benefit plans invested, directly or indirectly, in the Funds, in connection with the transaction;

(6) If the exercise of any of FRC's rights, claims, or causes of action in connection with its ownership of the Notes results in recovering from the issuer of the Notes, or any third party, an aggregate amount that is in excess of the sum of: (i) The Sale price paid for the Notes by FRC; and (ii) interest on such Sale price paid from September 10, 2010 to September 14, 2010, inclusive, made by FRC to the Funds, then FRC will refund such excess amount promptly to the Fund (after deducting all reasonable expenses incurred in connection with the recovery);

(c) RTC and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the person described below in paragraph (d)(1), to determine whether the conditions of this exemption have been met, except that:

(1) No party in interest with respect to a plan which engages in the covered transaction, other than FRC, RTC and their affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (d)(1);

(2) A separate prohibited transaction shall not be considered to have occurred solely because due to circumstances beyond the control of FRC, RTC or their affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period.

(d)(1) Except as provided, below, in paragraph (d)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in paragraph (c) are unconditionally available at their customary location for examination during normal business hours by —

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission; or

(B) Any fiduciary of any plan that engages in the covered transaction, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a plan that engages in the covered transaction, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a plan that engages in the covered transaction, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described, above, in paragraph (d)(1)(B)–(D) shall be authorized to examine trade secrets of FRC, RTC or their affiliates, or commercial or financial information which is privileged or confidential; and

(3) Should RTC refuse to disclose information on the basis that such information is exempt from disclosure, RTC shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Summary of Facts and Representations

1. RTC is a trust company organized under the laws of the State of Washington that is subject to regulation by the Washington State Department of Financial Institutions. RTC provides a wide range of fiduciary and investment management services to a broad array of institutional clients, including employee benefit plans subject to the Act and the Code. RTC serves as discretionary trustee for several commingled employee benefit fund trusts. RTC has numerous affiliates and is a subsidiary of FRC, a Washington corporation. FRC, in turn, is a subsidiary of NML.

2. The Applicant represents that the SecLending Fund is a separate fund of the Russell Trust Company Commingled Employee Benefit Funds Trust (the Trust), a group trust that is exempt from federal income tax pursuant to Rev. Rul. 81–100. The SecLending Fund is used as an investment vehicle for cash collateral received in connection with securities lending activities. The Applicant also represents that, on all dates relevant to the requested exemption, the SecLending Fund had Plan investors who were subject to the Act and the Code. The Liquidity Fund (like its predecessor fund, the Russell Short-Term Investment Fund, or STIF Fund) is a cash sweep vehicle that does not engage in securities lending activities. The Applicant represents that, on all dates relevant to the requested exemption, the assets of both the Liquidity Fund and its predecessor, the STIF Fund, constituted "plan assets" subject to the Act because each of the foregoing funds were collective trust funds maintained by a bank, and included Plan investors who were subject to the Act and the Code. In this connection, the Applicant represents that, under 29 CFR section 2510.3–101(h)(1)(ii), when a plan acquires or holds an interest in such a common or collective fund of a bank, its assets are deemed to include an undivided interest in each of the underlying assets of such fund.

Each of the Funds is bank-maintained for purposes of the Act, and RTC serves as a discretionary trustee for each Fund. The Funds are short-term investment funds that seek to maintain a constant net asset value, or "NAV," equal to $1.00 per unit. RTC has investment discretion with respect to the assets of the Funds, and makes all determinations with respect to the purchase, sale, and holding of the assets by the Funds (within the investment parameters established for each Fund).

3. The Applicant represents that, as of September 15, 2008, numerous collective investment funds maintained by RTC or its affiliates (the RTC CIFs) were direct investors in the STIF Fund. Further, numerous Plans were indirectly invested in the SecLending Fund and the STIF Fund through their investment in the RTC CIFs. One Plan sponsored by RTC or its affiliates had a direct (rather than an indirect) investment in the STIF Fund.

The Lehman Notes

4. On September 15, 2008, both the SecLending Fund and the STIF Fund held Notes issued by Lehman Brothers Holdings Inc. or its affiliates (the Lehman Issuers). The SecLending Fund acquired all of the Notes described in this proposed exemption between September of 2007 and March of 2008, while the STIF Fund acquired the Notes between September of 2007 and August of 2008. The decision both to acquire and to hold the Notes was made by RTC in its capacity as trustee and investment manager for each of the foregoing funds. Prior to investing in the Notes, the Applicant represents that RTC conducted an investigation of the potential investment, examining and considering the economic and other terms of the Notes. RTC represents that the investment in the Notes was consistent with the applicable investment policies and objectives of both the SecLending Fund and the STIF Fund. At the time they were acquired by the foregoing funds, the Notes were rated at least "A" or "A+" by both Moody's and S&P rating agencies. Based on its consideration of the relevant facts and circumstances, RTC determined that it was prudent and appropriate to acquire the Notes.[1]

The Initial Capital Support Agreements and Guarantees

5. On September 15, 2008, each of the Lehman Issuers filed for Chapter 11 bankruptcy protection. As a consequence of the Lehman Issuers' bankruptcy filing, the market value of the Notes decreased substantially and the market for the Notes became relatively illiquid, with prices for actual trades being substantially lower than the SecLending Fund's and the STIF Fund's amortized cost for the Notes. In this connection, the Applicant determined that FRC should immediately provide capital support to both the SecLending Fund and the STIF Fund in an amount sufficient to maintain a constant NAV of

[1] The Department is expressing no opinion herein regarding whether the acquisition and holding of the Notes on, before, or after September 15, 2008 by either the SecLending Fund or the STIF Fund (or its successor fund, the Liquidity Fund) violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. Section 404(a) of the Act also states that a plan fiduciary should diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

Moreover, the Department is not providing any opinion herein as to whether a particular category of investments or investment strategy would be considered prudent or in the best interests of a plan as required by section 404 of the Act. The determination of the prudence of a particular investment or investment course of action must be made by a plan fiduciary after appropriate consideration of those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including a plan's potential exposure to losses and the role the investment or investment course of action plays in that portion of the plan's portfolio with respect to which the fiduciary has investment duties (see 29 CFR 2550.404a–1). The Department also notes that in order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. Thus, a particular investment by a plan, which is selected in preference to other alternative investments, would generally not be prudent if such investment involves a greater risk to the security of a plan's assets than other comparable investments offering a similar return or result.

$1.00 per unit for each of the foregoing funds.

Accordingly, on September 15, 2008, FRC entered into separate capital support agreements with both the SecLending Fund (the Initial SecLending Fund CSA) and the STIF Fund (the STIF Fund CSA). The Applicant explains that, pursuant to these agreements (which, taken together, constitute the Initial CSAs), FRC contractually agreed to provide on-going capital support to both the SecLending Fund and the STIF Fund with respect to the Notes, up to the lesser of: (a) An agreed upon "maximum contribution amount" ($75,000,000 for the STIF Fund and $70,000,000 for the SecLending Fund), which amounts equaled the aggregate par value of the Notes held by the SecLending Fund and the STIF Fund, as applicable, as of September 15, 2008; (b) the difference between the amortized cost of such Notes and any proceeds received by either the SecLending Fund or the STIF Fund as a result of the subsequent sale or other disposition of the Notes by either fund; or (c) the minimum capital contribution amount necessary for each of the foregoing funds to maintain an NAV of $0.995 per unit, after taking into account the market value of the Notes held or disposed of by such fund. On the same date, NML contracted to guarantee FRC's capital support obligations to both the SecLending Fund (under the Initial SecLending Fund Guarantee) and the STIF Fund (under the STIF Fund Guarantee). The Applicant represents that, at all times relevant to this exemption, NML has maintained a rating of AAA by Standard & Poor's.

The Applicant represents that each of the Initial CSAs, as well as the Initial SecLending Fund Guarantee and the STIF Fund Guarantee (which, taken together, constitute the Initial Guarantees) were set to expire on September 15, 2009 unless, prior to that date, the SecLending Fund and the STIF Fund received either full cash repayment of the Notes or capital contributions from FRC and NML equal to the respective maximum contribution amounts pursuant to the Initial CSAs. Each of the Initial CSAs and Initial Guarantees also contained a repayment provision stipulating that, in the event that either the SecLending Fund or the STIF Fund received a capital contribution from FRC (or from NML, as guarantor) with respect to a Note and subsequently received additional payments from or on behalf of the Lehman Issuer in respect of the Note, such fund would repay to FRC (if NML had received contributions equal to its capital contribution) the lesser of: (i) The amount of such capital contribution; or (ii) the amount of such subsequent payments, provided that in no event would such repayment cause the respective fund's NAV per share to fall below $0.995 or such greater amount as required by any nationally-recognized statistical rating organization (NRSRO).[2]

6. The Applicant represents that the decision to enter into the Initial CSAs was a fund-level decision made by RTC (similar to any decision to acquire or dispose of assets) that was intended to limit the downside risk for both the SecLending Fund and the STIF Fund with respect to the Notes, while preserving the upside potential for the foregoing funds, and that this determination did not represent any change to the funds' goals or investment strategies or any deviation from the funds' investment parameters. The Applicant further represents that the relative rights and interests of the Plans with respect to both the SecLending Fund and the STIF Fund (and the RTC CIFs having an interest in each fund) and the terms and conditions of any agreements between RTC and the Plans were not affected by this decision.

The Applicant maintains that the terms of the Initial CSAs and Initial Guarantees executed on September 14, 2008 to provide capital support to both the SecLending Fund and the STIF Fund constituted a lending of money or other extension of credit from a party in interest to an employee benefit plan that satisfied the conditions contained in a class exemption, Prohibited Transaction Exemption (PTE) 80–26; for this reason, the Applicant is not seeking an individual exemption for the period of time during which the Initial CSAs and Initial Guarantees were in force.[3]

Transfer of the Assets of the STIF Fund to the Liquidity Fund

7. On September 11, 2009, RTC reorganized the STIF Fund, and transferred all of the assets of the STIF, including the Notes held by the STIF Fund that were subject to the STIF Fund CSA, to the Liquidity Fund. In connection with this reorganization, the Liquidity Fund became the beneficiary of both FRC's capital support obligations under the STIF Fund CSA and of NML's guarantee of FRC's foregoing capital support obligation pursuant to the STIF Fund Guarantee.

The Retention of an Independent Fiduciary

8. As noted previously, the terms of both the Initial CSAs and the Initial Guarantees were set to expire on September 15, 2009. Expiration of the Initial CSAs, however, would have triggered a contractual obligation that the Funds liquidate the Notes in the market. The Applicant further represents that the Funds' liquidation of the Notes would, in turn, have triggered the payment of FRC's capital support obligations to the Funds. The Applicant states that the capital support payments required under the Initial CSAs represented the amount that would have been necessary to permit each Fund to maintain an NAV of $0.995 per unit. Accordingly, it is represented that, because both FRC and RTC did not believe that it would be in the best interest of either Fund to liquidate the Notes upon the expiration of the Initial CSAs on September 15, 2009, FRC and RTC determined to seek the amendment and extension of the Initial CSAs and the Initial Guarantees for one year, through an expiration date of September 15, 2010.

[2] The Department expresses no opinion herein as to the role of an NRSRO in determining whether a fund's net asset value per share has fallen below $0.9950.

[3] Section IV of PTE 80–26 (as amended at 71 FR 17920, Apr. 7, 2006) provides that, effective as of December 15, 2004, the restrictions of section 406(a)(1)(B) and (D) and section 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only—

(1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or

(2) For a purpose incidental to the ordinary operation of the plan;

(c) The loan or extension of credit is unsecured;

(d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan;

(e) The loan is not described in section 408(b)(3) of ERISA and the regulations promulgated thereunder (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated thereunder (26 CFR 54.4975–7(b)); and

(f) (1) Any loan described in section IV(b)(1) that is entered into on or after April 7, 2006 and that has a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan.

(2) Any loan described in (b)(2) of this paragraph that is entered into for a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan.

The Department offers no opinion herein as to whether each of the applicable conditions for exemptive relief contained in PTE 80–26 were satisfied in this particular instance.

When, in September 2009, RTC determined that it would be necessary and in the best interest of the Funds to extend the terms of the Initial CSAs, RTC considered that such amendments would not qualify for relief in reliance upon PTE 80–26. In this connection, the Applicant represents that, had the Initial CSAs not included termination dates (*i.e.,* September 15, 2009), RTC could have continued to rely upon the exemptive relief provided under PTE 80–26; however, given these fixed termination dates, the amendment and renewal of the terms of the Initial CSAs could have been interpreted as depriving the Funds of payments to which they were contractually entitled to receive. Alternatively, the Applicant represents that the delay of such payments could have been construed as an extension of credit from the Funds to FRC, which would not have been permitted under PTE 80–26 or any other class exemption.[4] In light of these assumptions, the Applicant engaged Fiduciary Counselors Inc. (hereinafter the Independent Fiduciary) to negotiate and approve, on behalf of each Fund (and the Plans invested, directly or indirectly, in each Fund) the amendment and extension of the term of the Initial CSAs for an additional 12 months; this engagement was formalized under a letter agreement dated August 25, 2009 (the Engagement Letter).

9. Pursuant to the Engagement Letter, the Independent Fiduciary was retained to represent the Funds through September 15, 2010. The Independent Fiduciary represents that it is both an "investment adviser" within the meaning of the Investment Advisers Act of 1940 and a "qualified professional asset manager" within the meaning of PTE 84–14. The Applicant further represents that the Independent Fiduciary has provided independent fiduciary services to clients since its incorporation in 1999.

Under the terms of the Engagement Letter, the Independent Fiduciary assumed responsibility for, among other things: (1) Negotiating, on behalf of each Fund, the terms of any amendments to the Initial CSAs on behalf of each Fund and determining that such terms were fair and reasonable to each Fund; (2) determining whether to enter into any amendments on behalf of each Fund and directing RTC to sign any such amendments; (3) monitoring the future capital support agreements on a going-forward basis, including negotiating the terms, and determining the fairness and reasonableness, of any modifications, extensions, or renewals thereof; and (4) determining on behalf of each Fund whether to liquidate the Notes, and determining the fairness and reasonableness of any proposed sale of the Notes to RTC or an affiliate of RTC. The Independent Fiduciary also assumed the same duties on behalf of the Funds with respect to the negotiation and approval of any extension to, and amendment of, the Initial Guarantees made by NML.

The 2009–2010 Payment of Supplemental Yield Contributions to the Funds

10. The Applicant represents that the Independent Fiduciary reviewed the terms of the Initial CSAs and Initial Guarantees in place at the time of its engagement, and the proceeds that each Fund would receive if these instruments expired as scheduled and were not extended. Upon reviewing the terms of the Initial CSAs, the Independent Fiduciary determined that it would be in the best interests of the investors in each Fund for FRC to make additional periodic cash contributions, or Supplemental Yield Contributions, to each Fund. By letter agreement dated September 14, 2009, FRC agreed, after negotiation with the Independent Fiduciary, to pay the Supplemental Yield Contributions to each Fund. The amount of such contributions would be determined by a mathematical formula. The first step of this formula would require computing the sum of (a) the amount of capital support that would have been required under the Initial CSAs as of September 14, 2009, had the Notes been sold by the Funds at the September 14, 2009 closing market price, and (b) the market value of the Notes as of September 14, 2009 based upon the closing market price on such date (the date prior to the date that accrual of such Supplemental Yield Contributions commenced). The sum resulting from the first step of the formula (*i.e.,* the Base Amount) would then be multiplied by an annual interest rate figure equal to (a) t he 3-month LIBOR (expressed as an annual rate) as quoted by Bloomberg at end of day print on September 14, 2009, and updated every three months thereafter, plus (b) 0.15 percent. If any Notes were sold by a Fund after September 14, 2009, the Supplemental Yield Contributions would be proportionately reduced based on the par value of such sold Notes as a proportion of the aggregate par value of the Notes. The Supplemental Yield Contributions would accrue daily beginning on September 15, 2009, and would be paid to the Funds in arrears on a monthly basis. The Supplemental Yield Contributions would also not reduce or offset any of FRC's obligations under the proposed revision of the capital support agreements. FRC's obligation to make Supplemental Yield Contributions to the Funds pursuant to the September 14, 2009 letter agreement would cease only upon the occurrence of a termination event under the proposed revision of the capital support agreements (such as the sale of all of the Notes held by the Funds). Because accrual of the Supplemental Yield Contributions would commence on September 15, 2009, the Independent Fiduciary determined that, in the event of such sale, RTC (or its affiliate) would not be required to pay interest for any purchased Notes with respect to the period following September 14, 2009.

11. The following chart documents the monthly payment of accrued Supplemental Yield Contributions that were made by FRC to the Funds during the years 2009 and 2010, pursuant to the foregoing contractual arrangements:

	Supplemental yield contributions to the SecLending fund	Supplemental yield contributions to the liquidity fund
September 2009 (9/14/09 through 9/30/09)	$13,910.18	$12,647.38
October 2009	25,365.61	23,062.88
November 2009	24,547.37	22,318.91
December 2009	24,000.34	21,821.54
January 2010	23,014.31	20,925.03
February 2010	20,787.12	18,900.02
March 2010	23,135.59	21,035.30
April 2010	22,485.94	20,444.63
May 2010	23,235.47	21,126.11
June 2010	31,220.59	28,386.33
July 2010	39,163.17	35,608.04
August 2010	39,163.17	35,608.04
September 2010 (9/1/10 through 9/14/10)	17,686.68	16,081.05
Total Supplemental Yield Contributions Paid by FRC to the Funds:	327,715.54	297,965.26

The 2009 Revision of the CSAs and the Guarantees

12. In addition to requiring FRC to make Supplemental Yield Contributions to the Funds, the Independent Fiduciary (in a letter to RTC dated September 14, 2009) directed RTC and FRC to execute,

[4] The Department offers no opinion herein concerning whether any exemptive relief for which the Applicant may have been eligible under PTE 80–26 on or before September 15, 2009 would have expired upon the termination of the Initial CSAs and the Initial Guarantees. Moreover, the Department offers no opinion herein concerning the Applicant's contention that the inclusion of termination dates in the Initial CSAs and the Initial Guarantees would have made the Applicant ineligible for exemptive relief under PTE 80–26 after September 15, 2009.

on behalf of each Fund, revised capital support agreements between FRC and each of the Funds (namely, the Revised CSAs), as well as revised guarantees by NML of FRC's capital support obligations to each of the Funds under the Revised CSAs (namely, the Revised Guarantees). Each of the foregoing contracts were executed on September 14, 2009. The Applicant represents that a new provision was included in each of the Revised CSAs stipulating that if all of the Notes were sold after September 14, 2009 (or another event occurs triggering FRC's capital support obligations under each of the Revised CSAs, the total amount of capital support payable to each Fund under each of the Revised CSAs would be no less than the Base Amount, minus the sum of (a) The proceeds actually received by the Fund from the disposition of the Notes, plus (b) all payments received by the Fund in respect of the Notes to the extent not already included in (a), and excluding the amount of any Supplemental Yield Contributions. The Independent Fiduciary determined that this provision, in conjunction with the Supplemental Yield Contributions, would help to ensure that each Fund's total recovery with respect to the Notes and the required capital support would not decline as a result of the adoption of the Revised CSAs.

Further, the Independent Fiduciary determined it to be appropriate and in the best interest of the Funds to include a new provision in each of the Revised CSAs stipulating that, in the event the Funds determined to sell some or all of the Notes to RTC or an affiliate of RTC (through either a single transaction or series of transactions with each Fund), the purchase price for such Notes would be equal to the greater of (a) The market value of such Notes on the date of any such transaction, or (b) the sum of (i) the amortized cost of such Notes to be sold in such transaction, plus (ii) any accrued but unpaid interest through the earlier of the maturity date of the applicable Note or September 14, 2009 (the date prior to the date that accrual of the Supplemental Yield Contributions commenced) calculated at the contract rate.

It is represented that each of the Revised CSAs, as well as the Revised SecLending Fund Guarantee and the Revised Liquidity Fund Guarantee (which, taken together, constitute the Revised Guarantees) were set to expire on September 15, 2010 (unless, prior to that date, the Funds received either full cash payment for the Notes or capital contributions from FRC and NML equal to their respective maximum contribution amounts under each of the Revised CSAs). It is further represented that the Funds paid no fees or commissions in connection with the negotiation of either the Revised CSAs and Guarantees or the payment of the Supplemental Yield Contributions, nor for the Independent Fiduciary's services relating to such matters.

13. The Applicant represents that the Revised CSAs and the Revised Guarantees, as well as the Supplemental Yield Contributions, benefitted the investors in the Funds because the Independent Fiduciary determined that they placed the Funds in a position that was at least as favorable as that which would have been obtained had the Initial CSAs and Guarantees expired by their terms on September 15, 2009 and FRC and NML had made payments to the Funds in satisfaction of its capital support obligations. The Applicant also represents that the Revised CSAs and the Revised Guarantees provided the Funds the opportunity to seek recovery of their amortized cost or the full par value of the Notes, either through recovery from the Lehman Issuers, liquidation on the market or a potential sale to RTC or its affiliate. The Supplemental Yield Contributions were intended to ensure that the Funds remained in a position that was at least as favorable as if FRC had satisfied its capital support obligations upon expiration of the Initial CSAs on September 15, 2009 and the proceeds were invested in instruments providing a comparable yield. The Applicant also states that the Revised CSAs contained new provisions ensuring that the Funds would receive an aggregate amount not less than the Base Amount in connection with any sale of the Notes (or other event that would otherwise trigger FRC's capital support obligations). The foregoing arrangements were negotiated by and determined to be fair, reasonable and in the best interest of each of the Funds by the Independent Fiduciary.

The 2010 Sale of the Notes to FRC by the Funds

14. At a meeting of its investment committee on September 2, 2010, the Independent Fiduciary discussed and approved the terms of a proposed sale of the Notes by the Funds to FRC. Pursuant to this determination, RTC and FRC negotiated the terms of the Sale of the Notes with the Independent Fiduciary. The Independent Fiduciary concluded that the Sale transaction would benefit the investors in the Funds because it would permit the Funds to recover an amount equal to or in excess of its amortized cost for each of the Notes and maintain an NAV per unit of at least $0.995, while also retaining a right to recover amounts received by FRC in excess of the sale price for the Notes. In addition, under the terms of the Sale negotiated by the Independent Fiduciary, each Fund would continue to earn interest under the Supplemental Yield Agreements until the settlement of the transaction, and would be entitled to additional amounts in the event that FRC subsequently recovered an amount greater than the sale price adjusted for interest accrued through the date of the refund to the relevant Fund.[5] Given these factors, the Independent Fiduciary determined that the terms of the Sale were fair and reasonable to each Fund. Accordingly, by the terms of a letter dated September 8, 2010, the Independent Fiduciary directed in writing that all of the Notes held by each of the Funds be sold to FRC.

15. In accordance with the Independent Fiduciary's direction, the Sale of all of the Notes from the Liquidity Fund to FRC was executed on September 10, 2010, and settled two business days later on September 14, 2010 for an aggregate price of $75,296,431; similarly, the Sale of all of the Notes from the SecLending Fund to FRC was executed on September 10, 2010, and settled two business days later on September 14, 2010 for an aggregate price of $70,436,820. The Applicant represents that the Sale resulted in an NAV for the Liquidity Fund of $1.0000 per unit and for the SecLending Fund of $0.9991 per unit.[6] For each Note, the foregoing amounts paid by FRC (which were computed in accordance with the formula specified in the Revised CSAs with each of the Funds) represented the sum of (i) The applicable Fund's amortized cost of the Note ($75,000,000 in the aggregate for the Liquidity Fund and $70,000,000 for the SecLending Fund), plus (ii) any accrued but unpaid interest on the

[5] In this connection, the Independent Fiduciary stipulated that should FRC, through the exercise of any of its rights, claims, or causes of action related to its ownership of any Notes after the Sale date, recover from the Lehman Issuers or any third party an aggregate amount that was in excess of the sum of (a) the purchase price paid for the Notes by FRC and (b) interest on such purchase price from and after the date of the Sale transaction (determined at the rate of interest equal to the rate of interest applicable to the Supplemental Yield Contributions), FRC would refund such excess promptly to the applicable Fund (after deducting all reasonable expenses incurred in connection with the recovery).

[6] The Applicant represents that as of the close of business on September 10, 2010, the net asset value of the Liquidity Fund's portfolio was approximately $2,137,000,000, or $1.0000 per unit. As of the close of business on September 10, 2010, the net asset value of the SecLending Fund's portfolio was approximately $1,767,000,000, or $0.9991 per unit.

Notes that was owed by the Lehman Issuers through the earlier of the maturity date of the applicable Note or September 14, 2009, calculated at the contract rate ($296,431 of aggregate interest for the Liquidity Fund, and $436,820 in aggregate interest for the SecLending Fund).[7] The following chart summarizes the par values and the September 10, 2010 sale prices [8] of the various Notes held by each of the Funds:

Fund	Lehman note	Aggregate par value	Acquisition price & date	Sale price
Liquidity Fund	Lehman Brothers Disc (52525MJF6) Maturity Date: 9/18/08; Face Interest Rate: 2.80%	$10,000,000	$9,981,000 (acquired 8/22/08)	$10,000,000
	Lehman Brothers V/R (52517P5C1) Maturity date: 9/26/08; Face Interest Rate: 3.75%	35,000,000	35,000,000 (acquired 8/28/07)	35,218,410
	Lehman Brothers V/R (52525KAB8) Maturity Date: 3/11/09; Face Interest Rate: 3.75%	30,000,000	30,000,000 (acquired 2/11/08)	30,078,021
Total		$75,000,000	$74,981,000	$75,296,431
SecLending Fund	Lehman Brothers V/R (52517P5C1) Maturity Date: 9/26/08; Face Interest Rate: 5.51%	$40,000,000	$40,000,000 (acquired 8/28/07)	$40,249,611
	Lehman Brothers V/R (52517P5C1) Maturity Date: 9/26/08; Face Interest Rate: 5.51%	30,000,000	30,000,000 (acquired 8/28/07)	30,187,209
Total		$70,000,000	$70,000,000	$70,436,820

16. The Applicant represents that, with the execution of the Sale on September 10, 2010, the terms of Revised CSAs, the Revised Guarantees, and the agreement concerning the accrual and payment of the Supplemental Yield Contributions each ceased to be effective as of that date. On September 14, 2010, the Sale transaction was settled when each of the Funds received the sale price of the Notes from FRC. The Applicant further represents that, while FRC's obligation to accrue the Supplemental Yield Contributions technically terminated on September 10, 2010, FRC and RTC (following discussions with the Independent Fiduciary) determined that these contributions would continue to accrue (and would be paid on) the date that the Sale settled. Accordingly, the final installment of the Supplemental Yield Contributions to the Funds was paid on the settlement date of September 14, 2010.

17. In summary, the Applicant represents that the transactions described herein satisfied the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) The transactions were easily identifiable, have been completed, and will not require ongoing monitoring; (b) The Revised CSAs, the Revised Guarantees, and the Supplemental Yield Contributions were negotiated and documented, and were monitored by the Independent Fiduciary through their expiration; (c) The Sale was a one-time transaction for cash that was negotiated by the Independent Fiduciary, and neither of the Funds bore any brokerage commissions, fees or other expenses in connection with the Sale; (d) The transactions enabled the Funds, and the participating investors therein, including the Plans invested therein, to receive (i) Continued capital support from FRC with respect to the Notes under the Revised CSAs (guaranteed by NML) and (ii) periodic payment of the Supplemental Yield Contributions; (e) The Independent Fiduciary determined the foregoing arrangements placed the Funds in a position that was at least as favorable as the position they would have been in had the Initial CSAs and the Initial Guarantees expired by their terms; (f) The Revised CSAs and the Revised Guarantees provided the Funds the opportunity to seek recovery of their amortized cost, the full par value, or at least a greater portion of the par value of the Notes, either through recovery from the Lehman Issuers, liquidation on the market, or a potential Sale to RTC or its affiliates; and (g) the Independent Fiduciary determined that it would be in the best interests of the investors in each Fund for FRC to make Supplemental Yield Contributions to each Fund.

Notice to Interested Persons: Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the Applicant and the Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

For Further Information Contact: Mr. Mark Judge of the Department at (202) 693–8550 (This is not a toll-free number).

Pacific Capital Bancorp Amended and Restated Incentive and Investment and Salary Savings Plan (the Plan); Located in Santa Barbara, California; [Application No. D–11659]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

[7] Pursuant to the terms of the Revised CSAs, the one-time payment to the Funds of accrued but unpaid interest on the Notes owed by the Lehman Issuers was separate from, and in addition to, the accrual and payment of the Supplemental Yield Contributions to the Funds that commenced on September 15, 2009.

[8] The Applicant further represents that, prior to the consummation of the Sale, the Independent Fiduciary confirmed that the sale price calculated pursuant to the formula discussed above for each Note was greater than the market value of such Note as determined by reference to price quotes provided by two major investment brokers (since no transaction on the Notes was available through Bloomberg). Specifically, Barclays provided a quote of $19.25 (representing a bid price per unit received for each Note as of September 10, 2010), and J.P. Morgan provided a quote of $19.00 (representing the bid price per unit for each Note as of September 10, 2010). These prices reflect a decrease of approximately 81% from the par value of the Notes.

Section I: Transactions

If the proposed exemption is granted, effective October 27, 2010, the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and 4975(c)(1)(E) of the Code,[9] shall not apply:

(1) To the acquisition of certain rights (the Rights) by the Plan in connection with an offering (the Offering) of shares of the common stock (the Stock) in Pacific Capital Bancorp (Bancorp) by Bancorp, a party in interest with respect to the Plan, and

(2) To the holding of the Rights received by the Plan during the subscription period of the Offering; provided that the conditions as set forth in section II of this proposed exemption were satisfied for the duration of the acquisition and holding.

Section II: Conditions

The relief provided in this exemption is conditioned upon adherence to the material facts and representations described, herein, and as set forth in the application file and upon compliance with the conditions, as set forth in this proposed exemption.

(1) The receipt of the Rights by the Plan occurred in connection with the Offering and was made available by Bancorp on the same terms to all shareholders of the Stock of Bancorp;

(2) The acquisition of the Rights by the Plan resulted from an independent act of Bancorp, as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to the acquisition of such Rights;

(3) Each shareholder of the Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Stock of Bancorp held by such shareholder;

(4) The Board of Directors of Bancorp (the Board) decided that the Offering should be made available to all shareholders of the Stock, including the Plan, as record owner of the Stock held in the Plan on behalf of the accounts of the individual participants (the Invested Participants) all or a portion of whose accounts in the Plan are invested in the Stock, in accordance with provisions under such Plan for individually-directed investment of such accounts;

(5) The decision to exercise the Rights or to refrain from exercising the Rights was made by each of the Invested Participants in accordance with the provision under the Plan for individually-directed accounts; and

(6) No brokerage fees, commissions, subscription fees, or any other charges were paid by the Plan with respect to the Offering, and no brokerage fees, commissions, or other monies were paid by the Plan to any broker in connection with the exercise of the Rights.

Effective Date: This proposed exemption, if granted, will be effective, October 27, 2010, the date the Plan acquired the Rights.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan. Bancorp is the sponsor of the Plan. The Plan is intended to satisfy the requirements under section 401(a), 401(k) and 401(m) of the Code. The Plan is a participant directed account plan intended to satisfy the requirements of section 404(c) of the Act.

As of August 30, 2010, the Plan had approximately 1,417 participants. The fair market value of the total assets of the Plan, as of August 30, 2010, was $64,324,228.

The Compensation & Benefits Committee (the Committee) became the fiduciary responsible for Plan matters on October 2010. The Committee is comprised of non-employee members of the Board of Bancorp. It is represented the members of the Committee satisfy the independence requirements of NASDAQ, the Code, and various banking laws and regulations. As a fiduciary with respect to the Plan, the Committee is a party in interest to the Plan, pursuant to section 3(14)(A) of the Act.

On December 1, 2007, the Charles Schwab Trust Company (Charles Schwab Trust), a California chartered non-depository trust company, became the directed trustee for the Plan. Charles Schwab Trust also serves as custodian for the Plan. As custodian, Charles Schwab Trust executes investment directions in accordance with participants' written or electronic instructions. In addition Charles Schwab Corporate and Retirement Services (CSC) is the broker for the Plan. As service providers to the Plan, Charles Schwab Trust and CSC are parties in interest to the Plan, pursuant to section 3(14)(B) of the Act.

2. The Plan offers to participants the following permitted investment options in which to invest all or a portion of such participants' account balances: (a) The Stock, (b) a variety of money market funds, (c) common collective trusts, (d) mutual funds, and (e) self-directed accounts. Charles Schwab Stable Value Fund is the common collective trust fund in which Plan assets are invested. Certain Plan assets are also invested in mutual funds managed by an affiliate of Charles Schwab Trust.

3. The application was filed on behalf of Bancorp, a bank holding company, located in Santa Barbara, California. Pacific Capital Bank, National Association (the Bank) is a wholly-owned subsidiary of Bancorp. The Bank is a full-service, state-chartered commercial bank located in California whose deposits are insured by the Federal Deposit Insurance Corporation. As of June 30, 2010, the Bank had $7.1 billion in assets. The Bank, as an employer any of whose employees are covered by the plan, is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act. Substantially all of the activities of Bancorp are conducted through the Bank. Bancorp, as the parent of the Bank, is a party in interest with respect to the Plan, pursuant to section 3(14)(E) of the Act.

4. The Stock of Bancorp is listed for quotation on the NASDAQ Global Select Market under the symbol PCBC. The total number of shares of Stock outstanding, as of August 18, 2010, was 47,406,579. During the period beginning on October 19, 2010 and ending on November 15, 2010, the Stock was trading on the NASDAQ at prices ranging between $0.73 and $0.42 per share.

The Stock is a "qualifying employer security," as defined under section 407(d)(5) of the Act and 4975(e) of the Code.

5. On April 29, 2010, Bancorp and the Bank entered into an investment agreement with SB Acquisition Company LLC, a wholly-owned subsidiary of Ford Financial Fund, L.P. (the Investor) for the sale to the Investor of 225,000,000 shares of Stock at $0.20 per share and 455,000 shares of mandatorily convertible participating voting preferred stock at $1,000 per share. The aggregate consideration paid to Bancorp by the Investor for these securities was $500 million in cash. Before accounting for any issuance of Stock pursuant to the Offering, the Investor owned approximately 86 percent (86%) of the outstanding Stock.

As a condition of the investment agreement with the Investor, Bancorp agreed to commence the Offering, which is the subject of this proposed exemption, whereby shareholders of record would receive non-transferable rights to purchase a number of shares of

[9] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Stock equal to 20 percent (20%) of the then outstanding shares of Stock, at a purchase price equal to $0.20 per share. It is represented that the Rights were non-transferable to allow only legacy shareholders of the Stock the opportunity to purchase additional shares of the Stock to help offset the share dilution such shareholders incurred when the Stock was acquired by the Investor. Accordingly, Bancorp, as a corporate entity and issuer of securities, announced in connection with the Offering the issuance of up to 726,975,565 shares of Stock, as required by the investment agreement: (a) To raise equity capital; and (2) to provide existing shareholders the opportunity to purchase common stock at the same price per share paid by the Investor for the Stock. Bancorp intends to use the net proceeds from the Offering for general corporate purposes, including an investment in the Bank.

6. Under the terms of the Offering, all shareholders of the Stock of Bancorp, such as the Invested Participants, received at no charge the Rights to purchase, through the exercise of such Rights, the Stock being issued by Bancorp in connection with the Offering. With respect to the Rights, under the terms of the Offering, 15.335 Rights were issued for every share of the Stock held by each shareholder on August 30, 2010, (the Record Date). All Rights were rounded down to the nearest whole number for each shareholder. For example, an Invested Participant's account in the Plan that held 543 shares of Stock, as of the Record Date, would entitle such Invested Participant to 8,326 Rights ($15.335 \times 543 = 8{,}326.905$ rounded down to 8,326), pursuant to the Offering, which in turn would permit an Invested Participant to purchase 8,326 shares of Stock.

It is represented that the Rights were not listed, traded or quoted on NASDAQ or on any other stock exchange or trading market. Further, the terms of the Offering stipulated that the Rights could not be sold, assigned or transferred.

7. The Rights could only be exercised in whole numbers. Upon exercise, each of the Rights permitted a shareholder of the Stock of Bancorp to purchase one (1) additional share of Stock at a subscription price of $0.20 per share. A shareholder had the right to choose to exercise some, all, or none of his Rights. The exercise of any of the Rights was irrevocable. It is represented that there were no over-subscription rights associated with the Offering. The Rights could be exercised beginning October 18, 2010, the date of the issuance of the prospectus describing the Offering. The Offering closed with respect to the exercise of the Rights on November 19, 2010, at 5 p.m. New York City time. Pursuant to the terms of the Offering all unexercised Rights expired and became worthless after the closing of the Offering.

8. It is represented that on the Record Date, the Plan was the record owner of 1,573,450 shares of Stock which were allocated to the individual accounts of the 1,417 Invested Participants. The aggregate fair market value of the assets of the Plan invested in shares of the Stock, on the Record Date, based on a closing price of $0.859 on that date was $1,351,593.55. The approximate percentage of the fair market value of the Plan's total assets invested in the Stock is 2.1 percent (2.1%). As of the Record Date, 1,573,450 shares of Stock constituted approximately 3.32 percent (3.32%) of the 47,406,579 shares of Stock outstanding.

Based on the ratio of 15.335 Rights for each share of Stock held, the Plan acquired 24,128,855 Rights as a result of the Offering. It is represented that the Rights held by the Plan for the accounts of Invested Participants were plan assets. It is represented that 11,751,048 shares of Stock were subscribed for by the Plan. Of the Rights received by the Plan on behalf of accounts of the Invested Participants, all Rights were either exercised or expired.

It is represented that the Committee recommended to the Board that it was in the best interest of the Invested Participants to provide such Invested Participants with an opportunity to participate in (and the ability to make the decision not to participate in) the Offering which would prevent dilution of such Interested Participants' interest in Bancorp from the exercise of the Rights by other shareholders of Bancorp. Accordingly, the Board after considering the Committee's recommendation concluded, as a matter of California Corporations law and as a matter of fairness, that the Rights should be made available to all shareholders of Bancorp, including the Plan, as record owner of the Stock. In this regard, the Plan holds title to the Stock on behalf of the accounts of the Invested Participants, in accordance with provisions under such Plan for individually-directed investment of such accounts. The Offering was approved by the Board on April 28, 2010, August 18, 2010, and August 27, 2011. It is represented that all members of the Board participated in each vote to approve the Offering and each vote was unanimously approved by the Board.

On the dates of approval, the Board was comprised of eleven (11) individuals, two (2) of whom are employees of Bancorp or a subsidiary. The following table identifies the members of the Board and the Committee and each member's respective ownership interests in Bancorp, as of August 27, 2010:

Name	Number of shares owned	Ownership percentage [10]	Employed by Bancorp or subsidiary
Edward E. Birch	6,485	0.014	No.
H. Gerald Bidwell	0	0.000	No.
Richard S. Hambleton, Jr., Committee Member	6,485	0.014	No.
D. Vernon Horton	9,317	0.020	Yes. Mr. Horton provides services to Bancorp on a part-time basis.
S. Lachlan Hough	0	0.000	No.
Roger C. Knopf	363	0.001	No.
George S. Leis	6,318	0.013	Yes. Mr. Leis was the CEO of Bancorp at the time of the Offering and is currently the Chief Operating Officer of Bancorp.
William R. Loomis, Committee Member	0	0.000	No.
John R. Mackall	10,909	0.023	No.

[10] This ownership percentage is based on 47,406,579 common shares of Stock outstanding on August 18, 2010.

Name	Number of shares owned	Ownership percentage [10]	Employed by Bancorp or subsidiary
Richard A. Nightingale, Committee Member	15,204	0.032	No.
Kathy J. Odell, Committee Member	7,285	0.015	No.

9. Enclosed with a form letter mailed to each participant in the Plan, on October 19, 2010, Bancorp provided a copy of the prospectus which described the Offering, a document providing frequently asked questions and answers regarding the Offering for Plan participants, an election form for Plan participants, and a return envelope addressed to BNY Mellon Shareowner Services (BMSS), the subscription agent.

10. In order to exercise the Rights, Invested Participants had to complete an election form, deliver such form to BMSS, the subscription agent, liquidate sufficient existing investments in the Plan in order to generate the full subscription price in cash, transfer such cash to the Schwab Value Advantage Money Institutional Prime Shares Fund by the close of business on the fourth (4th) business day (November 15, 2010) prior to the expiration of the Offering on November 19, 2010. It is represented that the date, November 15, 2010, provided the third party administrator with four (4) days within which to compile the exercise elections of the Invested Participants, update the Plan records, and forward such exercise elections to the subscription agent.

It is represented that 404 Invested Participants out of 1,417 decided to exercise the Rights. In this regard, the Rights of such Invested Participants were executed on November 19, 2010.[11] It is represented that November 19, 2010, the last day of the Offering, was selected as the exercise date with respect to the Rights held under the Plan for the purpose of providing a protective cut-off date, where if on such date the exercise price of the Rights was greater than the trading price of the Stock, the election to exercise would not be honored and the Rights would be canceled. The Invested Participants exercised 11,751,048 Rights. As a result of this exercise, the Invested Participants received 11,751,048 shares of Stock. Accordingly, it is represented that the Plan received total gross proceeds of $2,350,209.60 as a result of participation in the Offering.

11. It is represented that no brokerage fees, commissions, subscription fees, or any other charges were paid by the Plan with respect to the Offering, and no brokerage fees, commissions, or other monies were paid by the Plan to any broker in connection with the exercise of the Rights. It is further represented that Bancorp did not charge any fees or sales commissions to issue the Rights or to issue the Stock upon the exercise of the Rights.

12. It is represented that, as soon as practicable after the expiration of the Offering, BMSS, as the subscription agent, arranged for the distribution of the Stock purchased as a result of the exercise of the Rights. It is further represented that the Stock purchased in connection with the Offering was eligible for trading on NASDAQ by the Invested Participants at any time after such Stock was credited to such participants' accounts.

13. Bancorp has requested an exemption with respect to the transactions which are the subject of this proposed exemption. In this regard, relief has been requested: (a) For the acquisition of the Rights by the Plan in connection with the Offering by Bancorp, and (b) for the holding of the Rights by the Plan during the subscription period of the Offering. It is represented that the Rights acquired by the Plan satisfy the definition of "employer securities," pursuant to section 407(d)(1) of the Act. As the Rights were not stock or a marketable obligation, such Rights do not meet the definition of "qualifying employer securities," as set forth in section 407(d)(5) of the Act. Accordingly, the subject transactions constitute an acquisition and holding on behalf of a plan, of an employer security which is not a qualifying employer security, in violation of section 407(a) of the Act, for which the applicant has requested relief from sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act. The subject transactions also raise conflict of interest issues by fiduciaries of the Plan for which relief from the prohibitions of section 406(b)(1) and 406(b)(2) of the Act has been requested.

14. It is represented that the subject transactions have already been consummated. In this regard, the Plan acquired the Rights pursuant to the Offering on October 27, 2010, and held such Rights pending the closing of the Offering on November 19, 2010. As there was insufficient time between the dates when the Plan acquired the Rights and when such Rights expired, to apply for and be granted an exemption, Bancorp is seeking a retroactive exemption to be granted, effective as of October 27, 2010, the date that the Plan acquired the Rights.

15. Bancorp represents that the proposed exemption is administratively feasible. In this regard, the acquisition and holding of the Rights by the Plan were one-time transactions that involved a distribution of the Rights to all shareholders at no cost. It is represented that it is customary for the industry involved to make a rights offering available to all shareholders.

16. Bancorp represents that the transactions which are the subject of this proposed exemption are in the interest of the Plan, because the subject transactions represented a valuable opportunity to the accounts of the Invested Participants in the Plan to buy the Stock at a discount. It is represented that this discount could be realized by selling the Stock immediately after the exercise of the Rights and investing the proceeds from such sale of the Stock in other investment options under the Plan. If the Plan had not participated in the Offering, the Invested Participants whose accounts in the Plan were invested in shares of the Stock on the Record Date would not have received the benefit all other shareholders of the Stock received.

Bancorp represents that denial of the requested exemption would result in the imposition of a tax to be paid by any disqualified person who participated in the prohibited transaction. Thus, the denial of the exemption would result in an economic loss to Bancorp, to its shareholders, and therefore to the Invested Participants.

17. Bancorp represents that the proposed exemption provides sufficient safeguards for the protection of the Plan and its participants and beneficiaries. In this regard, the participation in the Offering protected the accounts of the Invested Participants in the Plan from having their interest in the Stock being diluted as a result of the Offering.

It is further represented that the interests of the accounts of Invested Participants in the Plan were adequately

[11] It is represented that the Invested Participants rely on the relief provided by the statutory exemption, pursuant to section 408(e) of the Act for the exercise of the Rights. The Department is offering no view, as to whether the requirements of the statutory exemption provided in section 408(e) of the Act have been satisfied. Further, the Department, herein, is not providing any relief with respect to the exercise of the Rights.

protected in the decision for the Plan to acquire and hold the Rights in that such decision was made by the Board which was independent of management and Bancorp.

The accounts of Invested Participants in the Plan were protected against economic loss in that, if on November 15, 2010, the trading price of the Stock was not greater than $0.20 per share, all Rights that such Invested Participants had elected to exercise would be immediately cancelled.

18. In summary, Bancorp represents that the subject transactions satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The receipt by the Plan of the Rights occurred in connection with the Offering made available by Bancorp on the same terms to all shareholders of the Stock of Bancorp;

(b) The acquisition of the Rights by the Plan resulted from an independent act of Bancorp, as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to the acquisition of such Rights;

(c) Each shareholder of the Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Stock of Bancorp held by such shareholder;

(d) The Board decided that the Offering should be made available to all shareholders of the Stock, including the Plan, as record owner of the Stock held in the Plan on behalf of the accounts of the Invested Participants, all or a portion of whose accounts in the Plan are invested in the Stock, in accordance with provisions under such Plan for individually-directed investment of such accounts;

(e) The decision to exercise the Rights or to refrain from exercising the Rights was made by each of the Invested Participants in accordance with the provision under the Plan for individually-directed accounts; and

(f) No brokerage fees, commissions, subscription fees, or any other charges were paid by the Plan with respect to the Offering, and no brokerage fees, commissions, or other monies were paid by the Plan to any broker in connection with the exercise of the Rights.

Notice to Interested Persons

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include current participants and beneficiaries, former participants and beneficiaries, who were participants and beneficiaries as of the Record Date, alternate payees, the Committee, the Board, and the administrator, all trustees of the plan, and any other parties determined to be "interested persons."

It is represented that each of these classes of interested persons will be notified of the publication of the Notice by first class mail, within fifteen (15) days of publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise all interested persons of their right to comment and to request a hearing.

All written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

For Further Information Contact: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 8th day of June, 2011.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–14520 Filed 6–10–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Federal-State Extended Benefits Program—Methodology for Calculating "on" or "off" Total Unemployment Rate Indicators for Purposes of Determining When a State Begins and Ends an Extended Benefit Period

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: UIPL 16–11 informs states of the methodology used to calculate the "on" or "off" total unemployment rate (TUR) indicators to determine when extended benefit (EB) periods begin and end in a state. UIPL 16–11 is published below to inform the public and is available at: *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3027*.

SUPPLEMENTARY INFORMATION:

UIPL 16–11: Federal-State Extended Benefits Program—Methodology for Calculating "on" or "off" Total Unemployment Rate Indicators for Purposes of Determining When a State Begins and Ends an Extended Benefit Period

1. *Purpose.* To inform states of the new methodology used to calculate the "on" or "off" total unemployment rate (TUR) indicators to determine when extended benefit (EB) periods begin and end in a state.

2. *References.* The Federal-State Extended Unemployment Compensation Act of 1970 (EUCA); Section 2005 of Division B, Title II, the Assistance for

Unemployed Workers and Struggling Families Act, Public Law (Pub. L.) 111–5; Section 502 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111–312; 26 U.S.C. 3304(a)(11) note; 20 CFR 615.12; Unemployment Insurance Program Letter (UIPL) No. 45–92; UIPL No. 4–10, Change 6.

3. *Background.* EB is payable in a state only during an EB period in the state, that is, a period of unusually high unemployment. Section 203, EUCA, provides methods for determining whether a state's current unemployment situation qualifies as an EB period. EB periods are determined by "on" and "off" indicators (commonly referred to as triggers) in the state. Section 203(d), EUCA, provides for an "on" indicator based on the insured unemployment rate (IUR). The IUR is calculated weekly by the states using administrative data on state unemployment compensation claims filed and the total population of employed individuals covered by unemployment insurance. States trigger "on" EB if the IUR for the most recent 13-week period equals or exceeds 5 percent and equals or exceeds 120 percent of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years. The calculation of the relationship between the current rate and prior year's rates is commonly referred to as the "look-back."

The Unemployment Compensation Amendments of 1992, Pub. L. 102–318, added Section 203(f), EUCA, to provide for an optional alternative indicator that states may use to trigger "on" EB based on the TUR. That indicator requires that, for the most recent three months for which data for all states is published, the average TUR in the state (seasonally adjusted) for the most recent three-month period equals or exceeds 6.5 percent and the average TUR in the state (seasonally adjusted) equals or exceeds 110 percent of the average TUR for either or both of the corresponding three-month periods in the two preceding calendar years (look-back). The 1992 amendments also provided for a calculation of a "high unemployment period" when the TUR in a state equals or exceeds 8 percent and meets the 110 percent look-back described above, permitting the payment of additional weeks of EB. Section 203(f)(3), EUCA, provides that "determinations of the rate of total unemployment in any state for any period * * * shall be made by the Secretary." An EB period ends when the state no longer meets any of the "on" triggers provided for in state law.

Regulations at 20 CFR 615 implement the provisions of EUCA relating to the IUR indicators, including how they will be calculated. The regulation, at 20 CFR 615.12, explains the IUR triggers and how the rates are calculated. The regulation does not address the TUR indicator. The Department is issuing this guidance to describe how the TUR indicators are calculated for purposes of determining whether a state meets the 110 percent look-back requirement. The Department plans to promulgate regulations about this methodology in the near future.

In the absence of explicit guidance and regulation, the Department previously adapted a portion of the existing guidance for the IUR look-back indicator as a basis for calculating the TUR look-back indicator as well. Specifically, in computing the look-back percentage for the TUR trigger the procedure for determining the number of significant digits from the resulting fraction followed 20 CFR 615.12(c)(3).

The TUR trigger is calculated using unemployment rates determined by the Bureau of Labor Statistics. These rates are determined using sampled data and therefore have error around them. In contrast, IUR triggers are calculated from administrative data and thus represent the full universe. Because of these differences in the calculation of the insured and total unemployment rates, the Department has determined that an appropriate methodology for calculating the look-back on the TUR indicator is to switch from truncation at the fourth decimal place as used for the IUR to rounding at the second decimal place.

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 permitted states to amend state law in order to make determinations of whether there is an "on" or "off" indicator by comparing current unemployment rates to the unemployment rates for the corresponding period in the three preceding years. Authority to use this three-year look-back applies only for weeks of unemployment beginning after December 17, 2010, and ending on or before December 31, 2011. The Department will also use the methodology described below in determining whether a state meets the three-year TUR look-back criteria for those states that chose to amend their law to take advantage of this temporary authority.

4. *Methodology.* The Department will now use the following method of computing the current rate as a percentage of the comparable rate in prior years (look-back) for the TUR indicator: On a monthly basis, the three month average, seasonally adjusted rate of total unemployment is divided by the same measure for the corresponding three months in each of the applicable prior years, that is, either a two- or three-year look-back, as specified in state law. The resultant decimal fraction is then rounded to the hundredths place (the second digit to the right of the decimal place). The resulting number is then multiplied by 100 and reported as an integer and compared to the statutory threshold to determine the state's trigger status.

5. *Effective date of implementation.* In order to give full effect to this methodology, and to ensure that all unemployed individuals who are eligible to receive EB are paid in a timely manner, the Department is implementing the methodology described in Section 4 of this guidance retroactive to April 16, 2011.

6. *Action requested.* Administrators are to provide this information to the appropriate staff.

7. *Inquiries.* Please direct inquiries to the appropriate Regional Office.

Dated: June 6, 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–14478 Filed 6–10–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,671]

Hewlett Packard, Global Parts Supply Chain, Global Product Life Cycles Management Unit, Including Teleworkers Reporting to Houston, TX; Notice of Intent To Terminate Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on November 8, 2010, applicable to workers and former workers of Hewlett Packard, Global Parts Supply Chain, Global Product Life Cycles Management Unit, including teleworkers reporting to Houston, Texas (subject firm). The Department's Notice of certification was published in the **Federal Register** on November 23, 2010 (75 FR 71460).

At the request of the State of Texas, the Department reviewed the

certification applicable to workers and former workers of the subject firm. The State alleged that the subject worker group is concurrently eligible to apply for Trade Adjustment Assistance (TAA) benefits under a previously issued certification.

The review of information supplied by the State shows that the same worker group was covered under an existing certification for all workers of Hewlett Packard Company, Enterprise Business Division, Technical Services America, Global Parts Supply Chain Group, including leased workers from QFlex, North America Logistics and UPS teleworkers across Texas and on-site, Houston, Texas (TA–W–74,466I; issued September 10, 2010). The Department's Notice of certification was published in the **Federal Register** on September 10, 2010 (75 FR 57982).

Since eligible workers covered under TA–W–74,671 who have not yet received TAA benefits will be eligible to apply for these benefits under TA–W–74,466I (a certification issued two months before TA–W–74,671), the Department is terminating the later certification. It is the Department's intent to terminate the latter certification to correct the duplicate coverage of eligible workers and the possibility of unintended duplication of benefits.

Pursuant to 29 CFR 90.17(b), the group of workers or any persons showing a substantial interest in the termination of this certification are invited to submit written comments to the Director, Office of Trade Adjustment Assistance, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210, no later than ten (10) days from the date of the publication of this Notice in the **Federal Register**.

Pursuant to 29 CFR 90.17(d), any termination shall apply only to those workers who are totally or partially separated after the termination date specified in the determination.

Signed in Washington, DC, this 6th day of June, 2011

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–14563 Filed 6–10–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility to Apply For Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than June 23, 2011.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than June 23, 2011.

Copies of these petitions may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail, to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or to *foiarequest@dol.gov.*

Signed at Washington, DC, this 2nd day of June 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

Appendix

TAA PETITIONS INSTITUTED BETWEEN 5/23/11 AND 5/27/11

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
80192	Sykes Enterprises (Workers)	Tampa, FL	05/24/11	05/20/11
80193	Vicount Industries (State/One-Stop)	Farmington Hills, MI	05/24/11	05/23/11
80194	Kingston Technology Company Inc. (Workers)	Fountain Valley, CA	05/24/11	05/23/11
80195	Preferred Dental Labs (Company)	Rosland, NJ	05/24/11	05/23/11
80196	T-Shirt International Inc. (State/One-Stop)	Franklin, WI	05/24/11	05/23/11
80197	EMH Amherst Hospital (Company)	Amherst, OH	05/25/11	05/20/11
80198	Coviden (Company)	San Jose, CA	05/25/11	05/20/11
80199	Stimson Lumber Company (Workers)	Gaston, OR	05/25/11	05/24/11
80200	Accentia Physicians Services Inc. (Workers)	Lauderhill, FL	05/25/11	05/24/11
80201	Bradington-Young, LLC (Company)	Hickory, NC	05/27/11	05/25/11
80202	J. Kinderman & Sons, Inc. (Workers)	Philadelphia, PA	05/27/11	05/26/11

[FR Doc. 2011–14564 Filed 6–10–11; 8:45 am]

BILLING CODE 4510–FN–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 11–06]

Notice of the June 22, 2011 Millennium Challenge Corporation Board of Directors Meeting; Sunshine Act Meeting

AGENCY: Millennium Challenge Corporation.

TIME AND DATE: 10 a.m. to 12 p.m., Wednesday, June 22, 2011.

PLACE: Department of State, 2201 C Street, NW., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Information on the meeting may be obtained from Melvin F. Williams, Jr., Vice President, General Counsel and Corporate Secretary via e-mail at *Corporatesecretary@mcc.gov* or by telephone at (202) 521–3600.

STATUS: Meeting will be closed to the public.

MATTERS TO BE CONSIDERED: The Board of Directors (the "Board") of the Millennium Challenge Corporation ("MCC") will hold a meeting to discuss compact operations highlights, policy reform and reinstatement of Niger Threshold Program. The agenda items are expected to involve the consideration of classified information and the meeting will be closed to the public.

Dated: June 9, 2011.

Melvin F. Williams,

VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.

[FR Doc. 2011–14647 Filed 6–9–11; 11:15 am]

BILLING CODE 9111–03–P

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

National Endowment for the Arts; National Council on the Arts 173rd Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the National Council on the Arts will be held on June 23–24, 2011 in Rooms 527 and M–09 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting, from 12:15 p.m.–1:45 p.m. on June 23rd, will be closed for National Medal of Arts review and recommendations. The remainder of the meeting, from 9 a.m. to 11 a.m. on June 24th (ending time is approximate) in Room M–09, will be open to the public on a space available basis. Following opening remarks by the Chairman, the Council will vote on grants and guidelines. After the voting there will be presentations by Michael Harasimowicz, Vice Wing Commander, 70 Intelligence Surveillance and Reconnaissance Wing, Fort Meade, MD on Blue Star Museums; by Mayor Cedric B. Glover, Shreveport, LA on Creative Placemaking at Work; and by Lorna Jordan of Lorna Jordan Studios, Environmental Art in Madison, WI. The meeting will adjourn after announcement of voting results and concluding remarks.

The closed portions of meetings are for the purpose of review, discussion, evaluation, and recommendations on awards under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 15, 2011, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

If, in the course of the open session discussion, it becomes necessary for the Council to discuss non-public commercial or financial information of intrinsic value, the Council will go into closed session pursuant to subsection (c)(4) of the Government in the Sunshine Act, 5 U.S.C. 552b. Additionally, discussion concerning purely personal information about individuals, submitted with grant applications, such as personal biographical and salary data or medical information, may be conducted by the Council in closed session in accordance with subsection (c)(6) of 5 U.S.C. 552b.

Any interested persons may attend, as observers, Council discussions and reviews that are open to the public. If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TTY–TDD 202/682–5429, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from the Office of Communications, National Endowment for the Arts, Washington, DC 20506, at 202/682–5570.

Dated: June 8, 2011.

Kathy Plowitz-Worden,

Panel Coordinator, Office of Guidelines and Panel Operations.

[FR Doc. 2011–14561 Filed 6–10–11; 8:45 am]

BILLING CODE 7537–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7018; NRC–2008–0369]

Environmental Assessment and Finding of No Significant Impact for Special Nuclear Material License Application From Tennessee Valley Authority for Watts Bar Nuclear Plant, Unit 2, Spring City, TN

AGENCY: Nuclear Regulatory Commission.

ACTION: Publication of Environmental Assessment and Finding of No Significant Impact.

FOR FURTHER INFORMATION CONTACT: Mary T. Adams, Senior Environmental Engineer, Advanced Fuel Cycle, Enrichment, and Uranium Conversion Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. *Telephone:* 301–492–3113; *Fax number:* 301–492–3359; *E-mail: Mary.Adams@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license to Tennessee Valley Authority (TVA), to authorize the receipt, possession, inspection, and storage of special nuclear material (SNM) in the form of 193 fresh fuel assemblies at TVA's Watts Bar site in Spring City, TN. This license would be subject to the requirements of Title 10 of the Code of Federal Regulations (10 CFR), part 70. TVA plans to use this SNM in operating its proposed Watts Bar Nuclear Plant, Unit 2 (WBN2). TVA's request for authorization to operate WBN2 is the subject of a separate 10 CFR part 50 licensing action being evaluated by the NRC. TVA's existing reactor at the Watts Bar site, Unit 1 (WBN1), has operated since 1996.

The NRC has prepared an environmental assessment (EA), set forth below, in support of the SNM storage license, in accordance with 10 CFR part 51 (Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions), which implements section 102(2) of the National Environmental Policy Act

(NEPA) of 1969, as amended 42 U.S.C. 4321, *et seq.* Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate regarding issuance of the SNM license.

II. Background

NEPA requires a Federal agency to prepare an environmental impact statement (EIS) for any major federal action having the potential to significantly affect the quality of the human environment. Consistent with their responsibilities as Federal agencies under NEPA, both TVA and NRC previously prepared EISs regarding the operation of Units 1 and 2 at the Watts Bar Nuclear site. Some of the relevant history in this regard is briefly summarized below.

In 1978, the NRC published NUREG–0498, Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant Unit No. 1 and 2 (FES–OL). After safety issues were raised, TVA decided not to pursue its WBN reactor licenses for several years. Regarding operation of Unit 1, NRC prepared Supplement 1 to NUREG–0498 in April 1995 (ML081430592), to evaluate changes in environmental impacts that occurred as a result of changes made in the WBN Plant design and methods of operations after the 1978 FES–OL.

The TVA Final Supplemental EIS for Unit 2 was issued in June 2007 (ML080510469). The related Record of Decision by the TVA Board of Directors was published in the **Federal Register** on August 15, 2007 (72 FR 45859), and the 2007 EIS was submitted to the NRC on February 15, 2008. Table 2–1 of the 2007 EIS provides a TVA summary of the potential environmental effects of operating WBN2.

On March 4, 2009, pursuant to 10 CFR part 50, TVA submitted an updated application to the NRC for a power reactor operating license (OL) for WBN2 (ML090700378). The TVA Final Safety Analysis Report (FSAR) supporting the WBN2 OL request was submitted to the NRC on April 30, 2009 (ML091400067).

On September 11, 2009 (74 FR at 46799), the NRC published a notice of intent to prepare a second supplement to NUREG–0498—the NRC EIS for WBN that was issued in 1978 and supplemented in 1995. NRC anticipates that the draft of this second supplement will be published for public comment in mid-2011. The scope of the EA below is limited to assessing the potential impacts of the receipt, possession, inspection, and storage of fresh reactor fuel at the Watts Bar site that would be used to operate WBN2 if such authorization is later granted. The EA's scope does not include completion of construction, or operation, of WBN2.

III. Environmental Assessment

Pursuant to 10 CFR part 70, Domestic Licensing of Special Nuclear Material, TVA applied for an SNM license by application dated November 12, 2009 (ML100120487). The license would authorize TVA to receive, possess, inspect, and store SNM (in the form of 193 fully-assembled fresh fuel assemblies) for potential future use in its proposed WBN2 reactor.

Description of the Proposed Action

The proposed action is to issue TVA a 10 CFR part 70 license authorizing it to receive, possess, inspect, and store SNM in the form of 193 fully-assembled fuel assemblies that would later form the initial reactor core of WBN 2. The SNM in the fuel assemblies would be enriched up to 5% in the isotope U–235. The fresh fuel assemblies for WBN2 would be received and stored in areas common to WBN1 and WBN2. Specifically, these assemblies would be stored either in the WBN1 storage racks within the WBN1 fuel storage vault, or in the WBN1 spent fuel pool. TVA requested that its SNM license term last until June 30, 2013, or until it receives an OL for WBN2. The safety and environmental reviews for the proposed WBN2 OL are not part of the proposed action evaluated in this EA.

Need for the Proposed Action

TVA anticipates receiving the initial core of WBN 2 before NRC would issue the OL for the Unit 2 reactor. TVA needs this SNM license to authorize WBN 2 to receive, possess, inspect, and store the fresh fuel during the time period before the OL is issued. If an OL is issued, the OL would authorize use of the fresh fuel as well as the receipt, possession, storage, and use of additional fresh fuel that would be needed for operating WBN2. Thus, a separate Part 70 license would no longer be required and would be terminated.

Alternatives to the Proposed Action

TVA needs this SNM license to authorize WBN2 to receive, possess, inspect, and store the fresh fuel assemblies during the time period before the issuance of any WBN2 OL. An alternative to the proposed action is for NRC not to issue the SNM license. In that case, TVA would be unable to receive the fresh fuel for the initial WBN2 reactor core, causing a start-up delay if the OL for WBN2 were later granted.

Environmental Impacts of the Proposed Action and Alternatives

Section 1.3 of the November 12, 2009, SNM license application describes the affected environment, including site geography, demographics, meteorology, hydrology, and geology. The proposed activity is limited to the receipt, possession, inspection, and storage of SNM in the form of 193 fuel assemblies, and would have no significant impact on any of these site features. Issuance of a license to receive, possess, inspect, and store SNM in the form of 193 fresh fuel assemblies at the Watts Bar site is thus not expected to have any significant impact on the environment. Table 2–1 in TVA's 2007 EIS provides a summary of the potential environmental effects of operating WBN2. TVA's EIS considers the impacts of WBN2 operation, including surface water quality; groundwater quality; aquatic ecology; terrestrial quality; threatened and endangered species; wetlands; natural areas; cultural resources; socioeconomics, environmental justice, and land use; floodplains and flood risk; seismic effects; climatology and meteorology; nuclear plant safety and security; radiological effects; radiological waste; and spent fuel transportation and storage. The impacts of the activities that would be authorized by the SNM license are a very small part of the overall impacts of the operation of WBN2.

As discussed above, the fresh fuel would be received and stored in an existing auxiliary building containing a storage vault and a spent fuel pool where WBN1 fuel is currently stored. The uranium in fresh fuel decays primarily by alpha emission; alpha particles cannot escape the fuel cladding, so there are no worker exposures or environmental effluents from the alpha decay. Uranium also decays by spontaneous fission at a very low rate, thereby generating neutrons that escape the cladding and would result in an extremely low dose to an individual standing close to the fuel. Although fresh fuel emits neutrons, the neutrons do not become environmental effluents. There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public because the WBN2 fuel is in the form of sealed fuel rods in finished assemblies.

Part 20 of 10 CFR establishes standards for the protection of workers and members of the public against ionizing radiation resulting from activities conducted under licenses issued by the NRC. Under part 20, the

annual total effective dose equivalent must not exceed 1 mSv [0.1 rem] (100 mrem/1 mSv) for members of the public. The effluent limits in 10 CFR part 20, Appendix B, ensure that the effluent discharges are kept within the annual part 20 dose limits. In addition to meeting the annual dose limits, an NRC licensee is required to have a program with the goal of achieving doses that are as low as reasonably achievable (ALARA). The worker protection and environmental protection programs that are currently used for the receipt and storage of WBN1 fuel would also be used for the receipt and storage of WBN2 fuel, and will ensure that there would be no significant exposure to workers and members of the public under the proposed action. Thus, the proposed action is not expected to have a significant environmental impact.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Stevens Fishery Conservation and Management Act are expected from the receipt and storage of fresh fuel at WBN2. There are no impacts to the air or ambient air quality. There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources.

Section 3.16 of TVA's 2007 EIS quantifies the impacts of transportation of fresh fuel, enriched to 5% in the U–235 isotope. Transport of the 193 fresh fuel assemblies from a fuel fabrication facility would require approximately 20 truck trips. Un-irradiated new fuel assemblies will be shipped in packages that comply with the regulations in 10 CFR 71, Subpart E, Package Approval Standards. The only human exposure from the shipment of fresh fuel assemblies would be to those in direct view of the unpackaged assemblies and to assigned truck drivers. The exposure in the cab of a fuel transport truck was estimated to be 0.1 millirem per hour from neutrons, and exposure to transportation personnel was estimated to be less than 1 millirem per shipment. This level would not cause any significant health effects.

If WBN2 is licensed to operate, TVA would comply with all NRC, State, and Federal requirements for the transport of un-irradiated fuel, as it currently does for fuel deliveries to WBN1. Therefore, based on the above, the NRC finds that the impacts of WBN2 fresh fuel transport and delivery on human health and the environment would be minimal.

An alternative to the proposed action is for NRC not to issue the SNM license. In that case, TVA would be unable to receive, possess, and store the fresh fuel until and unless NRC issues the OL for WBN2 under 10 CFR part 50, which would authorize these activities. Denial of the SNM application would result in no change in current environmental impacts.

Fuel Handling Accident Analyses

The November 12, 2009, SNM license application includes analyses of three dropped fuel assembly accident scenarios and one dropped gate scenario. These analyses are part of the TVA FSAR (Section 9.0, Auxiliary Systems; 9.1, Fuel Storage and Handling; 9.1.1, New Fuel Storage; Section 9.1 9.1.1.3, Safety Evaluation) supporting its part 50 application for a WBN2 OL (ML091400648), which TVA incorporated by reference in its SNM license application. Therein, TVA described the fresh fuel storage conditions and concluded that a criticality accident during receipt, inspection, possession, and storage is not credible. TVA determined, and NRC review confirmed, that there would be no significant environmental impacts from these accident scenarios. The radiation safety, criticality safety, and fire safety aspects of the proposed activities are evaluated in chapters 3, 4, and 5, respectively, of the Safety Evaluation Report supporting issuance of the SNM license.

The NRC staff concluded that the proposed action to authorize WBN2 to receive, possess, inspect, and store fresh fuel under 10 CFR, part 70 would not significantly affect the environment.

Alternative Use of Resources

The proposed action does not involve the use of any different resources than those considered in the NRC's Final Environmental Statement for the WBN1 and WBN2, NUREG–0498, dated December 1978, and the NRC's supplement to the Final Environmental Statement (NUREG–0498 Supplement 1), dated April 1995 (ML081430592).

List of Agencies and Persons Consulted and Identification of Sources Used

In accordance with Consultation Procedures in Appendix D of NUREG–1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, August 2003, on September 30, 2010, the NRC staff consulted with Ruben Crosslin of the Tennessee Bureau of Radiological Health, regarding this EA. The State official had no comments on the draft EA.

Finding of No Significant Impact

The NRC reviewed the documents submitted by TVA in support of its Part 70 license application for the WBN2 facility—including those incorporated by reference from its part 50 operating license application for the WBN2 facility—and found no significant environmental impacts from the proposed fresh fuel assembly storage and handling. On the basis of this EA, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an EIS for the proposed action.

IV. Further Information

Documents related to this action, including the application for license and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this Notice are:

TVA Application for a Special Nuclear Material License for Watts Bar Nuclear Plant Unit 2 in Accordance with 10 CFR part 70, "Domestic Licensing of Special Nuclear Material," dated November 12, 2009 (ML100120487).

TVA Watts Bar Nuclear Plant (WBN)—Unit 2—Final Safety Analysis Report (FSAR), Amendment 93, dated April 30, 2009 (ML091400067).

TVA Watts Bar Nuclear Plant (WBN)—Unit 2—Final Supplemental Environmental Impact Statement for the Completion and Operation of Watts Bar Nuclear Plant Unit 2, dated June 2007 (ML080510469).

NRC Generic Environmental Impact Statement, License Renewal of Nuclear Plants, Main Report, Section 6.3—Transportation, Table 9.1 Summary of findings on NEPA issues for license renewal of nuclear power plants NUREG–1437, Volume 1, Addendum 1, dated August 1999 (ML040690720).

NRC Final Environmental Statement related to the operation of Watts Bar Nuclear Plant Units 1 and 2, dated April 1995 (ML081430592).

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact

the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O1F21, One White Flint North, 11555 Rockville Pike Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland this 7th day of June, 2011.

For the Nuclear Regulatory Commission.

Robert K. Johnson,

Chief Fuel Manufacturing Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission.

[FR Doc. 2011–14559 Filed 6–10–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Digital Instrumentation and Control Systems; Notice of Meeting

The ACRS Subcommittee on Digital Instrumentation and Control Systems (DI&C) will hold a meeting on June 22, 2011, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, June 7, 2011—8:30 a.m. until 5 p.m.

The Subcommittee will hear a briefing on the results and status of new NRC nuclear power plant digital system research activities which deal with Inventory and Certification of digital systems, operating experience for digital systems, and analyzing failure models for digital systems. The Subcommittee will hear presentations by and hold discussions with the Office of Nuclear Regulatory Research staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Mrs. Christina Antonescu (Telephone 301–415–6792 or E-mail: *Christina.Antonescu@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be e-mailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010 (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please contact Ms. Jessie Delgado (Telephone 301–415–7360) to be escorted to the meeting room.

Dated: June 6, 2011.

Yoira Diaz-Sanabria,

Acting Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–14550 Filed 6–10–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS), Meeting of the ACRS Subcommittee on Advanced Boiling Water Reactor; Notice of Meeting

The ACRS Subcommittee on Advanced Boiling Water Reactor (ABWR) will hold a meeting on June 21, 2011, Room T–2B1, 11545 Rockville Pike, Rockville, MD.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed to protect information that is security related or proprietary pursuant to 5 U.S.C. 552b(c)(4).

The agenda for the subject meeting shall be as follows: *June 21, 2011—8:30 a.m. until 5p.m.*

The Subcommittee will review selected Chapters of the Safety Evaluation Report (SER) with no open items, and selected action items resulting from prior ACRS reviews associated with the Combined License Application (COLA) for the South Texas Project (STP) Units 3 and 4. The Subcommittee will hear presentations by and hold discussions with the NRC staff, Nuclear Innovation North America (NINA), and other interested persons. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Ms. Maitri Banerjee (Telephone 301–415–6973 or E-mail: *Maitri.Banerjee@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2010, (75 FR 65038–65039).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the website cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please contact Ms. Jessie Delgado (Telephone 301–415–7360) to be escorted to the meeting room.

Dated: June 6, 2011.

Cayetano Santos,

Chief, Reactor Safety Branch A, Advisory Committee on Reactor Safeguards.

[FR Doc. 2011–14548 Filed 6–10–11; 8:45 am]

BILLING CODE 7590–01–P

OVERSEAS PRIVATE INVESTMENT CORPORATION

Sunshine Act; Board of Directors Meeting

June 23, 2011.

TIME AND DATE: Thursday, June 23, 2011, 10 a.m. (Open Portion) 10:15 a.m. (Closed Portion).

PLACE: Offices of the Corporation, Twelfth Floor Board Room, 1100 New York Avenue, NW., Washington, DC.

STATUS: Meeting OPEN to the Public from 10 a.m. to 10:15 a.m. Closed portion will commence at 10:15 a.m. (approx.).

MATTERS TO BE CONSIDERED:

1. President's Report.
2. Approval of March 10, 2011 Minutes (Open Session).
3. Confirmation: Jay L. Koh as Vice President, Investment Funds.

FURTHER MATTERS TO BE CONSIDERED: (Closed to the Public 10:15 a.m.).

1. Reports.
2. Finance Project—Egypt and Jordan.
3. Finance Project—Global.
4. Finance Project—Global.
5. Finance Project—India and Southeast Asia.
6. Finance Project—India, Philippines, Sri Lanka and Southeast Asia.
7. Finance Project—Vietnam, Cambodia and Laos.
8. Finance Project—Israel.
9. Finance Project—Sub-Saharan Africa and North Africa.
10. Finance Project—Zambia, Malawi, Mozambique, Tanzania and Uganda.
11. Approval of March 10, 2011 Minutes (Closed Session).
12. Pending Major Projects.

Written summaries of the projects to be presented will be posted on OPIC's Web site on or about June 6, 2011.

CONTACT PERSON FOR INFORMATION: Information on the meeting may be obtained from Connie M. Downs at (202) 336–8438.

Dated: June 9, 2011.

Connie M. Downs,

Corporate Secretary, Overseas Private Investment Corporation.

[FR Doc. 2011–14675 Filed 6–9–11; 4:15 pm]

BILLING CODE 3210–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting on June 22, 2011 at 10 a.m., in the Auditorium, Room L–002.

The subject matters of the Open Meeting will be:

Item 1: The Commission will consider whether to adopt new rules and rule amendments under the Investment Advisers Act of 1940 to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These rules and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things, increase the statutory threshold for registration of investment advisers with the Commission, require advisers to hedge funds and other private funds to register with the Commission, and address reporting by certain investment advisers that are exempt from registration.

Item 2: The Commission will consider whether to adopt rules that would implement new exemptions from the registration requirements of the Investment Advisers Act of 1940 for advisers to venture capital funds and advisers with less than $150 million in private fund assets under management in the United States. These exemptions were enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The new rules also would clarify the meaning of certain terms included in a new exemption for foreign private advisers.

Item 3: The Commission will consider whether to adopt a rule defining "family offices" that will be excluded from the definition of an investment adviser under the Investment Advisers Act of 1940.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: June 8, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–14720 Filed 6–9–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, June 16, 2011 at 3 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, June 16, 2011 will be:

institution and settlement of injunctive actions; institution and settlement of administrative proceedings; consideration of amicus participation; an opinion; and other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

June 9, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–14719 Filed 6–9–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting

on June 15, 2011 at 10 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be:

The Commission will consider whether to propose amendments to Rule 17a–5—the broker-dealer reporting rule—under the Securities Exchange Act of 1934.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

June 8, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–14672 Filed 6–9–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64614; File No. SR–CBOE–2011–053]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Option Expiration Months Open for Trading on the Exchange

June 7, 2011.

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 June 3, 2011, the Chicago Board Options Exchange, Incorporated (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] 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 its rules to permit the Exchange to list additional expiration months if such expiration months are listed on another exchange. The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend CBOE's Rules to permit the Exchange to list additional expiration months if such expiration months are listed on another exchange. This filing is based on a filing previously submitted by NASDAQ OMX PHLX, Inc. ("PHLX") [4] and by International Securities Exchange, LLC ("ISE").[5]

Pursuant to Interpretation and Policy .03 to Rule 5.5, the Exchange typically opens four (4) expiration months for each class of options open for trading on the Exchange: The first two being the two nearest months, regardless of the quarterly cycle on which that class trades; the third and fourth being the next two months of the quarterly cycle previously designated by the Exchange for that specific class. For example, if the Exchange listed, in late April, a new stock option on a January-April-July-October quarterly cycle, the Exchange would list the two nearest term months (May and June) and the next two expiration months of the cycle (July and October). When the May series expires, the Exchange would add January series. When the June series expires, the Exchange would add August series as the next month, and would not add April.

In 2010, for competitive reasons, the Exchange established a pilot program pursuant to which CBOE would list up to an additional two expiration months, for a total of six expiration months for each class of options open for trading on the Exchange (the "Additional Expiration Months Pilot").[6]

PHLX submitted a proposal to adopt rules that permit it to list an unlimited number of expiration months and series for each class of standard options opened for trading on that exchange. Specifically, PHLX amended its rules so that it can open "at least one expiration month" for each class of standard options open for trading on that exchange. CBOE does not believe that its Additional Expiration Months Pilot restricts the total number expirations that CBOE may list under its Rules. However, at least one other exchange (ISE), which has adopted a similar Additional Expiration Months Pilot has filed to expressly permit the listing of additional series if such series are listed on at least one other registered national securities exchange.

For competitive reasons, CBOE proposes to add new Interpretation and Policy .19 to Rule 5.5 and new Interpretation and Policy .12 to Rule 24.9 to permit the Exchange to list additional expiration months on options classes opened for trading on the Exchange if such expiration months are opened for trading on at least one other national securities exchange. This proposed rule change will allow CBOE to match the listing of expiration months that other exchanges list.

The Exchange notes that the proposed rule change affords additional flexibility in that it will permit the exchange to list those additional expiration months that have an actual demand from market participants thereby potentially reducing the proliferation of classes and series. The Exchange believes the proposed rule change is proper, and indeed necessary, in light of the need to have rules that permit the listing of identical expiration months across exchanges for products that multiply-listed and fungible with one another. The Exchange believes that the proposed rule change should encourage

[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. 63700 (January 11, 2011) 76 FR 2931 (January 18, 2011) (SR–PHLX–2011–04).

[5] *See* Securities Exchange Act Release No. 64343 (April 26, 2011), 76 FR 24546 (May 2, 2011) (SR–ISE–2011–26).

[6] *See* Securities Exchange Act Release No. 63185 (October 27, 2010), 75 FR 67419 (November 2, 2010) (SR–CBOE–2010–97). As stated in footnote 5 at page 67419, CBOE does not believe that Rule 5.5.03 limits the maximum number of expiration months that may be listed. Rule 5.5(a) and 5.5(c) provide CBOE with the flexibility to add additional expiration months, which the Exchange has previously done. By establishing the Additional Series Pilot Program, CBOE did not limit its existing ability.

competition and be beneficial to traders and market participants by providing them with a means to trade on the Exchange securities that are listed and traded on other exchanges.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act [7] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposed rule change will permit the Exchange to accommodate requests made by its Trading Privilege Holders and other market participants to list the additional expiration months and thus encourage competition without harming investors or the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b-4(f)(6) thereunder.[11]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal should promote competition by allowing the Exchange, without undue delay, to list and trade option series that are trading on other options exchanges. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–053 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–CBOE–2011–053. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–053 and should be submitted on or before July 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–14516 Filed 6–10–11; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(1).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day prefiling requirement in this case.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64617; File No. SR–CBOE–2011–050]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase the Class Quoting Limit in One Option Class

June 7, 2011.

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 May 25, 2011, the Chicago Board Options Exchange, Incorporated ("CBOE"or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one constituting a stated policy, practice, or interpretation with respect

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act, and Rule 19b–4(f)(1) thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to increase the class quoting limit in one option class. The text of the proposed rule change is available on CBOE's Web site (*http://www.cboe.org/legal*), at the CBOE's Office of the Secretary, 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

CBOE Rule 8.3A, *Maximum Number of Market Participants Quoting Electronically per Product,* establishes class quoting limits ("CQLs") for each class traded on the Hybrid Trading System.[3] A CQL is the maximum number of quoters that may quote electronically in a given product and Rule 8.3A, Interpretation .01(a) provides that the current levels are generally established at 50.

In addition, Rule 8.3A, Interpretation .01(b) provides a procedure by which the President of the Exchange may increase the CQL for an existing or new product. In this regard, the President of the Exchange may increase the CQL in a particular product when he deems it appropriate. The effect of an increase in the CQL is procompetitive in that it increases the number of market participants that may quote electronically in a product. The purpose of this filing is to increase the CQL in options on the CBOE Volatility Index (VIX) from its current limit of 60[4] to 70, which CBOE's President has determined would be appropriate. Increasing the CQL also may enhance the liquidity offered in the option class. Lastly, CBOE represents that it has the systems capacity to support this increase in the CQL.

2. Statutory Basis

CBOE believes the proposed rule change is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of section 6(b) of the Act.[5] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest. As indicated above, the Exchange believes that increasing the CQL in this option class is procompetitive and may enhance the liquidity offered.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither received nor solicited written comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act[7] and Rule 19b–4(f)(1) thereunder,[8] because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–050 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–CBOE–2011–050. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–

[3] *See* Rule 8.3A.01.

[4] *See* Securities Exchange Act Release No. 63001 (September 28, 2010), 75 FR 61538 (October 5, 2010) (SR–CBOE–2010–85) (increasing the VIX CQL from 50 to 60).

[5] 15 U.S.C. 78(f)(b).

[6] 15 U.S.C. 78(f)(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(i).

[8] 17 CFR 240.19b–4(f)(1).

2011–050 and should be submitted on or before July 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–14519 Filed 6–10–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64616; File No. SR–NASDAQ–2011–077]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Adopt a Risk Monitor Mechanism

June 7, 2011.

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 June 1, 2011, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is filing with the Securities and Exchange Commission ("Commission") a proposal for the NASDAQ Options Market ("NOM") to amend Chapter VI, Trading Systems, to adopt new Section 19, Risk Monitor Mechanism, to provide a risk monitor mechanism for all NOM Participants.[3]

This change is scheduled to be implemented on NOM on or about August 1, 2011; the Exchange will announce the implementation schedule by Options Trader Alert, once the rollout schedule is finalized.

The text of the proposed rule change is available at *nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to reflect in NOM's rules that Participants will be able to establish new risk control parameters. Specifically, NASDAQ proposes to adopt new Chapter VI, Section 19, Risk Monitor Mechanism, which is very similar to NASDAQ OMX PHLX ("PHLX") Rule 1093 (as explained in detail below) and is intended to bring this aspect of PHLX's technological functionality to NOM. The Risk Monitor Mechanism provides protection from the risk of multiple executions across multiple series of an option. The risk to Participants is not limited to a single series in an option; Participants have exposure in all series of a particular option, requiring them to offset or hedge their overall position in an option.

In particular, the Risk Monitor Mechanism will be useful for Market Makers,[4] who are required to continuously quote in assigned options. Quoting across many series in an option creates the possibility of "rapid fire" executions that can create large, unintended principal positions that expose the Market Maker to unnecessary market risk. The Risk Monitor Mechanism is intended to assist such Participants in managing their market risk.

Though the Risk Monitor Mechanism will be most useful to Market Makers, the Exchange proposes to offer the functionality to all participant types. There are other firms that trade on a proprietary basis and provide liquidity to the Exchange; these firms could potentially benefit, similarly to Market Makers, from the Risk Monitor Mechanism. The Exchange believes that the Risk Monitor Mechanism should help liquidity providers generally, market makers and other participants alike, in managing risk and providing deep and liquid markets to investors.

Pursuant to new Section 19(a), the Risk Monitor Mechanism operates by the System maintaining a counting program for each Participant, which counts the number of contracts traded in an option by each Participant within a specified time period, not to exceed 15 seconds, established by each Participant (the "specified time period"). The specified time period will commence for an option when a transaction occurs in any series in such option. Furthermore, the System engages the Risk Monitor Mechanism in a particular option when the counting program has determined that a Participant has traded a Specified Engagement Size (as defined below) established by such Participant during the specified time period. When such Participant has traded the Specified Engagement Size during the specified time period, the Risk Monitor Mechanism automatically removes such Participant's orders in all series of the particular option.

As provided in proposed subparagraph (b)(ii), the Specified Engagement Size is determined by the following: (A) For each series in an option, the counting program will determine the percentage that the number of contracts executed in that series represents relative to the Participant's total size at all price levels in that series ("series percentage"); (B) The counting program will determine the sum of the series percentages in the option issue ("issue percentage"); (C) Once the counting program determines that the issue percentage equals or exceeds a percentage established by the Participant ("Specified Percentage"), the number of executed contracts in the option issue equals the Specified Engagement Size. For example, if a Participant is quoting in four series of a particular option issue, and sets its Specified Percentage at 100%, the Specified Engagement Size would be determined as follows:

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term "Options Participant" or "Participant" means a firm or organization that is registered with the Exchange pursuant to Chapter II of the NOM Rules for purposes of participating in options trading on NOM as a "Nasdaq Options Order Entry Firm" or "Nasdaq Options Market Maker."

[4] Unlike the PHLX Risk Monitor Mechanism, the NOM Risk Monitor Mechanism will be available to all Participants, not just Market Makers.

EXAMPLE I

Series	Size	Number of contracts executed	Percentage
Series 1	100	40	40
Series 2	50	20	40
Series 3	200	20	10
Series 4	150	15	10
Total	500	95	100

In this example, the Specified Engagement Size is 95 contracts, which is the aggregate number of contracts executed among all series during the specified time period that represents an issue percentage equal to the Specified Percentage of 100%.

EXAMPLE II

Series	Size	Number of contracts executed	Percentage
Series 1	100	0	0
Series 2	50	0	0
Series 3	200	0	0
Series 4	150	150	100
Total	500	150	100

In this example, the Specified Engagement Size is 150 contracts, which is the aggregate number of contracts executed among all series during the specified time period that represents an issue percentage equal to the Specified Percentage of 100%.

If a Participant is quoting in four series of a particular option, and sets its Specified Percentage at 200%, the Specified Engagement Size would be determined as follows:

EXAMPLE III

Series	Size	Number of contracts executed	Percentage
Series 1	100	80	80
Series 2	50	40	80
Series 3	200	40	20
Series 4	150	30	20
Total	500	190	200

In this example, the Specified Engagement Size is 190 contracts, which is the aggregate number of contracts executed among all series during the specified time period that represents an issue percentage equal to the Specified Percentage of 200%.

The Specified Engagement Size will be automatically offset by a number of contracts that are executed on the opposite side of the market in the same option issue during the specified time period (the "Net Offset Specified Engagement Size"). Long call positions will only be offset by short call positions, and long put positions will only be offset by short put positions. For example, a Participant that buys calls and also sells calls in the same option during the specified time period would have a Net Offset Specified Engagement Size as follows:

EXAMPLE IV

Series	Size	Buy call	Sell call	Net offset size	Percentage
Series 1	100	60	20	40	40
Series 2	100	100	60	40	40
Series 3	200	150	130	20	10
Series 4	150	75	60	15	10
Total	550	385	270	115	100

Here, the Net Offset Specified Engagement Size for each series is determined by offsetting the number of contracts executed on the opposite side of the market for each series during the specified time period. The Risk Monitor Mechanism shall be engaged once the Net Offset Specified Engagement Size is for a net number of contracts executed among all series in an option issue during the specified time period that represents an issue percentage equal to or greater than the Specified Percentage.

As explained above, the Specified Engagement Size would be based on all price levels. For example, if a Participant is quoting in two series of a particular option, at several price levels in each, and sets its Specified Percentage at 90%, the Specified Engagement Size would be determined as follows:

EXAMPLE V

Price level	Series 1 size	Series 2 size	Number of contracts executed series 1	Number of contracts executed series 2	Percentage
Level 1	100	50	100	50	32.5
Level 2	100	50	100	50	32.5
Level 3	150	100	0	100	25
Level 4	150	200	0	0	
Total	500	400	200	200	
Percentage			40	50	90

In this example, the Specified Engagement Size is 400 contracts, which is the aggregate number of contracts executed among all series, at all price levels, during the specified time period that represents an issue percentage equal to the Specified Percentage of 90%. Although the Participant executed 40% and 50% of the aggregate size displayed in series 1 and series 2, respectively, 100% of the Participant's top price level was executed in both series.

While the Risk Monitor Mechanism is a useful feature that serves an important risk management purpose, it operates consistent with the firm quote obligations of a broker-dealer pursuant to Rule 602 of Regulation NMS. Specifically, proposed paragraph (c) provides that any marketable orders or quotes that are executable against a Participant's quotation that are received prior to the time the Risk Monitor Mechanism is engaged will be automatically executed at the price up to the Participant's size, regardless of whether such an execution results in executions in excess of the Participant's Specified Engagement Size. Accordingly, the Risk Monitor Mechanism cannot be used to circumvent a Participant's firm quote obligation.

If a Participant is quoting in two series of a particular option, at several price levels in each, and sets its Specified Percentage at 90%, one contra side order can result in executions in excess of the Specified Engagement Size. Specifically, if a market order to sell 500 contracts is received in Series 1, the order will execute against all four levels that the Participant is quoting, as follows:

EXAMPLE VI

Price level	Series 1 size	Series 2 size	Number of contracts executed series 1	Number of contracts executed series 2	Percentage
Level 1	100	50	100	0	20
Level 2	100	50	100	0	20
Level 3	150	100	150	0	25
Level 4	150	200	150	0	25
Total	500	400	200	0	
Percentage			100	0	100

Although the Participant's Specified Percentage is 90%, the contra side order executes in its entirety and the Risk Protection Mechanism is engaged after the resulting executions have surpassed the Specified Engagement Size.

Proposed Section 19(d) further provides that the system will automatically reset the counting program and commence a new specified time period when:

(i) A previous counting period has expired and a transaction occurs in any series in such option; or

(ii) the Participant refreshes his/her quotation, in a series for which an order has been executed (thus commencing the specified time period) prior to the expiration of the specified time period.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [5] in general, and furthers the objectives of Section 6(b)(5) of the Act [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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

mechanisms 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 proposal is appropriate and reasonable, because it offers additional functionality for Participants to manage their risk.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NASDAQ–2011–077 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–077. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–077 and should be submitted on or before July 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–14518 Filed 6–10–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64615; File No. SR–BX–2011–033]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Functionality of the Post-Only Order

June 7, 2011.

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 June 1, 2011, NASDAQ OMX BX, Inc. (the "Exchange" or "BX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change to modify the functionality of its Post-Only Order on the NASDAQ OMX BX Equities System (the "BX System" or the "System"). BX proposes to implement the rule change thirty days after the date of filing or as soon thereafter as practicable. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at BX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BX proposes to modify the functionality associated with its existing Post-Only Order. Currently, if a Post-Only Order would lock an order on the BX System at the time of entry, the order is re-priced and displayed by the System to one minimum price increment (*i.e.,* $0.01 or $0.0001) below the current low offer (for bids) or above the current best bid (for offers). Thus, if the best bid and best offer on the BX book were $10.00 × $10.05, and a market participant entered a Post-Only Order to buy at $10.05, the order would be re-priced and displayed at $10.04. This aspect of the functionality of the order is not changing. In addition, if a Post-Only Order would cross an order on the System, the order will be repriced as described above unless the value of price improvement associated with executing against a resting order

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

equals or exceeds the sum of fees charged for such execution and the value of any rebate that would be provided if the order posted to the book and subsequently provided liquidity, in which case the order will execute. As provided by Rule 4757, price improvement accrues to the party entering the order. Thus, if a sell order is on the book at $10 and a Post-Only Order to buy at $10.01 is entered, the order will execute at $10. This aspect of the order's functionality is also not changing.[3]

At present, however, the order is repriced in a similar manner if the order would lock or cross a protected quotation of another market center. Thus, if the national best offer of $10.05 is being displayed on another market center but not on BX, at present an order to buy at $10.05 would be repriced and displayed at $10.04. Under the changed functionality that BX is proposing, if the order locks or crosses the other market center, the order will be accepted at the locking price (*i.e.,* the current low offer (for bids) or to the current best bid (for offers)) and displayed by the System to one minimum price increment (*i.e.,* $0.01 or $0.0001) below the current low offer (for bids) or above the current best bid (for offers). Thus, if the national best bid and offer, as displayed on another market center, was $10 × $10.05, an order to buy at $10.05 or higher would be accepted at the locking price of $10.05, but would be displayed at $10.04. Subsequently, an incoming order to sell at $10.05 or lower would be matched against the Post-Only buy order. In this case, the incoming sell order would receive price improvement.

As a result of the change, the order will resemble more closely BX's Price to Comply order, which uses a similar logic of retaining a locking price but displaying at a non-locking price. The modified Post-Only Order will serve to allow the market participant entering the order to post its order at its desired price, unless the price would lock or cross the BX book, in which case the order will execute or be repriced, as is currently the case, to avoid the internal lock/cross. The revised order type is designed to provide market participants with better control over their execution costs and to provide them with a means to offer price improvement opportunities to other market participants.[4]

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. BX also believes that the modified order is consistent with Rule 610(d) under Regulation NMS.[7] Rule 610(d) requires exchanges to establish, maintain, and enforce rules that require members reasonably to avoid "[d]isplaying quotations that lock or cross any protected quotation in an NMS stock." Such rules must be "reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock," and must "prohibit * * * members from engaging in a pattern or practice of displaying quotations that lock or cross any quotation in an NMS stock." Rule 600 under Regulation NMS[8] defines a "quotation" as a "bid or offer," and in turn defines "bid or offer" to mean "the bid price or the offer price *communicated* by a member * * * to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security * * *." Thus, the hidden price of the Post-Only Order is not a quotation under Regulation NMS, and is therefore covered neither by the provisions of Rule 610 pertaining to displayed quotations nor by the provision requiring rules to assure reconciliation of locked or crossed quotations. In this respect, the order is similar to BX's existing Price to Comply order, which uses a hidden locking price and a displayed non-locking price to ensure compliance with this rule. It is also similar to the Post Only Order of the BATS Exchange and the BATS–Y Exchange, as described in BATS Exchange Rule 11.9(c)(4) and (6) and BATS–Y Exchange Rule 11.9(c)(4) and (6), and the Post Only Order of the EDGA Exchange and EDGX Exchange, as described in EDGA Exchange Rule 11.5(c)(4) and (5) and EDGX Exchange Rule 11.5(c)(4) and (5).

B. Self-Regulatory Organization's Statement on Burden on Competition

BX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Rather, the change will promote greater competition by allowing BX to adopt functionality already in use at competing national securities exchanges.

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]

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

[3] The functionality was described in the original filing to establish the Post-Only Order but was not fully reflected in the text of Rule 4751. *See* Securities Exchange Act Release No. 59259 (January 15, 2009), 74 FR 4491 (January 26, 2009) (SR–BX–2009–003). Accordingly, the rule is being amended to provide a complete description of the order's current behavior when crossing an existing order on the System.

[4] In addition to amending Rule 4751 to reflect the functionality of the Post-Only Order, BX is also amending Rule 4755 to add references to the Post-Only Order, which had been inadvertently omitted from that rule when the Post-Only Order was first introduced.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 17 CFR 242.610(d).

[8] 17 CFR 242.600.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BX–2011–033 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2011–033. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–033 and should be submitted on or before July 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–14517 Filed 6–10–11; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12590 and #12591]

South Dakota Disaster Number SD–00041

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of South Dakota (FEMA–1984–DR), dated 05/13/2011.

Incident: Flooding.

Incident Period: 03/11/2011 and continuing.

Effective Date: 05/31/2011.

Physical Loan Application Deadline Date: 07/12/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 02/13/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of South Dakota, dated 05/13/2011, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Stanley.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–14501 Filed 6–10–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

ITS Joint Program Office; Webinar on Connected Vehicle Infrastructure Deployment Analysis Report Review; Notice of Public Meeting

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

The U.S. Department of Transportation (USDOT) ITS Joint Program Office (ITS JPO) will host a free public webinar on June 24, 2011 at 1 p.m. (EDT) to discuss the Connected Vehicle Infrastructure Deployment Analysis Report. The webinar will provide an opportunity for stakeholders to hear about and provide feedback on the American Association of State Highway and Transportation Officials (AASHTO) *Connected Vehicle Infrastructure Deployment Analysis Report* developed by the AASHTO Connected Vehicle Working Group with support from USDOT. The purpose of the report is to explore infrastructure deployment approaches and potential issues for state and local transportation agencies, primarily from a state DOT perspective. The analysis does not significantly consider the needs and interests of transit and trucking stakeholders, as these communities' visions and issues are being considered elsewhere in the ITS program in conjunction with their respective stakeholder organizations.

The AASHTO Working Group is made up of representatives of eleven state agencies, along with three local transportation agencies, and one metropolitan planning organization. Automotive representatives from the Vehicle Infrastructure Integration Consortium (VIIC), private sector equipment manufacturers, and telecommunications service providers were also invited to the Deployment Plan meetings, and they actively and constructively participated in the discussions leading to this report.

The report covers connected vehicle applications of most interest to the states, current state and local programs underway, deployment readiness in the vehicle market, aftermarket devices and communications, the magnitude of effort to upgrade the nation's signal controllers with Dedicated Short Range Communications (DSRC) capabilities, and a set of deployment scenarios with corresponding strategies and actions for the state and local transportation community.

Connected Vehicle research at the USDOT is a multimodal program that

involves using wireless communication between vehicles, infrastructure, and personal communications devices to improve safety, mobility, and environmental sustainability. The program is the major research initiative of the ITS JPO, which is currently working with the eight major automotive companies to develop vehicle crash warning applications using DSRC technology. In addition, the ITS JPO is working to develop a myriad of applications which will use data collected from connected vehicles that can improve safety, mobility and sustainability. There is also connected vehicle-related research in the areas of standards, data collection, certification, policy, road weather, and public transportation.

Persons planning to attend the webinar should send their full name, organization, and business e-mail address to Adam Hoops at ITS America at *Ahopps@ITSA.org* by June 16, 2011. Please specify the name of the webinar in the e-mail. For additional questions, please contact Adam Hoops at (202) 680–0091.

Issued in Washington, DC on the 6th day of June 2011.

John Augustine,

Managing Director, ITS Joint Program Office.

[FR Doc. 2011–14538 Filed 6–10–11; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

ITS Joint Program Office; Core System Requirements Walkthrough and Architecture Proposal Review Meetings and Webinars; Notice of Public Meeting

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

The U.S. Department of Transportation (USDOT) ITS Joint Program Office (ITS JPO) will host two free public meetings with accompanying webinars to discuss the Vehicle to Infrastructure (V2I) Core System Requirements and Architecture Proposal. The first meeting, June 21, 22, and 23, 2011, 9 a.m.–4:30 p.m. at the University of California—Washington Center, 1608 Rhode Island Ave., NW., Washington, DC 20036 (202) 974–6200, will walk through the review of System Requirements Specification and Architecture Proposal. The second meeting will be a review of the System Requirements Specification and Architecture Proposal and will take place on September 19, 20, and 21, 2011, 9 a.m.–4:30 p.m. at the San Jose Garden Inn 1740 North First Street, San Jose, CA 95112 (408) 793–3300. To learn more about the ITS JPO, visit the program's Web site at *http://www.its.dot.gov.*

The V2I Core System will support applications for safety, mobility, and sustainability for various modes of transportation including passenger vehicles, transit, and heavy trucks. This is the successor to work originally performed under the Vehicle Infrastructure Integration Proof of Concept (VII POC). The Core System supports a distributed, diverse set of applications.

Connected Vehicle research at the USDOT is a multimodal program that involves using wireless communication between vehicles, infrastructure, and personal communications devices to improve safety, mobility, and environmental sustainability. The program is the major research initiative of the ITS JPO which is currently working with the eight major automotive companies to develop vehicle crash warning applications using Dedicated Short Range Communications (DSRC) technology. In addition, the ITS JPO is working to develop of myriad of applications which will use data collected from connected vehicles that can improve safety, mobility and sustainability. There is also connected vehicle-related research in the areas of standards, data collection, certification, policy, road weather, and public transportation.

Persons planning to attend the first public meeting should send their full name, organization, business e-mail address, and meeting number they plan to attend to Adam Hoops at ITS America at *Ahopps@ITSA.org* by June 17, 2011. Persons planning to attend the second public meeting should send their full name, organization, business e-mail address, and meeting number they plan to attend to Adam Hoops at ITS America at *Ahopps@ITSA.org* by September 15, 2011. Please note that if you are planning to register for the webinar, please mention which webinar you will be attending. Details about how to participate in the webinars will be e-mailed to you. For additional questions, please contact Adam Hoops at (202) 680–0091.

Issued in Washington, DC, on the 6th day of June 2011.

John Augustine,

Managing Director, ITS Joint Program Office.

[FR Doc. 2011–14537 Filed 6–10–11; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA 2011–001–N–8]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking renewal of the following currently approved information collection activities. Before submitting these information collection requirements (ICRs) for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than August 12, 2011.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 25, Washington, DC 20590, or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, "Comments on OMB control number 2130–0004." Alternatively, comments may be transmitted via facsimile to (202) 493–6216 or (202) 493–6497, or via e-mail to Mr. Brogan at *Robert.Brogan@dot.gov,* or to Ms. Toone at *Kimberly.Toone@dot.gov.* Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 25, Washington, DC 20590 (*telephone:* (202) 493–6292) or Ms. Kimberly Toone,

Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 35, Washington, DC 20590 (*telephone:* (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(I)–(iv); 5 CFR 1320.8(d)(1)(I)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a "user friendly" format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of the currently approved ICRs that FRA will submit for clearance by OMB as required under the PRA:

Title: Railroad Locomotive Safety Standards and Event Recorder.

OMB Control Number: 2130–0004.

Abstract: The Locomotive Inspection requires railroads to inspect, repair, and maintain locomotives and event recorders so that they are safe, free of defects, and can be placed in service without peril to life. Crashworthy locomotive event recorders provide FRA with verifiable factual information about how trains are maintained and operated, and are used by FRA and State inspectors for Part 229 rule enforcement. The information garnered from crashworthy event recorders is also used by railroads to monitor railroad operations and by railroad employees (locomotive engineers, train crews, dispatchers) to improve train handling, and promote the safe and efficient operation of trains throughout the country, based on a surer knowledge of different control inputs.

Affected Public: Businesses.

Respondent Universe: 744 Railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
229.9—Movement of Non-Complying Locomotives	744 Railroads	21,000 tags	1 minute	350
229.17—Accident Reports	744 Railroads	1 report	15 minutes	.25
29.21—Daily Inspection	744 Railroads	5,655,000 insp. reports/records.	1 minute or 3 minutes.	155,350
Written Reports of MU Locomotive Inspections	744 Railroads	250 written reports	3 minutes	13
Form FRA F 6180.49A	744 Railroads	4,000 forms	2 minutes	133
210.31—Locomotive Noise Emission Test	744 Railroads	100 tests/remarks	15 minutes	25
229.23—Periodic Inspections of Locomotives and Steam Generators.	744 Railroads	87,000 tests/forms	8 hours	696,000
229.33—Out of Use Credit for Locomotives	744 Railroads	500 out-of-use notations.	5 minutes	42
229.25—Periodic Inspection of Event Recorders—Written Copy of Instructions—Amendments.	744 Railroads	200 amendments	15 minutes	50
Data Verification Readout	744 Railroads	4,025 readout records/reports.	90 minutes	6,038
Pre-Maintenance Test Failures	744 Railroads	700 test failure notations.	30 minutes	350
229.135—Removal from Service	744 Railroads	1,000 removal tags	1 minute	17
Preserving Accident Data	744 Railroads	2,930 data reports	15 minutes	733
229.27—Annual Tests	744 Railroads	700 test records	90 minutes	1,050
229.135—Certified Memory Modules	744 Railroads	200 certified memory modules.	2 hours + 200 hours for test design.	600
Lead Locomotives w/Certified Module	744 Railroads	600 certified memory modules.	2 hours	1,200
Re-Manufactured Event Recorders with Certified Module.	744 Railroads	1,000 certified memory modules.	2 hours	2,000

Form(s): FRA F 6180.49A.

Total Responses: 5,779,206.

Estimated Total Annual Burden: 863,951 hours.

Type of Request: Extension without change of a currently approved collection.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC, on June 7, 2011.

Kimberly Coronel,

Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. 2011–14549 Filed 6–10–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2011–0001–N–7]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, (FRA), Department of Transportation (DOT).

ACTION: Notice of Office of Management and Budget (OMB) Approvals.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.5(b), this notice announces that new information collection requirements (ICRs) listed below have been approved by the Office of Management and Budget (OMB). These new ICRs pertain to 49 CFR parts 213, 216, 220, 225, 229, 236, 237, and 240. Additionally, FRA hereby announces that additional ICRs listed below have been re-approved by the Office of Management and Budget (OMB). These ICRs pertain to parts 207, 209, 210, 212, 214, 215, 216, 218, 219, 221, 222, 223, 228, 234, 238, 239, and 244. The OMB approval numbers, titles, and expiration dates are included herein under supplementary information.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave., SE., Mail Stop 25, Washington, DC 20590 (telephone: (202) 493–6292), or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave., NW., Mail Stop 35, Washington, DC 20590 (*telephone:* (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to display OMB control numbers and inform respondents of their legal significance once OMB approval is obtained. The following new FRA information collections were approved within the last 18 months: (1.) OMB No. 2130–0533, Qualification for Locomotive Engineers (Final Rule) (49 CFR part 240). The new expiration date for this information collection is July 31, 2013. (2.) OMB No. 2130–0553, Positive Train Control (Final Rule) (49 CFR part 236). The new expiration date for this information collection is May 31, 2013. (3.) OMB No. 2130–0544, Passenger Equipment Safety Standards (Final Rule) (49 CFR parts 216, 229, 238). The new expiration date for this information collection is May 31, 2013. (4.) OMB No. 2130–0587, Notice of Funds Availability and Solicitation of Applications under the Railroad Safety Technology Grant Program (Form FRA F 6180.154). The new expiration date for this information collection is October 31, 2013. (5.) OMB No. 2130–2130–0589, State Highway Rail Grade Crossing Action Plans (Final Rule) (49 CFR part 234). The new expiration date for this information collection is October 31, 2013. (6.) OMB No. 2130–0586, Bridge Safety Standards (Final Rule) (49 CFR parts 213, 237). The new expiration date for this information collection is May 31, 2014. (7.) OMB No. 2130–0590, Alleged Violation Reporting Form (Form FRA F 6180.151). The new expiration date for this information collection is December 31, 2013. (8.) OMB No. 2130–0524, Railroad Communications (Restrictions on Railroad Employees Use of Cellular Telephones and Other Electronic Devices) (Final Rule) (49 CFR part 220). The new expiration date for this information collection is February 28, 2014. (9.) OMB No. 2130–0500, Miscellaneous Amendments to FRA's Accident and Incident Reporting Requirements (Final Rule) (49 CFR part 225) (Forms FRA F 6180.39i, 6180.54, 6180.55, 6180.55a, 6180.56, 6180.57, 6180.78, 6180.81, 6180.98, 6180.107, and 6180.150). The new expiration date for this information collection is February 28, 2014.

The following information collections were re-approved: (1.) OMB No. 2130–0580, Notice of Funds Availability and Solicitation of Applications for Grants under the Railroad Rehabilitation and Repair Grant Program. The new expiration date for this information collection is January 31, 2013. (2) OMB No. 2130–0509, State Safety Participation Regulations and Remedial Actions (49 CFR parts 209 and 212) (Forms FRA F 6180.33, 6180.61, 6180. 67, 6180.96, 6180.109, 6180.110, 6180.111, 6180.112). The new expiration date for this information collection is February 28, 2013. (3) OMB No. 2130–0560, Use of Locomotive Horns at Highway-Rail Grade Crossings (49 CFR part 222). The new expiration date for this information collection is February 28, 2013. (4) OMB No. 2130–0584, American Recovery and Reinvestment Solicitation of Applications and Notice of Funds Availability for High-Speed Rail Corridors and Intercity Passenger Rail Service—Capital Assistance and Planning Grant Program (Form FRA F 6180.132, 6180.33, 6180.34(a)–(d), 6180.135, 6180.138, 6180.139). The new expiration date for this information collection is January 31, 2013. (5) OMB No. 2130–0525, Certification of Glazing Materials (49 CFR part 223). The new expiration date for this information collection is March 31, 2013. (6.) OMB No. 2130–0529, Disqualification Proceedings (49 CFR part 209). The new expiration date for this information collection is April 30, 2013. (7.) OMB No. 2130–0511, Designation of Qualified Persons (49 CFR part 215). The new expiration date for this information collection is May 31, 2013. (8.) OMB No. 2130–0545, Passenger Train Emergency Preparedness (49 CFR 239). The new expiration date for this information collection is June 30, 2013. (9.) OMB No. 2130–0526, Control of Alcohol and Drug Use in Railroad Operations (49 CFR part 219). The new expiration date for this information collection is April 30, 2012. (10.) OMB No. 2130–0516, Remotely Controlled Switch Operations (49 CFR part 218). The new expiration date for this information collection is September 30, 2013. (11.) OMB No. 2130–0519, Bad Order and Home Shop Card (49 CFR part 215). The new expiration date for this information collection is September 30, 2013. (12.) OMB No. 2130–0520, Stenciling Reporting Mark on Freight Cars (49 CFR part 215). The new expiration date for this information collection is September 30, 2013. (13.) OMB No. 2130–0523, Rear-End Marking Devices (49 CFR part 221). The new expiration date for this information collection is September 30, 2013. (14.) OMB No. 2130–0527, Locomotive Certification (Noise Compliance Regulations) (49 CFR part 210). The new expiration date for this information collection is September 30, 2013. (15.) OMB No. 2130–0534, Grade Crossing Signal System Safety (49 CFR 234). The new expiration date for this information collection is September 30, 2013. (16.) OMB No. 2130–0535, Bridge Worker Safety Rules (49 CFR part 214). The new expiration date for this information collection is September 30, 2013. (17.) OMB No. 2130–0537, Railroad Police Officers (49 CFR part 207). The new expiration date for this information collection is September 30, 2013. (18.) OMB No. 2130–0502, Filing

of Dedicated Cars (49 CFR part 215). The new expiration date for this information collection is September 30, 2013. (19.) OMB No. 2130–0005, Hours of Service Regulations (49 CFR part 228) (Form FRA F 6180.3). The new expiration date for this information collection is September 30, 2013. (20.) OMB No. 2130–0504, Special Notice for Repairs (49 CFR part 216). The new expiration date for this information collection is September 30, 2013. (21.) OMB No. 2130–0555, Foreign Railroads Foreign Based Employees Who Perform Train or Dispatching Service in the United States (49 CFR part 219). The new expiration date for this information collection is September 30, 2013. (22.) OMB No. 2130–0574, Confidential Close Call Reporting System Evaluation-Related Interview Data Collection (Forms FRA 6180.126A and 6180.126B). The new expiration date for this information collection is March 31, 2014. (23.) OMB No. 2130–0557, Safety Integration Plans (49 CFR part 244). The new expiration date for this information collection is February 28, 2014. (24.) OMB No. 2130–0576, Passenger Train Emergency Systems (49 CFR part 238). The new expiration date for this information collection is February 28, 2014.

Persons affected by the above referenced information collections are not required to respond to any collection of information unless it displays a currently valid OMB control number. These approvals by the Office of Management and Budget (OMB) certify that FRA has complied with the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and with 5 CFR 1320.5(b) by informing the public about OMB's approval of the information collection requirements of the above cited forms, studies, and regulations.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC, on June 7, 2011.

Kimberly Coronel,

Director, Office of Financial Management, Federal Railroad Administration.

[FR Doc. 2011–14555 Filed 6–10–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket No. NHTSA–2011–0068]

Reports, Forms, and Record Keeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections.

This document describes the collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before August 12, 2011.

ADDRESSES: You may submit comments identified by DOT Docket ID Number NHTSA–2011–0068 using any of the following methods:

Electronic submissions: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

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

Hand Delivery: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: 1–202–493–2251.

Instructions: Each submission must include the Agency name and the Docket number for this Notice. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Block, Contracting Officer's Technical Representative, Office of Behavioral Safety Research (NTI–131), National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., W46–499, Washington, DC 20590. Mr. Block's phone number is 202–366–6401 and his e-mail address is *alan.block@dot.gov*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the Federal Register providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(I) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks public comment on the following proposed collection of information:

The National Survey of Pedestrian and Bicyclist Attitudes, Knowledge, and Behaviors

Type of Request—New information collection requirement.

OMB Clearance Number—None.

Form Number—NHTSA Form 1148.

Requested Expiration Date of Approval—3 years from date of approval.

Summary of the Collection of Information—The National Highway Traffic Safety Administration (NHTSA) proposes to collect information from the public to ascertain the scope and magnitude of bicycle and pedestrian activity and the public's behavior and attitudes regarding bicycling and walking. A national telephone survey will be administered to 9,000 randomly selected respondents drawn from all 50 States and the District of Columbia. The national survey will be preceded by a pretest administered to 15 respondents. The survey will ask about the characteristics of bicycling and walking trips, conspicuity, community design for bicycling and walking, bicycle helmet use, and general opinions about bicycling and walking. Interview length will average 20 minutes.

In conducting the proposed telephone interviews, the interviewers would use computer-assisted telephone interviewing to reduce interview length and minimize recording errors. No personally identifiable information will be collected during the telephone interviews.

Description of the Need for the Information and Proposed Use of the Information—NHTSA was established to reduce the number of deaths, injuries, and economic losses resulting from motor vehicle crashes on the Nation's highways. As part of this statutory mandate, NHTSA is authorized to conduct research as a foundation for the development of motor vehicle standards and traffic safety programs.

Pedestrian safety and bicyclist safety are two of several behavioral areas for which NHTSA has developed comprehensive programs to meet its injury reduction goals. The major components of pedestrian safety programs are education, enforcement, and outreach. Those three approaches are also applied to bicyclist safety programs, with legislative efforts added to the mix.

NHTSA encourages bicycling as an alternate mode of transportation to motor vehicle travel. Moreover, increasing safe bicycling and walking behavior is promoted as a positive contributor to the quality of life. But an increase in these behaviors often means an increase in exposure to potential risk of collision with motor vehicles, underscoring the need to have in place aggressive pedestrian and bicyclist safety programs to keep injuries on a downward trajectory. This in turn requires periodic data collection to assess whether the programs continue to be responsive to the public's information needs, behavioral intentions, attitudes, physical environment, and other factors that contribute to safety while walking or bicycling.

A survey of pedestrian and bicyclist attitudes and behavior was conducted in 2002. That survey provided program planners and community leaders with detailed information on walking and bicycling behavior, level of support for facilities assisting those activities, and awareness of safety issues. But the information is in need of updating, especially given recent programs and initiatives to increase walking and bicycling. This project will provide that update by conducting the 2012 National Survey of Bicyclist and Pedestrian Attitudes and Behavior.

NHTSA will use the findings from this proposed collection of information to assist States, localities, and communities in developing and refining bicycling and walking safety programs.

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information)—Under this proposed effort, the Contractor would conduct 15 pretest telephone interviews and 9,000 national survey telephone interviews for a total of 9,015 interviews. The telephone interviews will be conducted with respondents age 16 and older, with over-sampling of respondents 16 through 39. Interview length will average 20 minutes. Interviews would be conducted with respondents at residential phone numbers selected through random digit dialing. Interviews would be conducted both with respondents using landline phones and respondents using cell phones. Businesses are ineligible for the sample and would not be interviewed. All respondents will be administered the survey one time only.

Estimate of the Total Annual Reporting and Record Keeping Burden Resulting from the Collection of Information—NHTSA estimates that respondents would require an average of 20 minutes to complete the telephone interviews or a total of 3,005 hours for the 9,015 respondents. All interviewing would occur during a two-to-three month period during 2012. Thus the annual reporting burden would be the entire 3,005 hours. The respondents would not incur any reporting cost from the information collection. The respondents also would not incur any record keeping burden or record keeping cost from the information collection.

Authority: 44 U.S.C. 3506(c)(2)(A).

Jeffrey Michael,

Associate Administrator, Research and Program Development.

[FR Doc. 2011–14464 Filed 6–10–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

June 7, 2011.

The Department of the Treasury will submit the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. A copy of the submissions may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding these information collections should be addressed to the OMB reviewer listed and to the Treasury PRA Clearance Officer, Department of the Treasury, 1750 Pennsylvania Avenue, NW., Suite 11010, Washington, DC 20220.

DATES: Written comments should be received on or before July 13, 2011 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–New.

Type of Review: New collection.

Title: Certain Fuel Products Report.

Form: 720–CF.

Abstract: Form 720–CF is an information return that will be used by fuel producers, importers/enterers, resellers and/or blenders to report their monthly receipts including production, deliveries to a terminal and sales of certain fuel products. To ensure reporting and filing compliance, this information is needed by the Service to properly track the movement of fuel between these entities and the terminal operators and carrier operators that are currently filing forms 720–TO/CS.

Respondents: Private sector: Businesses or other for-profits.

Estimated Total Burden Hours: 518,361.

OMB Number: 1545–1465.

Type of Review: Extension without change of a currently approved collection.

Title: TD 8668—Environmental Settlement Funds—Classification.

Abstract: Section 7701 and the regulations thereunder classify entities for federal tax purposes as partnerships, associations, and trusts. Section 671 requires a grantor treated as an owner of a portion of a trust to include items in income. This regulation provides reporting rules.

Respondents: Private sector: Business or other for-profit.

Estimated Total Burden Hours: 2,000.

OMB Number: 1545–1548.

Type of Review: Extension without change of a currently approved collection.

Title: Revenue Procedure 2003–43, Late Election Relief for S Corporations; Revenue Procedure 2004–48, Deemed Corporate Election for Late Electing S Corporations.

Abstract: The IRS will use the information provided by taxpayers under this revenue procedure to determine whether relief should be granted for the relevant late election.

Respondents: Private sector: Businesses or other for-profits.

Estimated Total Burden Hours: 50,000.

OMB Number: 1545–1757.

Type of Review: Extension without change of a currently approved collection.

Title: TD 9036—Disclosure of Returns and Return Information by Other Agencies.

Abstract: In general, under the regulations, the IRS is permitted to authorize agencies with access to returns and return information under

section 6103 of the Internal Revenue Code to redisclose returns and return information based on a written request and with the Commissioner's approval, to any authorized recipient set forth in Code section 6103, subject to the same conditions and restrictions, and for the same purposes, as if the recipient had received the information from the IRS directly.

Respondents: State and Local Agencies.

Estimated Total Burden Hours: 11.

OMB Number: 1545–1912.

Type of Review: Extension without change of a currently approved collection.

Title: Election of Partnership Level Tax Treatment.

Form: 8893.

Abstract: IRC section 6231(a)(1)(B)(ii) allows small partnerships to elect to be treated under the unified audit and litigation procedures. Form 8893 will allow IRS to better track these elections by providing a standardized format for this election.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 227.

OMB Number: 1545–1915.

Type of Review: Extension without change of a currently approved collection.

Title: Notice 2005–4, Fuel Tax Guidance, as modified by Notice 2005–24.

Abstract: Notice 2005–4 provides guidance on certain excise tax provisions in the Internal Revenue Code that were added or affected by the American Jobs Creation Act of 2004 (Pub. L. 108–357) (Act). These provisions relate to: alcohol and biodiesel fuels; the definition of off-highway vehicles; aviation-grade kerosene; claims related to diesel fuel used in certain buses; the display of registration on certain vessels; claims related to sales of gasoline to state and local governments and nonprofit educational organizations; two party exchanges of taxable fuel; and the classification of transmix and certain diesel fuel blendstocks as diesel fuel. Notice 2005–24 modifies Notice 2005–4, by extending the transitional rule related to sales of gasoline on oil company credit cards and by making several corrections to Notice 2005–4.

Respondents: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 76,190.

OMB Number: 1545–2202.

Type of Review: Extension without change of a currently approved collection.

Title: New Hire Retention Credit.

Form: 5884–B.

Abstract: Form 5884–B, New Hire Retention Credit, was developed to carry out the provisions of section 102 of the Hiring Incentives to Restore Employment (HIRE) Act (Public Law (P.L.) 111–147). The new form provides a means for employers to calculate and claim the credit. This credit is a new non-Code general business credit and the form is required to be attached to the tax return.

Respondents: Private Sector: Businesses or other for-profits, Farms, Not-for-profit institutions.

Estimated Total Burden Hours: 13,815,000.

Bureau Clearance Officer: Yvette Lawrence, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224; (202) 927–4374.

OMB Reviewer: Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2011–14502 Filed 6–10–11; 8:45 am]

BILLING CODE 4810–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning information collection requirements related to Passive Foreign Investment Companies.

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Passive Foreign Investment Companies.

OMB Number: 1545–1028.

Regulation Project Number: INTL–941–86 and INTL–655–87 (TD 8178).

Abstract: These regulations specify how U.S. persons who are shareholders of passive foreign investment companies (PFICs) make elections with respect to their PFIC stock.

Current Actions: There are no changes being made to the regulation at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 275,000.

Estimated Time per Respondent: 25 minutes.

Estimated Total Annual Burden Hours: 112,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Approved: May 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14525 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1099–C

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning Form 1099–C, Cancellation of Debt.

DATES: Written comments should be received on or before August 12, 2011, to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224 or through the Internet at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* Cancellation of Debt.

OMB Number: 1545–1424.

Form Number: 1099–C.

Abstract: Form 1099–C is used by Federal government agencies, financial institutions, and credit unions to report the cancellation or forgiveness of a debt of $600 or more, as required by section 6050P of the Internal Revenue Code. The IRS uses the form to verify compliance with the reporting rules and to verify that the debtor has included the proper amount of canceled debt in income on his or her income tax return.

Current Actions: There are no major changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and the Federal government.

Estimated Number of Responses: 3,885,872.

Estimated Time per Response: 13 min.

Estimated Total Annual Burden Hours: 854,892.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 31, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14531 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8582

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning Form 8582, Passive Activity Loss Limitations.

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Passive Activity Loss Limitations.

OMB Number: 1545–1008.

Form Number: 8582.

Abstract: Under Internal Revenue Code section 469, losses from passive activities, to the extent that they exceed income from passive activities, cannot be deducted against nonpassive income. Form 8582 is used to figure the passive activity loss allowed and the loss to be reported on the tax returns.

Current Actions: There are no major changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, and farms.

Estimated Number of Respondents: 2,414,854.

Estimated Time per Respondent: 3 hours, 30 minutes.

Estimated Total Annual Burden Hours: 8,451,989.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal

revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14534 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8827

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning Form 8827, Credit for Prior Year Minimum Tax-Corporations.

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Credit for Prior Year Minimum Tax-Corporations.

OMB Number: 1545–1257.

Form Number: 8827.

Abstract: Internal Revenue code Section 53(d), as revised, allows corporations a minimum tax credit based on the full amount of alternative minimum tax incurred in tax years beginning after 1989, or a carryforward for use in a future year. Form 8827 is used by corporations to compute the minimum tax credit, if any, for alternative minimum tax incurred in prior tax years and to compute any minimum tax credit carryforward.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and farms.

Estimated Number of Respondents: 25,000.

Estimated Time per Respondent: 11 hours, 55 minutes.

Estimated Total Annual Burden Hours: 298,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 31, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14532 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning information collection requirements related to Treaty-Based Return Positions.

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Treaty-Based Return Positions.

OMB Number: 1545–1126.

Regulation Project Numbers: INTL–121–90 (TD 8733), INTL–292–90 (TD 8305), and INTL–361–89 (TD 8292).

Abstract: Regulation section 301.6114–1 sets forth reporting requirements under Code section 6114

relating to treaty-based return positions. Persons or entities subject to these reporting requirements must make the required disclosure on a statement attached to their return or be subject to a penalty. Regulation section 301.7701(b)–7(a)(4)(iv)(C) sets forth the reporting requirement for dual resident S corporation shareholders who claim treaty benefits as nonresidents of the U.S. Persons subject to this reporting requirement must enter into an agreement with the S corporation to withhold tax pursuant to procedures prescribed by the Commissioner.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 6,020.

Estimated Time per Respondent: 1 hr.

Estimated Total Annual Burden Hours: 6,015.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14530 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 730

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning Form 730, Tax on Wagering.

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, at (202) 622–3179, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224 or through the Internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tax on Wagering.

OMB Number: 1545–0235.

Form Number: Form 730.

Abstract: Form 730 is used to identify taxable wagers under Internal Revenue Code section 4401 and collect the tax monthly. The information is used to determine if persons accepting wagers are correctly reporting the amount of wagers and paying the required tax.

Current Actions: There are no major changes being made to the form at this time.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit organizations and individuals.

Estimated Number of Respondents: 51,082.

Estimated Time per Response: 8 hrs., 11 min.

Estimated Total Annual Burden Hours: 418,362.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14526 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8404

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning Form 8404, Interest Charge on DISC–Related Deferred Tax Liability.

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Interest Charge on DISC–Related Deferred Tax Liability.

OMB Number: 1545–0939.

Form Number: 8404.

Abstract: Shareholders of Interest Charge Domestic International Sales Corporations (IC–DISCs) use Form 8404 to figure and report an interest charge on their DISC-related deferred tax liability. The interest charge is required by Internal Revenue Code section 995(f). IRS uses Form 8404 to determine whether the shareholder has correctly figured and paid the interest charge on a timely basis.

Current Actions: There are no major changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations and individuals.

Estimated Number of Responses: 2,000.

Estimated Time per Response: 7 hrs., 47 min.

Estimated Total Annual Burden Hours: 15,580.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14529 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 1040–PR and 1040–SS

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to 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)). Currently, the IRS is soliciting comments concerning Form 1040–PR, Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico) and Form 1040–SS, U.S. Self-Employment Tax Return (Including the Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)

DATES: Written comments should be received on or before August 12, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico).

OMB Number: 1545–0090.

Form Number: Form 1040–PR.

Abstract: Form 1040–PR, is used by self-employed individuals to figure and report self-employment tax under IRC chapter 2 of Subtitle A, and provide credit to the taxpayer's social security account. Anejo H–PR is used to compute household employment taxes.

Current Actions: There are no major changes being made to the form at this time.

This form is being submitted for renewal purposes.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households, Businesses and other for-profit organizations, Farms.

Estimated Number of Respondents: 154,860.

Estimated Time per Respondent: 13 hours, 11 minutes.

Estimated Total Annual Burden Hours: 1,673,289.

Title: U.S. Self-Employment Tax Return (Including the Additional Child Tax Credit for Bona Fide Residents of Puerto Rico).

OMB Number: 1545–0090.

Form Number: Form 1040–SS.

Abstract: Form 1040–SS, is used by self-employed individuals to figure and report self-employment tax under IRC chapter 2 of Subtitle A, and provide credit to the taxpayer's social security account. Both of these forms are also used by bona-fide residents of Puerto Rico to claim the additional child tax credit.

Current Actions: There are no major changes being made to the form at this time.

This form is being submitted for renewal purposes.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households, Businesses and other for-profit organizations, Farms.

Estimated Number of Respondents: 101,640.

Estimated Time per Respondent: 10 hours, 54 minutes.

Estimated Total Annual Burden Hours: 1,107,876.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–14527 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Low Income Taxpayer Clinic Grant Program; Availability of 2012 Grant Application Package

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: This document contains a notice that the IRS has made available the grant application package and guidelines (Publication 3319) for organizations interested in applying for a Low Income Taxpayer Clinic (LITC) matching grant for the 2012 grant cycle, which runs January 1, 2012, through December 31, 2012. The application period runs from May 31, 2011, through July 15, 2011.

The IRS will award a total of up to $6,000,000 (unless otherwise provided by specific Congressional appropriation) to qualifying organizations, subject to the limitations of Internal Revenue Code section 7526, for matching grants. A qualifying organization may receive a matching grant of up to $100,000 per year. Qualifying organizations that provide representation for free or for a nominal fee to low income taxpayers involved in tax controversies with the IRS, or that provide education on taxpayer rights and responsibilities to taxpayers for whom English is a second language, or both, can apply for a grant for the 2012 grant cycle.

Examples of Qualifying Organizations Include: (1) Clinical programs at accredited law, business or accounting schools, whose students represent low income taxpayers in tax controversies with the IRS, and (2) organizations exempt from tax under I.R.C. § 501(a) that represent low income taxpayers in tax controversies with the IRS or refer those taxpayers to qualified representatives.

DATES: Grant applications for the 2012 grant cycle must be electronically filed, postmarked, sent by private delivery service, or hand-delivered to the LITC Program Office in Washington, DC by July 15, 2011.

ADDRESSES: Send completed grant applications to: Internal Revenue Service, Taxpayer Advocate Service, LITC Grant Program Administration Office, TA:LITC, 1111 Constitution Avenue, NW., Room 1034, Washington, DC 20224. Copies of the 2012 *Grant Application Package and Guidelines,* IRS Publication 3319 (Rev. 5–2011), can be downloaded from the IRS Internet site at *http://www.irs.gov/advocate* or ordered by the IRS Distribution Center by calling 1–800–829–3676. Applicants can also file electronically at *http://www.grants.gov.* For applicants applying through the Federal Grants Web site, the Funding Number is TREAS–GRANTS–052012–001.

FOR FURTHER INFORMATION CONTACT: The LITC Program Office at (202) 622–4711 (not a toll-free number) or by e-mail at *LITCProgramOffice@irs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 7526 of the Internal Revenue Code authorizes the IRS, subject to the availability of appropriated funds, to award organizations matching grants of up to $100,000 per year for the development, expansion, or continuation of qualified low income taxpayer clinics. Section 7526 authorizes the IRS to provide grants to qualified organizations that represent low income taxpayers in controversies with the IRS or inform individuals for whom English is a second language of their taxpayer rights and responsibilities, or both. The IRS may award grants to qualifying organizations to fund one-year, two-year or three-year project periods. Grant funds may be awarded for start-up expenditures incurred by new clinics during the grant cycle.

Mission Statement

Low Income Taxpayer Clinics ensure the fairness and integrity of the tax system by educating low income taxpayers about their rights and responsibilities, by providing *pro bono* representation to taxpayers in tax disputes with the IRS, by conducting outreach and education to taxpayers who speak English as a second language, and by identifying and advocating for issues that impact low income taxpayers.

Selection Consideration

Applications that pass the eligibility screening process will undergo a two-tiered evaluation process. Applications will be subject to both a technical evaluation and program office evaluation. The final funding decision is made by the National Taxpayer Advocate, unless recused. The costs of preparing and submitting an application are the responsibility of each applicant. Each application will be given due consideration and the LITC Program Office will notify each applicant once funding decisions have been made.

Nina E. Olson,

National Taxpayer Advocate, Internal Revenue Service.

[FR Doc. 2011–14535 Filed 6–10–11; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Securities and Exchange Commission

17 CFR Parts 240 and 249
Securities Whistleblower Incentives and Protections; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–64545; File No. S7–33–10]

RIN 3235–AK78

Securities Whistleblower Incentives and Protections

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Final rule.

SUMMARY: The Commission is adopting rules and forms to implement Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") entitled "Securities Whistleblower Incentives and Protection." The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 ("Dodd-Frank"), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the Federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the Commission with information about possible securities violations.

DATES: *Effective Date:* August 12, 2011.

FOR FURTHER INFORMATION CONTACT: Sean X. McKessy, Securities and Exchange Commission, Division of Enforcement, 100 F Street, NE., Washington, DC 20549, Tel. (202) 551–4790, Fax (703) 813–9322.

SUPPLEMENTARY INFORMATION: We are adopting new rules 21F–1 through 21F–17, and new Forms TCR and WB–APP, under the Securities Exchange Act of 1934.

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I. Background and Summary

Section 922 of Dodd-Frank added new Section 21F to the Exchange Act, entitled "Securities Whistleblower Incentives and Protection."[1] Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding $1,000,000.

On November 3, 2010, we proposed Regulation 21F to implement new Section 21F.[2] The rules contained in proposed Regulation 21F defined certain terms critical to the operation of the whistleblower program, outlined the procedures for applying for awards and the Commission's procedures for making decisions on claims, and generally explained the scope of the whistleblower program to the public and to potential whistleblowers.

We received more than 240 comment letters and approximately 1300 form letters on the proposal.[3] Commenters included individuals, whistleblower advocacy groups, public companies, corporate compliance personnel, law firms and individual lawyers, academics, professional associations, nonprofit organizations and audit firms. The comments addressed a wide range of issues. Many commenters provided views on an issue we highlighted in the proposing release—the interplay of the whistleblower program and company internal compliance processes. Commenters also expressed a range of views on other significant issues, including the proposed exclusions from award eligibility for certain categories of individuals or types of information, the availability of awards to culpable whistleblowers, the procedures for submitting information and making a claim for an award, and the application of the statutory anti-retaliation provision.

As discussed in more detail below, we have carefully considered the comments received on the proposed rules in fashioning the final rules we adopt today. We have made a number of revisions and refinements to the proposed rules. Taken together, we believe these changes will better achieve the goals of the statutory whistleblower program and advance effective enforcement of the Federal securities laws. The revisions of each proposed rule are described in more detail throughout this release, but the following are among the most significant:

• *Internal Compliance:* A significant issue discussed in the Proposing Release was the impact of the whistleblower program on companies' internal compliance processes. While we did not propose a requirement that whistleblowers report through internal

[1] Public Law 111–203, § 922(a), 124 Stat 1841 (2010).

[2] Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, Release No. 34–63237 ("Proposing Release").

[3] The public comments we received are available at *http://www.sec.gov/comments/s7–33–10/s73310.shtml*. In addition, to facilitate public input on the Dodd-Frank Act, the Commission provided a series of e-mail links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*.

compliance processes as a prerequisite to eligibility for an award, we requested comment on this topic, and we included in the proposed rules several other elements designed to encourage potential whistleblowers to utilize internal compliance. Commenters were sharply divided on the issues raised by this topic. After considering these different viewpoints, we have determined not to include a requirement that whistleblowers report violations internally, but we have made additional changes to the rules to further incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate.

○ With respect to the criteria for determining the amount of an award, the final rules expressly provide: first, that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award; and, second, that a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.

○ The final rules contain a provision under which a whistleblower can receive an award for reporting original information to an entity's internal compliance and reporting systems, if the entity reports information to the Commission that leads to a successful Commission action. Under this provision, all the information provided by the entity to the Commission will be attributed to the whistleblower, which means that the whistleblower will get credit—and potentially a greater award—for any additional information generated by the entity in its investigation.

○ The final rule extends the time for a whistleblower to report to the Commission after first reporting internally and still be treated as if he or she had reported to the Commission at the earlier reporting date. We proposed a "lookback period" of 90 days after the whistleblower's internal report, but in response to comments, we are extending this period to 120 days in the final rules.

• *Procedures for Submitting Information and Claims:* The proposed rules set forth a two-step process for submitting information, which required the submission of two different forms. In response to comments that urged us to streamline the procedures for submitting information, we have adopted a simpler process, combining the two proposed forms into a single Form TCR that would be submitted by a whistleblower under penalty of perjury. With respect to the claims application process, we have made one section of that form optional to make the form less burdensome. We also describe in greater detail below several other features of the process to assist whistleblowers that we expect will become part of the Office of the Whistleblower's standard practice.

• *Aggregation of smaller actions to meet the $1,000,000 threshold:* The proposed rules stated that awards would be available only when the Commission had successfully brought a single judicial or administrative action in which it obtained monetary sanctions of more than $1,000,000. In response to comments, we have provided in the final rules that, for purposes of making an award, we will aggregate two or more smaller actions that arise from the same nucleus of operative facts. This will make whistleblower awards available in more cases.

• *Exclusions from award eligibility for certain persons and information:* The proposed rules set forth a number of exclusions from eligibility for certain categories of persons and information. In response to comments suggesting that some of these exclusions were overly broad or unclear, we have revised a number of these provisions. Most notably, the final rules provide greater clarity and specificity about the scope of the exclusions applicable to senior officials within an entity who learn information about misconduct in connection with the entity's processes for identifying, reporting, and addressing possible violations of law.

II. Description of the Rules

A. Rule 21F–1—General

Rule 21F–1 provides a general, plain English description of Section 21F of the Exchange Act. It sets forth the purposes of the rules and states that the Commission's Office of the Whistleblower administers the whistleblower program. In addition, the rule states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of an award or the amount thereof.

B. Rule 21F–2—Definition of a Whistleblower

a. Proposed Rule

As proposed, Rule 21F–2(a) defined a whistleblower as an individual who, alone or jointly with others, provides information to the Commission relating to a potential violation of the securities laws. Under the proposed rule, a company or another entity could not qualify as a whistleblower.

Paragraph (b) of the proposed rule stated that the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act would apply irrespective of whether a whistleblower satisfied all the procedures and conditions to qualify for an award under the Commission's whistleblower program. Similarly, the protections against retaliation applied to any individual who provided information to the Commission about a potential violation of the securities laws.

Paragraph (c) of the proposed rule stated that, to be eligible for an award, a whistleblower must submit original information to the Commission in accordance with all the procedures and conditions described in Proposed Rules 21F–4, 21F–8, and 21F–9.

b. Comments Received

Commenters advanced a number of suggestions to refine the definition of "whistleblower." Many commenters agreed that the definition of "whistleblower" should not turn on whether a violation of the securities laws is ultimately adjudged to have occurred,[4] but expressed differing opinions on our proposal to use the term "potential violation." One commenter agreed that the whistleblower definition should include the term "potential violation" because this would allow broad application of the anti-retaliation measures in Section 21F.[5] Several other commenters recommended that the term "potential violation" should be coupled with a requirement that the individual have a "reasonable belief" or "good faith belief" that the information relates to a securities law violation.[6] Some commenters suggested instead of the term "potential violation," we should use the terms "probable violation," "likely violation," or "claimed violation."[7]

On other aspects of the definition of whistleblower, one commenter recommended that we clarify that a "violation of the securities laws" relates only to the Federal securities laws and not to violations of state or foreign

[4] *See, e.g.,* letters from Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association ("ABA"); Project of Government Oversight ("POGO"); Jones Day; Wells Fargo Advisors, LLC ("Wells Fargo"); and Society of Corporate Governance Professionals.

[5] *See* letter from POGO.

[6] *See, e.g.,* letters from Jones Day; Wells Fargo; and Morgan Lewis. As discussed further below in the text, commenters asserted that a "reasonable belief" or "good faith" standard is necessary to prevent employees from making bad-faith allegations of retaliation.

[7] *See, e.g.,* letters from ABA; Goodwin Procter.

securities laws.[8] A few commenters recommended that a whistleblower be limited to a person who provided information relating to a "material" violation of the securities laws.[9]

Two commenters disagreed with the proposed rule's limiting whistleblower status to natural persons,[10] suggesting that non-governmental organizations and/or worker representatives, including labor unions, should be permitted to bring claims.[11]

A number of commenters responded to our request for comment on whether we should limit the definition of "whistleblower" to a person who provides information regarding violations of the securities laws "by another person"—some favoring this,[12] others opposing it.[13] Several of the commenters recommended that we limit the whistleblower definition based on an individual's relative culpability for the reported violation. For example, some commenters stated that the definition of "whistleblower" should cover only individuals who report violations by another person, and who did not participate in or facilitate the violations.[14]

Commenters made several suggestions relating specifically to the scope of the anti-retaliation protections. Among other things, commenters recommended that we expressly state in the rules that the anti-retaliation provisions do not apply to an individual if (1) he files a false, fraudulent, or bad faith and meritless submission; [15] (2) he lacks a good faith or reasonable belief of a violation; [16] or (3) the submission does not evince a "reasonable likelihood of a violation of securities laws." [17] Another commenter suggested the anti-retaliation provisions should only apply to those who qualify for an award.[18]

Several commenters proposed that the anti-retaliation provisions should categorically exempt a company's adverse action against an employee based on factors other than whistleblower status,[19] such as engaging in culpable conduct,[20] failing to comply with the reporting requirements of a company's internal compliance programs,[21] or violating a professional obligation to hold information in confidence." [22] One commenter explained that, without a categorical exemption, the broad anti-retaliation provisions of the statute could prompt a "wave of litigation" alleging retaliation in such circumstances.[23]

Commenters made a series of other suggestions related to the scope and enforceability of the anti-retaliation protections, including that we should: (1) Clarify our authority to bring enforcement actions based on retaliation; [24] (2) provide that the anti-retaliation remedies may not be waived by any agreement, policy, or condition of employment; [25] and (3) exclude from anti-retaliation protection employees whose submissions are based on information that is either publicly disseminated or which the employee should reasonably know is already known to the company's board of directors or chief compliance officer, a court, the Commission or another governmental entity.[26]

c. Final Rule

In response to the comments, we have made several changes to the definition of whistleblower in Rule 21F–2(a) and the application of the anti-retaliation provisions in Rule 21F–2(b) to more precisely track the scope of Section 21F(h)(1). We are adopting Rule 21F–2(c) as proposed, but have re-designated it as Rule 21F–2(a)(2).

With respect to the definition of whistleblower, we agree with those commenters who suggested that the term "potential violation" may be imprecise, and thus in the final rule have changed this to "possible violation" that "has occurred, is ongoing, or is about to occur." We believe that this modification provides greater clarity concerning when an individual who provides us with information about possible violations, including possible future violations, of the securities laws qualifies as a whistleblower. An individual would meet the definition of whistleblower if he or she provides information about a "possible violation" that "is about to occur."

Although some commenters recommended that we use the terms "probable violation" or "likely violation," we have decided to use the term "possible violation." In our view, this requires that the information should indicate a facially plausible relationship to some securities law violation—frivolous submissions would not qualify for whistleblower status. We believe that a higher standard requiring a "probable" or "likely" violation is unnecessary, and would make it difficult for the staff to promptly assess whether to accord whistleblower status to a submission.

In the final rule, the definition of whistleblower clarifies that the submission must relate to a violation of

[8] *See* letter from ABA.

[9] *See, e.g.,* letters from ABA; and Society of Corporate Secretaries and Governance Professionals ("Society of Corporate Secretaries").

[10] *See, e.g.,* joint letter from Voices for Corporate Responsibility, Change to Win, National Employment Lawyers Association, Government Accountability Project ("VOICES"); and Mike G. McCluir.

[11] *See* letter from VOICES.

[12] *See* letters from Chris Barnard; Thompson Hine LLP; William A. Jacobson, Angel Prado, and Yaozhi Ye ("Cornell Securities Law Clinic"); Evolution Petroleum Corp.; Securities Industry and Financial Markets Association ("SIFMA"); The Washington Legal Foundation; Morgan Lewis; Continewity LLC; Davis Polk & Wardwell LLP ("Davis Polk"); Oppenheimer Funds.

[13] *See, e.g.,* letters from Grohovsky, Vogel, and Lambert ("Grohovsky Group"); Peter van Schaick.

[14] *See, e.g.,* joint letter from Americans for Limited Government; Ryder Systems, Inc.; Financial Services Institute, Inc.; U.S. Chamber of Commerce; Verizon; and White & Case, LLP ("Chamber of Commerce Group").

[15] *See, e.g.,* letters from Connolly & Finkel; National Association of Corporate Directors ("NACD"); Investment Company Institute ("ICI"); Valspar; Auditing Standards Committee of the Auditing Section of the American Accounting Association ("Auditing Standards Committee"); U.S. Chamber of Commerce Center for Capital Markets Competitiveness and the U.S. Chamber of Institute for Legal Reform ("CCMC"); joint letter from General Electric Company, Google, Inc., Honeywell, Inc., JPMorgan Chase & Co., Microsoft Corporation and Northrop Grumman Corporation ("GE Group"); Jones Day; TECO Energy. Two commenters suggested that the Commission should consider "whether it can apply additional sanctions" to any person who uses the whistleblower process in bad faith." *See* joint letter from the Financial Services Roundtable and the American Bankers Association ("Financial Services Roundtable"); letter from TECO Energy.

[16] *See* letters from Chris Barnard; Paul Hastings.

[17] *See* letter from Goodwin Proctor.

[18] *See* letter from NACD (commenting that not limiting anti-retaliation protection to those who satisfy the conditions for an award "opens the door for employees to submit fake allegations that may cause reputational harm to the company and/or unfairly embarrass corporate employees and leadership").

[19] *See* letters from Thompson Hine; Americans for Limited Government ("ALG"); AT&T; Equal Employment Advisory Council ("EEAC"); Connolly & Finkel; ICI; GE Group; Society of Corporate Secretaries; Association of Corporate Counsel; Financial Services Roundtable; Davis Polk; ABA; joint letter from Allstate Insurance Company, American Institute of Certified Public Accountants, American Insurance Association, Americans for Limited Government, Association of Corporate Counsel, AT&T, Center for Business Ethics, Dover Corporation, FedEx Corporation, Financial Services Institute, Inc., Pharmaceutical Research and Manufacturers of America, Retail Industry Leaders Association, Royal Caribbean Cruises Ltd, Ryder Systems, Inc., UPS, U.S. Chamber of Commerce, U.S. Chamber of Commerce Institute for Legal Reform, Verizon and White & Case, LLP ("Allstate Group").

[20] *See* letters from ALG; Allstate Group; Morgan Lewis; Davis Polk; ABA.

[21] *See* letters from Thompson Hine; *see also* letters from ALG; Allstate Group; Connolly & Finkel; NACD; TECO Energy; Association of Corporate Counsel.

[22] *See* letter from the ABA.

[23] *See* letter from ALG; *see also* letter from Allstate Group.

[24] Letter from Alex Hoover; *see also* letters from Bryan Maloney; National Coordinating Committee for Multiemployer Plans ("NCCMP").

[25] *See* letter from Kaiser Saurborn & Mair.

[26] *See* letter from ABA.

the Federal securities laws, or a rule or regulation promulgated by the Commission. An individual who submits information that relates only to a state law or foreign law violation would not satisfy the whistleblower definition.

The final rule also clarifies that, to qualify as a whistleblower eligible for the award program and the heightened confidentiality provisions of Section 21F(h)(2) of the Exchange Act, an individual must submit his or her information to the Commission in accordance with the procedures set forth in Rule 21F–9(a).[27] Rule 21F–9(a) establishes procedures for an individual to mail, fax, or electronically submit to us information relating to a possible securities law violation. As proposed, our definition could have been misconstrued to apply to any individuals who provide us with information relating to a securities law violation, including individuals whom we subpoena and law enforcement personnel from other governmental authorities. This result would have been outside the intended scope of Section 21F.

We have not added a requirement that the information relate to a "material" violation of the securities laws. We believe that, rather than use a materiality threshold barrier that might limit the number of submissions to us, it is preferable for individuals to provide us with any information they possess about possible securities violations (irrespective of whether it appears to relate to a material violation) and for us to evaluate whether the information warrants action.[28] To the extent that commenters advanced this suggestion as a way to prevent individuals from abusing the anti-retaliation protections afforded by Section 21F(h) of the Exchange Act, we believe this issue is sufficiently addressed by the revisions to Rule 21F–2(b), discussed further below. To the extent that commenters suggested this approach as a way to reduce frivolous submissions, we believe our use of the term "possible violation" sufficiently addresses this concern.

We have decided not to extend the definition of whistleblower beyond natural persons because we believe that this is consistent with the statutory definition, which provides that a whistleblower must be an "individual." The ordinary meaning of "individual" is "natural person,"[29] and nothing in the statutory text or legislative history suggests a different meaning here. Although one commenter identified a reference to "individuals" in the False Claims Act to argue that the term should be read to extend beyond natural persons, we note that the False Claims Act otherwise repeatedly refers to whistleblowers as "persons" (which ordinarily extends beyond natural persons),[30] and we believe this explains the different result under that Act.[31]

We have modified proposed Rule 21F–2(b)'s anti-retaliation protections, which are now in Rule 21F–2(b)(1). We are also adding Rule 21F–2(b)(2), which expressly states that the Commission may enforce the anti-retaliation provisions of Section 21F(h)(1) of the Exchange Act and any rules promulgated thereunder.

Rule 21F–2(b)(1) provides that, for purposes of the anti-retaliation protections afforded by Section 21F of the Exchange Act, an individual is a whistleblower if (i) he possesses a reasonable belief that the information he is providing relates to a possible securities law violation (or, where applicable, to a violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and (ii) he reports that information in a manner described in Section 21F(h)(1)(A).

With respect to the first prong of this standard, the employee must possess a "reasonable belief that the information he is providing relates to a possible securities law violation (or, where applicable, to a violation of the provisions set forth in 18 U.S.C. 1514A(a))[32] that has occurred, is ongoing, or is about to occur." The "reasonable belief" standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess.[33] We believe that requiring a "reasonable belief" on the part of a whistleblower seeking anti-retaliation protection strikes the appropriate balance between encouraging individuals to provide us with high-quality tips without fear of retaliation, on the one hand, while not encouraging bad faith or frivolous reports, or permitting abuse of the anti-retaliation protections, on the other.[34] This approach is consistent with the approach followed by various courts that have construed the anti-retaliation provisions of other Federal statutes, including the False Claims Act,[35] to

[27] The statutory definition of "whistleblower" in Section 21F(a)(6) of the Exchange Act provides that the Commission may "establish by rule or regulation" the "manner" in which an individual provides the Commission information so as to qualify as a whistleblower for purposes of the awards program.

[28] We do not expect potential whistleblowers to make a fact-dependent materiality assessment.

[29] *See, e.g., Jove Engineering, Inc.* v. *I.R.S.,* 92 F.3d 1539, 1550–51 (11th Cir. 1996) (quoting Black's Law Dictionary 773 (6th ed. 1996), and Webster's New Collegiate Dictionary 581 (8th ed. 1979)).

[30] *Compare* 31 U.S.C. 3730(e)(4)(B) *with id.* 3730(b)(1) ("A person may bring a civil action * * *"), and *id.* 3730(b)(4)(B)(5) ("When a person brings an action * * *").

[31] The ABA made several additional recommendations to clarify and/or narrow the definition of whistleblower. *See* letter from ABA. Specifically, the ABA recommended that we: (1) Exclude from the definition individuals who provide information that is "clearly stale (*e.g.,* flawed disclosure in a ten-year old proxy statement); (2) require as part of the definition that the individual have a non-speculative "basis in fact or knowledge" to support the potential securities law violation; and (3) exclude from the definition individuals who provide information that is "either publicly disseminated [already] or which the employee should reasonably know is already known to the company's board of directors or chief compliance officer, a court or the Commission or another governmental entity." With respect to clearly stale information, we believe that this is already addressed by the requirement that the information relate to a "possible violation," because we view this term as encompassing a requirement that the violation must be potentially actionable, which would preclude plainly stale violations. Similarly, we believe that the "possible violation" requirement excludes submissions that have *no* "basis in fact or knowledge." Finally, rather than addressing in the threshold definition of whistleblower information that is already publicly known, we have addressed this issue in Rule 21F–4 in the definition of "original information."

[32] This parenthetical reflects the fact that the anti-retaliation protection afforded by Section 21F(h)(1)(A)(iii) includes not only reports of securities law violations, but also various other violations of Federal law (*e.g.,* 18 U.S.C. 1341, 1343, 1344, and 1348).

[33] *See, e.g., Livingston* v. *Wyeth, Inc.,* 520 F.3d 344, 352 (4th Cir. 2008); *Clover* v. *Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (11th Cir. 1999).

[34] *See, e.g., Parker* v. *B&O R. Co.,* 652 F.2d 1012, 1020 (DC Cir. 1981) (holding, in Title VII retaliation case, that "[t]he employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate a good faith, reasonable belief that the challenged practice violates Title VII"); *McDonnell* v. *Cisneros,* 84 F.3d 256, 259 (7th Cir.1996) ("There is nothing wrong with disciplining an employee for filing frivolous complaints"); *Hindsman* v. *Delta Airlines,* 2010 DOL Ad. Rev. Bd. 58 LEXIS at *10 (ARB Jun. 30, 2010) (interpreting the anti-retaliation provisions of the Wendell H. Ford Aviation Investment and Reform Act, which explicitly excludes frivolous complaints and those brought in bad faith, as requiring a "reasonable belief" by the whistleblower that the violation of the statute has occurred).

[35] *See Fanslow* v. *Chi. Mfg, Ctr.,* 384 F.3d 469, 480 (7th Cir. 2004) (noting that several circuits had held that the relevant inquiry to determine whether an employee's actions are protected under the False Claims Act is whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government") (citing *Moore* v. *Cal. Inst. of Tech., Jet Propulsion Lab,* 275 F.3d 838, 845 (9th Cir. 2002); *Wilkins* v. *St. Louis,* 314 F.3d 927, 933 (8th Cir. 2002), and *McNeil* v. *Empl. Sec. Dep't,* 2002 Wash.

Continued

require that a whistleblower have a reasonable belief that he or she is reporting a violation of that statute even where the statute does not expressly require such a showing.[36]

The second prong of the Rule 21F–2(b)(1) standard provides that, for purposes of the anti-retaliation protections, an individual must provide the information in a manner described in Section 21F(h)(1)(A). This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*. Specifically, Section 21F(h)(1)(A)(iii)—which incorporate the anti-retaliation protections specified in Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. 1514A(a)(1)(C)—provides anti-retaliation protections for employees of public companies, subsidiaries whose financial information is included in the consolidated financial statements of public companies, and nationally recognized statistical rating organizations[37] when these employees report to (i) A Federal regulatory or law enforcement agency, (ii) any member of Congress or committee of Congress, or (iii) a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct. However, the retaliation protections for internal reporting afforded by Section 21F(h)(1)(A) do not broadly apply to employees of entities other than public companies.[38]

In addition, Rule 21F–2(b)(1)(iii) provides that the retaliation protections apply to a whistleblower irrespective of whether the whistleblower is ultimately entitled to an award. This provision of the rule restates a result compelled by the text of Section 21F(h)(1), which on its face provides retaliation protection to whistleblowers irrespective of whether they actually collect an award.[39]

Rule 21F–2(b)(2) states that Section 21F(h)(1) of the Exchange Act, including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission. Because the anti-retaliation provisions are codified within the Exchange Act, we agree with commenters that we have enforcement authority for violations of Section 21F(h)(1) by employers who retaliate against employees for making reports in accordance with Section 21F.[40]

With regard to the other significant comments made regarding the anti-retaliation provisions in Rule 21F–2(b), for the reasons set forth below we find that it is either inappropriate or unnecessary to make the modifications that those commenters recommended. Regarding the comments that we should categorically provide that employees who make whistleblower reports to us may be disciplined for reasons independent of their whistleblowing activities, we think this is unnecessary. By its terms, the statute only prohibits adverse employment actions that are taken "because of" any lawful act by the whistleblower to provide information; adverse employment actions taken for other reasons are not covered. Moreover, there is a well-established legal framework for making this factual determination on a case-by case basis,[41] and we see no indication that Congress intended to depart from this framework here.[42]

With regard to the comment expressing concern that entities might require employees to waive their anti-retaliation rights under Section 21F, we believe that possibility is foreclosed by the Exchange Act. Specifically, because Section 21F is codified in the Exchange Act, it is covered by Section 29(a) of the Exchange Act, which specifically provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder * * * shall be void."[43] Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F.

C. Rule 21F–3—Payment of Award

a. Proposed Rule

Paragraphs (a) and (b) of Proposed Rule 21F–3 summarized the statutory

App. LEXIS 1900, at *15–*16 (Wash. Ct. App. Aug. 9, 2002) (same)).

[36] *See, e.g., Calhoun* v. *United States Dep't of Labor* ("*US DOL*"), 576 F.3d 201, 212 (4th Cir. 2009) (anti-retaliation provisions of the Surface Assistance Transportation Act); *Knox* v. *U.S. DOL,* 232 Fed. App. 255, 258–59 (4th Cir. 2007) (Clean Air Act); *Williams* v. *U.S. DOL,* 157 Fed. Appx. 575–76 (4th Cir. 2005) (Toxic Substances Control Act, Solid Waste Disposal Act and Clean Air Act); *see also Vinnett* v. *Mitsubishi Power Systems,* 2010 DOL Ad. Rev. Bd. LEXIS 69 at *12 (ARB Jul. 27, 2010) (Energy Reorganization Act requires "reasonable belief" of violation); *Carter* v. *Electrical District No. 2 of Pinal County,* 1995 DOL Sec. Labor LEXIS 153 (July 26, 1995) (requiring reasonable belief under anti-retaliation provisions of environmental statutes). Other anti-retaliation provisions, such as the anti-retaliation provisions enacted by Section 806 the Sarbanes-Oxley Act of 2002, expressly contain a "reasonable belief" standard. *See* 18 U.S.C. 1514A(a).

[37] The anti-retaliation protections afforded by Section 806 of the Sarbanes-Oxley Act have also been read to cover employees of agents or contractors of public companies in certain situations. *See Klopfenstein* v. *PCC Holdings Corp,* 2006 DOL Ad. Rev. Bd. LEXIS 50 (ARB May 31, 2006) (employee of a private subsidiary of a public company was covered under Section 806 where private subsidiary acted at direction of public company in taking adverse action against complainant); *Lawson* v. *FMR LLC,* 724 F. Supp. 2d 167, 169 (D. Mass. 2010) (employees of private investment advisers to investment companies were covered by Section 806), on appeal, No. 10–2240 (1st Cir.).

[38] In a few limited situations—reporting by employees of subsidiaries and NRSRO's covered by SOX Section 806, and by employees whose reports were required or protected under SOX or the Exchange Act, see Section 21F(h)(1)(A)(iii)—internal reporting is expressly protected.

[39] Indeed, providing whistleblowers anti-retaliation protection only if they ultimately receive an award could unduly deter whistleblowers from coming forward with information. Under that approach, a whistleblower would not be protected from retaliation if he or she had provided accurate information about the employer's violation, but for some reason no successful Commission action was brought or the whistleblower was not awarded a payment.

[40] Section 21F(h)(1)(B).

[41] This framework involves burden-shifting analysis. *See, e.g, Roadway Express, Inc.* v. *U.S. DOL,* 495 F.3d 477, 481–82 (7th Cir. 2007); *Scott* v. *Metropolitan Health Corp.,* 234 Fed Appx. 341, 346 (6th Cir. 2007) (applying burden shifting analysis to retaliation claim under the False Claims Act). *See generally McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). It provides that (1) the employee must first make a *prima facie* case of retaliation (that is, that he or she engaged in protected activity, has suffered an adverse employment action, and that the action was causally connected to the protected activity), (2) the burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for its employment decision, after which (3) the burden shifts to the employee to show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus. *E.g., Collazo* v. *Bristol-Myers Squibb Mfg, Inc.,* 617 F.3d 39, 46 (1st Cir. 2010) (citations and quotations omitted). While anti-retaliation claims brought under the Sarbanes-Oxley Act of 2002 ("SOX") (unlike with Section 21F) are governed by a slightly different framework, under that framework the determination of whether an employee was disciplined for retaliatory or legitimate reasons is likewise a fact-bound inquiry. SOX claims are governed by the procedures applicable to whistleblower claims brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. *See* 18 U.S.C. 1514A(b)(2). Under that statute, "the employee bears the initial burden of making a prima facie showing of retaliatory discrimination because of a specific act"; once the employee makes that showing, "[t]he burden then shifts to the employer to rebut the employee's prima facie case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of protected activity." *See Day* v. *Staples, Inc.,* 555 F.3d 42, 53 (1st Cir. 2009).

[42] We note that where Congress intended to categorically exclude from anti-retaliation protections of certain statutes those employees who, without any direction from the employer, deliberatively committed violations of those statutes, it has expressly said so. *See., e.g.,* 33 U.S.C. 1367(d) (excluding such employees from anti-retaliation protections of Federal Water Pollution Control Act); 15 U.S.C. 2622(e) (TOSCA); 42 U.S.C. 6971(d) (Solid Waste Disposal Act); 42 U.S.C. 7622(g) (Clean Air Act); 42 U.S.C. 9610(d) (CERCLA); 42 U.S.C. 5851(g) (Energy Reorganization Act).

[43] 15 U.S.C. 78cc(a).

requirements for payment of an award based on a covered action or a related action. Paragraph (a) stated that, subject to the eligibility requirements in the Regulation, the Commission will pay an award or awards to one or more whistleblowers who voluntarily provide the Commission with original information that leads to the successful enforcement by the Commission of a Federal court or administrative action in which the Commission obtains monetary sanctions totaling more than $1,000,000. Paragraph (b) described the circumstances under which the Commission would also pay an award to the whistleblower based upon monetary sanctions that are collected from a "related action." Payment based on the "related action" would occur if the whistleblower's original information led the Commission to obtain monetary sanctions totaling more than $1,000,000, the related action is based upon the same original information that led to the successful enforcement of the Commission action, and the related action is brought by the Attorney General of the United States, an appropriate regulatory agency, a self-regulatory organization, or a state attorney general in a criminal case.

Paragraph (c) of Proposed Rule 21F–3 explained that the Commission must determine whether the original information that the whistleblower gave to the Commission also led to the successful enforcement of a related action using the same criteria used to evaluate awards for Commission actions. To help make this determination, the Commission may seek confirmation of the relevant facts regarding the whistleblower's assistance from the authority that brought the related action. However, the proposed rule stated that the Commission would deny an award to a whistleblower if the Commission determined that the criteria for an award are not satisfied or if the Commission was unable to obtain sufficient and reliable information about the related action.

Paragraph (d) of Proposed Rule 21F–3 provided that the Commission would not make an award in a related action if an award already has been granted to the whistleblower by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act.[44] Proposed Rule 21F–3(d) also provided that, if the CFTC has previously denied an award in a related action, the whistleblower will be collaterally estopped from relitigating any issues before the Commission that were necessary to the CFTC's denial.

b. Comments Received

We received a few comments on the proposed rule's treatment of related actions.

One commenter objected to paragraph (c) to the extent that it would preclude a recovery in situations where the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination of the whistleblower's contribution to the success of the related action, suggesting instead that the rule include a mechanism for inter-agency coordination to allow the Commission to understand the whistleblower's contribution to the related action.[45] Another commenter challenged paragraph (c) because it would preclude an award for a whistleblower in situations where the Department of Justice or another entity pursues a successful action based on a whistleblower's tip that the Commission forwarded, but the Commission does not bring an enforcement action.[46]

With respect to proposed paragraph (d) and the overlap with CFTC actions, one commenter commended the Commission for clarifying that the Commission will not make an award in a related action if the CFTC has already made an award to the whistleblower on that action,[47] while another acknowledged that there should not be double recoveries, but stated that there should be no automatic rule that would bar rewards because the interaction of the Commission and CFTC programs can be adjudicated on a case-by-case basis.[48]

c. Final Rule

After reviewing the comments, we have decided to adopt Rule 21F–3 substantially as proposed.[49] With respect to related actions, we do not believe that inter-agency coordination can always ensure that the Commission will obtain "sufficient and reliable information" about a whistleblower's contribution to the success of a related action, and thus we continue to believe that there is a need for paragraph (b)(2).[50] We have not modified the rule to permit a whistleblower to recover in a related action absent a successful Commission action, because the statute expressly requires a successful Commission action *before* there can be a "related action" upon which a whistleblower may recover.[51]

With respect to the interrelation with CFTC actions, we are adopting the rule substantially as proposed because it provides claimants with a clear statement of how the Commission will address any issues that arise where a claimant pursues either a double recovery or a "second bite at the apple" by filing an application for an award on a related action after having already pursued an award on the same action under the CFTC's whistleblower awards program.[52] Our Proposing Release had included the qualification that the issue must have been "necessary" to the CFTC's determination, but we believe this requirement would have introduced unwarranted disputes over whether a particular issue was actually necessary. Therefore, we have made a slight modification to provide that the CFTC need only have decided the issue against the award claimant.

[44] *See* 7 U.S.C. 26.

[45] *See* letter from VOICES.

[46] *See* letter from Stuart D. Meissner, LLC.

[47] *See* letter from Society of Corporate Secretaries.

[48] *See* letter from the National Whistleblowers Center ("NWC").

[49] In the final rule, we have grouped proposed paragraphs (b)–(d) together under the heading "related actions," and renumbered these paragraphs (b)(1)–(b)(3), respectively. We have also changed the term "appropriate regulatory agency" to "appropriate regulatory authority" to more closely comport with the terms of Section 21F and to clarify that our rules regarding payment for awards in connection with related actions govern actions brought by other agencies, not Commission actions. *See* discussion below under Rule 21F–4(g).

[50] In cases where the Commission coordinates closely with an entity that ultimately brings a related action, we anticipate that Commission staff will know and will be able to provide information about the whistleblower's contribution to the coordinated efforts. We have added a reference to new Rule 21F–12(a)(5) which provides that neither the Commission nor the Claims Review Staff is permitted to rely upon any information received from the entity that brought the related action if the entity has precluded us from also sharing that information with a claimant. The reference to Rule 21F–12(a)(5) makes clear that if the Commission is unable to receive sufficient and reliable information that is available for the claimant's review, the Commission will deny the claimant's related-action award request.

[51] *See* Section 21F(a)(5) of the Exchange Act, 15 U.S.C. 78u–6(a)(5) (related action must be "based upon the original information * * * that led to the successful enforcement of the Commission action").

[52] Several comment letters suggested that a *qui tam* action under the False Claims Act, 31 U.S.C. 3729 *et seq,* could qualify as a "related action." *See, e.g.,* letter from VOICES. This is not correct. A *qui tam* action is not brought by the Attorney General of the United States as is required under the definition of "related action" in Section 21F(a)(5) of the Exchange Act. In a *qui tam* action, the relator "bring[s]" the action "in the name of the Government," *see Vermont Agency of Natural Resources* v. *United States ex rel. Stevens,* 529 U.S. 765, 769 (2000), and thereafter the Attorney General may "elect to intervene and proceed with the action," 31 U.S.C. 3730(b)(2), 3730(b)(4). Moreover, given that Congress has specifically provided a 15–30% award for successful *qui tam* plaintiffs, *see* 31 U.S.C. 3730(d)(1)–(2), we do not believe Congress intended Section 21F of the Exchange Act to permit additional recovery for the same action above what it specified in the False Claims Act.

D. Rule 21F–4—Other Definitions

Although the statute defines several relevant terms, Rule 21F–4 defines other terms that are important to understanding the scope of the whistleblower award program, in order to provide greater clarity and certainty about the operation and scope of the program.

1. Rule 21F–4(a)—Voluntary submission of information

a. Proposed Rule

Under Section 21F(b)(1) of the Exchange Act,[53] whistleblowers are eligible for awards only when they "voluntarily" provide original information about securities violations to the Commission. Proposed Rule 21F–4(a)(1) defined a submission as made "voluntarily" if a whistleblower provided the Commission with information before receiving any request, inquiry, or demand from the Commission, Congress, any other Federal, state or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in the whistleblower's submission was relevant. The proposed rule covered both formal and informal requests. Thus under the proposed rule, a whistleblower's submission would not be considered "voluntary" if the whistleblower was contacted by the Commission or one of the other authorities first, whether or not the whistleblower's response was compelled by subpoena or other applicable law.

As our Proposing Release explained, this approach was intended to create a strong incentive for whistleblowers to come forward early with information about possible violations of the Federal securities laws, rather than wait to be approached by investigators. For the same reasons, Proposed Rule 21F–4(a)(2) provided that a whistleblower's submission of documents or information would not be deemed "voluntary" if the documents or information were within the scope of a prior request, inquiry, or demand to the whistleblower's employer, unless the employer failed to make production to the requesting authority in a timely manner.

Proposed Rule 21F–4(a)(3) provided that a submission also would not be considered "voluntary" if the whistleblower was under a pre-existing legal or contractual duty to report the securities violations to the Commission or to one of the other designated authorities.

[53] 15 U.S.C. 78u–6(b)(1).

b. Comments Received

Commenters had diverse perspectives on our proposal to require that whistleblowers come forward before they receive either a formal or informal request or demand from the Commission or one of the other designated authorities about any matter relevant to their submission. Some commenters believed that our proposed rule was too restrictive. For example, one commenter urged that all information provided by a whistleblower should be treated as "voluntary" until the whistleblower is testifying under compulsion of a subpoena.[54] Another commenter suggested that persons who are first contacted by an authority should remain eligible for awards if they provide information about transactions or occurrences beyond the specific parameters of the request.[55] A third commenter expressed concern that our proposed rule could have the effect of barring whistleblowers in cases where the whistleblower's information is arguably "relevant" to a general informational request from an authority, even though the authority is not focused on the issue on which the whistleblower might report.[56]

Other commenters took the view that our proposed rule did not go far enough in precluding whistleblower submissions from being treated as "voluntary." A number of commenters urged that our rules also preclude an individual from making a "voluntary" submission after the individual has been contacted for information in the course of a company's internal investigation or other internal review.[57] In response to one specific request for comment, other commenters advocated that we not treat a submission as "voluntary" if the whistleblower was aware of a governmental or internal investigation at the time of the submission, whether or not the whistleblower received a request from the Commission or one of the other authorities.[58]

Our request for comment on whether a whistleblower's submission should be deemed to be "voluntary" if the information was within the scope of a previous request to the whistleblower's employer (Proposed Rule 21F–4(a)(2)) also generated diverse reactions. Some commenters urged that we eliminate this provision because it could have a sweeping effect in cutting off large numbers of potential whistleblowers, in particular in industry-wide investigations.[59] Other commenters supported the exclusion and suggested that it be expanded in various ways.[60]

Our proposed rule to preclude whistleblowers from acting "voluntarily" if they are under a pre-existing legal or contractual duty to report the violations to the Commission or another authority (Proposed Rule 21F–4(a)(3)) also generated varied comment. Some commenters opposed the exclusion on the grounds that Section 21F(c)(2) of the of the Exchange Act sets forth a specific list of persons whom Congress deemed to be ineligible for awards, some as a result of their pre-existing duties.[61] These commenters urged that the Commission should not expand these exclusions, as doing so would be inconsistent with Congressional intent and would undermine the purposes of Section 21F.[62] One of these commenters asserted, for example, that the proposed rule could result in barring submissions from individual employees if regulators require companies under their

[54] *See* letter from NWC.

[55] *See* letter from Bijan Amini.

[56] *See* letter from Taxpayers Against Fraud ("TAF"). As an example, this commenter pointed out that a request by a municipal bond issuer for completed transaction documents from a Guaranteed Investment Contract ("GIC") provider could be interpreted to preclude a "voluntary" submission of whistleblower allegations that the GIC provider engaged in bid rigging.

[57] *See* letters from CCMC; Jones Day; and GE Group (arguing that a person who is questioned by an employer about a matter should not be permitted subsequently to become a whistleblower unless he or she provided the employer substantially the same information in response to the employer's questioning).

[58] *See* letters from ABA, Wells Fargo, and the National Society of Compliance Professionals ("NSCP").

[59] *See* letters from Section on Corporation, Finance and Securities Law of the District of Columbia Bar ("DC Bar"), Daniel J. Hurson, Continewitty LLC.

[60] *See* letters from SIFMA (urging elimination of the exception that would permit an employee to make a voluntary submission if the employer did not produce the documents or information in a timely manner), Wells Fargo (same); NCSP (employee should be regarded as having received a request to an employer if there is a reasonable likelihood that the employee would have been contacted by the employer in responding to the request); and the Institute of Internal Auditors (should expand exclusion to other persons within the scope of a request, such as contractors, agents, and service providers).

[61] Section 21F(c)(2), 15 U.S.C. 78u–6(c)(2), sets forth four categories of individuals who are ineligible for whistleblower awards. These include employees of the Commission and of certain other authorities, persons who are convicted of a criminal violation in relation to action for which they would otherwise be eligible for an award, auditors in cases where a submission would be contrary to the requirements of Section 10A of the Exchange Act, and persons who fail to submit information in the form required by the Commission's rules.

[62] *See* letters from NWC; Stuart D. Meissner, LLC; NCCMP; DC Bar; and Daniel J. Hurson.

jurisdiction to report violations of law, and could also preclude submissions from some senior corporate managers who are obligated under Federal procurement regulations to report violations of various Federal criminal laws, False Claims Act violations and overpayments on government contracts to agency inspectors general and to contracting officers.[63] This same commenter also expressed concern that the Commission should not be in a position of having to decide whether whistleblowers from within state or municipal corporations have pre-existing obligations to report violations.

Other commenters favored the "legal duty" exclusion and recommended that its reach be clarified and extended. In particular, these commenters suggested that the exclusion should be applied to various categories of individuals in the corporate context. Several commenters urged that we not consider submissions to be "voluntary" in circumstances where an employee or an outside service provider has a duty to report misconduct to a company.[64] Another commenter suggested that a company's principal financial officer, principal executive officer, senior management, audit committee, and board of directors should be viewed as having a legal duty to report violations to the government because of the officer certification requirements of Section 302 of the Sarbanes-Oxley Act, and the provisions regarding reporting of illegal acts under Section 10A of the Exchange Act.[65]

Our request for comment concerning whether the "legal duty" limitation on voluntary submissions should apply to all government employees prompted a number of responses. Some commenters appeared to take the view that government employees who are involved in law enforcement or the regulation of business or financial services should be deemed to have a legal duty to report violations.[66] Other commenters indicated that government employees should be viewed as having a duty to report violations that they uncover in the course of their official duties.[67]

Finally, most commenters who responded to our request for comment on whether the list of other authorities in the rule should include foreign authorities stated that foreign authorities should be included.[68] Two commenters argued against this approach. One of these emphasized that the Commission cannot be assured that all foreign authorities will share information they may obtain concerning possible violations of U.S. securities laws, and that it would be difficult for the Commission in many instances to determine whether an individual owed a legal duty under foreign law to report a violation to a foreign authority.[69] Another similarly argued that the fact that a whistleblower received a request from a foreign authority would not compel the whistleblower to provide the information to the Commission.[70]

c. Final Rule

After considering the comments, we have decided to adopt the rule with certain modifications. Although we continue to believe that a requirement that the whistleblower come forward before being contacted by government investigators is both good policy and consistent with existing case law from related areas,[71] we agree with the concerns expressed by some commenters that our proposed rule might have the unintended result of deterring high-quality submissions as a threshold matter based on an overly-broad construction of the concept of voluntariness. In response to this concern, we have made several changes to the final rule.

As adopted, paragraph (1) of Rule 21F–4(a) now provides that a submission of information is deemed to have been made "voluntarily" if the whistleblower makes his or her submission before a request, inquiry, or demand that relates to the subject matter of the submission is directed to the whistleblower or anyone representing the whistleblower (such as an attorney) (i) By the Commission; (ii) in connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board ("PCAOB") or any self-regulatory organization;[72] or (iii) in connection with an investigation by Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority.

Thus, rather than apply to all information requests of any kind, as was proposed, our final rule narrows the types of requests that that may preclude a later whistleblower submission from being treated as "voluntary." All requests from the Commission are still covered, as we believe that a whistleblower award should not be available to an individual who makes a submission after first being questioned about a matter (or otherwise requested to provide information) by the Commission staff acting pursuant to any of our investigative or regulatory authorities. Only an investigative request made by one of the other designated authorities will trigger application of the rule, except that a request made in connection with an examination or inspection, as well as an investigative request, by staff of the PCAOB or a self-regulatory organization will also render a whistleblower's subsequent submission relating to the same subject matter not "voluntary." This provision recognizes the important relationship that frequently exists between examinations and enforcement investigations, as well as our regulatory oversight of the PCAOB and self-regulatory organizations. However, the rule only precludes a whistleblower from making a "voluntary" submission if a previous request, as described, was directed to the whistleblower or to his or her personal representative. For example, an examination request directed to a broker-dealer or an investment adviser would not automatically foreclose whistleblower submissions related to the subject matter of the exam from all employees of the entity. However, if a firm employee were interviewed by examiners, the employee could not later make a "voluntary" submission related to the subject matter of the interview.[73]

We have also narrowed the list of authorities set forth in the rule by limiting state and local authorities to state Attorneys General and state securities regulatory authorities.

[63] *See* letter from the DC Bar, *citing* 73 FR 67064 (December 2008).

[64] *See* letters from NSCP and from Financial Services Roundtable.

[65] 15 U.S.C. 78j–1; *see* letter from the Cornell Securities Law Clinic.

[66] *See* letters from Patrick Burns, ICI, Auditing Standards Committee, and TRACE International, Inc.

[67] *See* letters from the NACD and Grohovsky Group. *See also* letter from the Institute of Internal Auditors ("a general preclusion of government employees would be appropriate.").

[68] *See* letters from Auditing Standards Committee; NSCP; Continewity, LLC; Society of Corporate Secretaries; Institute of Internal Auditors.

[69] *See* letter from Georg Merkl.

[70] *See* letter from VOICES.

[71] *Cf. Barth* v. *Ridgedale Electric, Inc.,* 44 F.3d 699 (8th Cir. 1994); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005) (rejecting argument that information provided beyond that required by subpoena is voluntary for purposes of False Claims Act); *United States ex rel. Fine* v. *Chevron, USA, Inc.,* 72 F.3d 740 (9th Cir. 1995), *cert. denied,* 517 U.S.1233 (1996) (rejecting argument that provision of information to the Government is always voluntary unless compelled by subpoena).

[72] The term "self-regulatory organization" is defined in Rule 21F–4(h).

[73] As is further discussed below, individuals who wait to make their submission until after a request is directed to their employer will not face an easy path to an award. We expect to scrutinize all of the attendant circumstances carefully in determining whether such submissions "significantly contributed" to a successful enforcement action under Rule 21F–4(c)(2) in view of the previous request to the employer on the same or related subject matter.

Accordingly, whistleblowers will have the opportunity to submit information to the Commission "voluntarily" even after they receive requests from other state and local authorities. This change recognizes the fact that the Commission less regularly receives information through cooperative arrangements with state and local authorities other than state Attorneys General and state securities regulatory authorities.[74]

As adopted, our rule retains the provision (now placed in a newly-designated paragraph (2)) that a whistleblower who receives a request, inquiry, or demand as described in paragraph (1) first will not be able to make a subsequent "voluntary" submission of information that relates to the subject matter of the request, inquiry, or demand, even if a response is not compelled by subpoena or other applicable law.[75] We believe that this approach strikes an appropriate balance between, on the one hand, permitting any submission to be considered "voluntary" as long as it is not compelled, and, on the other hand, precluding a submission from being treated as "voluntary" whenever a whistleblower may have become "aware of" an investigation or other inquiry covered by the rule, regardless of whether the relevant authority contacted the whistleblower for information. A standard based on the receipt of a subpoena would go too far in permitting individuals to claim whistleblower awards even after being directly asked about conduct by staff of the Commission or other authorities. We do not believe either that Congress intended this result, or that it is suggested by existing law.[76] Conversely, a rule that prohibited a whistleblower from acting "voluntarily" any time the whistleblower became aware of an investigation or other inquiry covered by the rule is overly inclusive because the subject of the inquiry may not be clear to potential whistleblowers with valuable information or these potential whistleblowers may not be known to the Commission. Accordingly, such an interpretation of "voluntary" is likely to have a negative impact on our Enforcement program by reducing the opportunities for us to receive high-quality, valuable information in many circumstances.[77] Such a rule would create the difficult problem of determining whether a whistleblower was actually aware of an investigation or other inquiry before he or she came forward.

For similar reasons, we reject the suggestion of some commenters that a whistleblower should not be permitted to make a "voluntary" submission after being contacted for information in the course of an internal investigation. Elsewhere in our rules, we have attempted to create strong incentives for employees to continue to utilize their employers' internal compliance and other processes for receiving and addressing reports of possible violations of law. If a whistleblower took any steps to undermine the integrity of such systems or processes, we will consider that conduct as a factor that may decrease the amount of any award.[78] However, a principal purpose of Section 21F is to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the Commission. Although we acknowledge that internal investigations can be an important component of corporate compliance, and although there are existing incentives for companies to self-report violations,[79] providing information to persons conducting an internal investigation, or simply being contacted by them, may not, without more, achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff.

As noted, paragraph (1) of Rule 21F–4(a) provides that a whistleblower submission will not be deemed "voluntary" if made after we or another of the designated authorities have already contacted the whistleblower (or his or her representative) with an investigative or other covered request, inquiry, or demand that "relates to the subject matter" of the submission. This language is intended to provide clearer guidance than use of the word "relevant" in the proposed rule. The determination of whether an inquiry "relates to the subject matter" of a whistleblower's submission will depend on the nature and scope of the inquiry and on the facts and circumstances of each case. Generally speaking, however, we will consider this test to be met—and therefore the whistleblower's submission not to be "voluntary"—even if the submission provides more information than was specifically requested, if it only describes additional instances of the same or similar conduct, provides additional details, or describes other conduct that is closely related as part of a single scheme. For example, if our staff sends an individual an investigative request relating to a possible fraudulent accounting practice, we would ordinarily not expect to treat as "voluntary" for purposes of Rule 21F–

[74] We have also determined not to expand the list of authorities in Rule 21F–4(a) to include foreign authorities. Foreign authorities operate under different legal regimes, with different standards. Further, as some commenters pointed out, whether and under what circumstances the Commission may receive information obtained by a foreign authority is more uncertain than is the case of other Federal authorities, and state Attorneys General or securities regulators. In addition, we may have limited ability to evaluate the scope of a request from a foreign authority to an individual, and whether it relates to the subject matter of the individual's whistleblower submission. We note, however, that in cases where we request the assistance of a foreign authority to obtain documents or information through a memorandum of understanding, and the foreign authority sends a corresponding request to one of its country's residents, we will treat the request as coming from us for purposes of our rule, with the result that a subsequent whistleblower submission on the same subject matter from the foreign resident will not be treated as "voluntary."

[75] One commenter asked us to clarify that, after a whistleblower makes an initial voluntary submission, if the staff subsequently contacts the whistleblower and requests additional information, any information so provided will be eligible for an award. *See* letter from Stuart D. Meissner, LLC. While we agree that this should ordinarily be the case with respect to routine follow-up communications with most whistleblowers, there may be circumstances where the whistleblower's additional provision of information would not be deemed voluntary. For example, if the whistleblower only provides us with more detailed information pursuant to a cooperation agreement with the Department of Justice, we would not view the whistleblower as having "voluntarily" provided all of the subsequent information. In addition, potential whistleblowers are cautioned that Rule 21F–8(b) requires, as a condition of award eligibility, that a whistleblower provide the staff with all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission in a complete and truthful manner.

[76] One commenter expressed concern that many employees are required to sign confidentiality agreements that may prevent them from providing information to the Commission without a subpoena. *See* letter from David Sanford. We caution employers that, as adopted, Rule 21F–17(a) provides that no person may take any action to impede a whistleblower from communicating directly with the Commission about a possible securities law violation, including by enforcing or threatening to enforce a confidentiality agreement. Further, Section 21F(h)(1)(A) of the Exchange Act prohibits any form of retaliation by an employer against a whistleblower because of any lawful act done by the whistleblower in providing information to the Commission in accordance with Section 21F. 15 U.S.C. 78u–6(h)(1)(A)(i).

[77] For example, an individual who becomes aware of an investigation and who has valuable information or documents to offer may not, in the ordinary course, be approached by investigators. This is particularly likely to be the case if the individual is not directly or indirectly involved in the conduct under investigation. We do not believe that it would be appropriate to adopt a definition of "voluntary" that might prevent such individuals from coming forward and assisting our staff as whistleblowers.

[78] *See* Rule 21F–6(b)(3).

[79] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001); U.S. Sentencing Guidelines § 8C2.5.

4(a) a subsequent whistleblower submission from the same individual that describes additional instances of the same practice, or a different but related practice as part of an overall earnings manipulation scheme.[80] However, the individual could still make a "voluntary" submission that described other, unrelated violations (*e.g.,* Foreign Corrupt Practices Act violations).[81]

In further consideration of the views expressed that our proposed rule was overly-broad, and could result in precluding too many potential whistleblowers (*e.g.,* in industry-wide investigations), we have decided not to adopt a rule that would treat a request to an employer as directed as well to all employees whose documents or information fall within the scope of the request. (This provision was found in paragraph (2) of Proposed Rule 21F–4(a), and is not part of final Rule 21F–4(a).)[82] As a commenter stated, establishing this requirement as a threshold barrier to submissions could effectively "shut down" our whistleblower program because "any relevant documents or information would almost certainly be covered by an even marginally comprehensive investigative request."[83] Thus, only a request that is directed to the individual involved (or to his or her representative) will preclude that individual from subsequently making a "voluntary" submission of the requested information or closely related information. We note, however, that as part of our determination of whether a submission leads to a successful enforcement action under Rule 21F–4(c), we expect to evaluate whether a previous request to the whistleblower's employer obtained substantially the same information, or would have obtained the information but for any action of the whistleblower in not providing the information to his or her employer. In such circumstances, we ordinarily would not expect to treat the whistleblower's submission as having "significantly contributed" to the success of our action for purposes of Rule 21F–4(c)(2).

We have also decided to revise our proposed requirement that a submission will not be considered "voluntary" if the whistleblower is under a pre-existing legal or contractual duty to report the information to the Commission or to any of the other authorities designated in the rule. As adopted, Rule 21F–4(a)(3) provides that a whistleblower cannot "voluntarily" submit information if the whistleblower is required to report his or her original information to the Commission as a result of a pre-existing legal duty,[84] a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (1), or a duty that arises out of a judicial or administrative order.

Unlike in the proposed rule, the final rule provides that a duty to report information only to an authority other than the Commission does not result in exclusion of the whistleblower.[85] We have narrowed the reach of this provision out of concern that, as proposed, it was potentially vague and overbroad. Without a clearer and more specific description of the types of duties owed to these other authorities that might preclude a submission, the proposed rule could have the unintended consequence of discouraging some meritorious whistleblowers. In addition, we have adopted exclusions for specific types of individuals based on the definition of "independent knowledge" under Rule 21F–4(b)(4). Consistent with our approach of applying potential threshold exclusions narrowly, we intend this exclusion to govern only in cases where a whistleblower has an individual duty to report to the Commission, and not in cases where the duty belongs to the whistleblower's employer.

Although this determination of "voluntariness" turns on whether the whistleblower is under a duty to report information to the Commission, the duty to report to the Commission can arise from a contract with either the Commission or with one of the other authorities identified in the rule. Thus, the rule would not consider as "voluntary" disclosures made by an individual who has entered into a cooperation or similar agreement with another authority, such as the Department of Justice, which requires the individual to cooperate with or provide information to the Commission, or more generally to government agencies. Further, the requirement that the contractual duty be owed to the Commission or to one of the other authorities means that whistleblowers will not be precluded from award eligibility if they are subject to a contractual duty to report information to the Commission because of an agreement with a third party. In other words, submissions from such whistleblowers will be treated as "voluntary," assuming that the other requirements of this rule are satisfied. This clarification responds to the concerns of some commenters that employers should not be able to preclude their employees from whistleblower eligibility by generally requiring all employees to enter into agreements that they will report evidence of securities violations directly to the Commission.[86]

The rule also provides that a whistleblower submission will not be treated as "voluntary" if the whistleblower had a duty arising out of a judicial or administrative order to report the information to the Commission. This language covers persons such as independent monitors or consultants who may be appointed or retained as a result of Commission or other proceedings with a requirement that they report their findings, conclusions, or other information to the Commission.

Finally, this rule will not apply to an employee or a third party who has a duty of some kind to report misconduct to a company, as we believe that a wholesale exclusion of whistleblower submissions in such cases would not effectuate the purposes of Section 21F.

[80] This is a separate analysis from the question of whether information will be deemed to have "led to" a successful Commission enforcement action. As is discussed below, even after we have commenced an investigation or an examination, a whistleblower who voluntarily submits original information may be eligible for an award if the information significantly contributes to the success of our action. *See* Rule 21F–4(c)(2).

[81] We have also added to paragraph (2) a statement that a whistleblower's submission of information to the Commission will be considered "voluntary" if the whistleblower voluntarily provided the same information to one of the other authorities identified in the rule prior to receiving a request, inquiry, or demand from the Commission. This language is intended to respond to comments that, as proposed, our rule could have had the unintended consequence of precluding a submission from being considered as "voluntary" in circumstances where the whistleblower provided the information to another authority, the other authority referred the matter to the Commission, and our staff contacted the whistleblower before he or she had the opportunity to file a whistleblower submission with us. *See* letter from Grohovsky Group.

[82] This would include requests that are directed to a specific office or function of an employer where the whistleblower works.

[83] *See* letter from DC Bar.

[84] Although in certain circumstances auditors have pre-existing legal duties to report information about securities law violations to the Commission, for purposes of these rules, an auditor's eligibility for a whistleblower award will not be addressed under this rule, but will be addressed under Rules 21F–4(b)(4)(iii) and (v) and Rule 8(c)(4).

[85] As noted above, some commenters objected to the proposed rule on the grounds that Congress expressly only declared certain categories of whistleblowers to be ineligible as a result of their pre-existing legal duties. However, Congress did not define the term "voluntarily" as used in Section 21F, instead leaving it to the Commission to interpret this term and others in a manner that furthers the statutory purposes. *See* Section 21F(j), 15 U.S.C. 78u–6(j).

[86] *See* letters from Stuart D. Meissner and Georg Merkl.

2. Rule 21F–4(b)—Original Information

As proposed, Rule 21F–4(b)(1) tracked the definition of "original information" found in Section 21F(a)(3) of the Exchange Act, with the added requirement that the information must be provided to the Commission for the first time after the date of enactment of Dodd-Frank. We are adopting the rule as proposed.

a. Proposed Rule

Our proposed rule defined "original information" to mean information that is: (i) Derived from the independent knowledge or independent analysis of the whistleblower; (ii) not already known to the Commission from any other source, unless the whistleblower is the original source of the information; (iii) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information;[87] and (iv) provided to the Commission for the first time after July 21, 2010 (the date of the enactment of Dodd-Frank). The first three requirements recited the definition of "original information" found in Section 21F(a)(3) of the Exchange Act. The fourth requirement made clear that awards would be considered only for original information submitted after the enactment of Section 21F.

Some of the elements of this definition—specifically, "independent knowledge," independent analysis," and "original source"—are defined in other proposed rules, and are separately discussed below.

b. Comments Received

Some commenters urged that our definition of "original information" be broadened in various ways. One commenter suggested that "original information" should include information that was provided to the Commission before the enactment of Dodd-Frank if the information leads to an enforcement action after the date of enactment.[88] Another commenter offered that "original information" should include information an employee reports to his or her company and that is later reported to the Commission by the company.[89] Similarly, another commenter expressed concern that, because "original information" must be information that is "not already known" to the Commission, the definition appeared to exclude subsequent whistleblowers who provide additional helpful information.[90] This commenter urged that we not automatically exclude subsequent whistleblowers, but instead make an appropriate award allocation among the individuals involved.

Other commenters believed that our definition of "original information" should be narrowed to exclude certain information from consideration for an award. Two commenters suggested that our rule exclude information beyond the statute of limitations period for actions to recover penalties.[91] One of these commenters also urged that "original information" should not include information about a violation that has already been addressed by the entity that is alleged to have violated the securities laws.[92]

Another commenter expressed concern that, as proposed, "original information" would not clearly exclude information a whistleblower receives as a result of an investigation by a securities exchange or other self-regulatory organization, a foreign regulator, or information received in connection with internal investigations or civil or criminal proceedings.[93] This commenter urged that the rule be modified to exclude information derived from any investigative or enforcement activity or proceeding, and not merely the types of proceedings set forth in the statute (*i.e.,* "an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation").

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(1) as proposed. Congress enacted Section 21F in order to provide new incentives for individuals with knowledge of securities violations to report those violations to the Commission. We believe that applying Section 21F prospectively—for new information provided to the Commission after the statute's enactment and not to information previously submitted—is most consistent with Congressional intent and with the language of the statute.[94] Similarly, we do not believe that it would be consistent with Congressional intent for our rules to categorically exclude through the definition of "original information" tips about violations that may arguably be beyond an applicable statute of limitations or that a company may have addressed through remedial action. Rather, considerations such as these are better addressed through our exercise of discretion in determining whether to open an investigation, whether to bring an enforcement action, and the nature and scope of any action filed and relief granted.

In other respects, we believe that our final rules substantially address the issues raised by the commenters. For example, under Rules 21F–4(b)(5) and (6) an individual can be considered the original source of information provided to the Commission by another source (including the individual's employer), or of information that "materially adds" to information already in our possession. Further, Rule 21F–4(c), as adopted, provides that a whistleblower may be eligible for an award based upon information that the whistleblower reports through a company's internal legal and compliance procedures if the company subsequently provides the information to the Commission. In addition, Rule 21F–4(c) provides that, even after an investigation has commenced, a whistleblower can be eligible for award consideration if he or she provides original information that significantly contributes to the success of the Commission's action. Thus, our rules will permit awards to subsequent whistleblowers in appropriate circumstances.

Similarly, we believe that several provisions in our rules will ordinarily operate to exclude whistleblowers whose only source of original information is an existing investigation or proceeding. Information that is exclusively derived from a governmental investigation is expressly excluded from the definition of "original information" under Section 21F(a)(3) of the Exchange Act and our Rule 21F–

[87] In our Proposing Release we stated that we will interpret the term "judicial or administrative hearing" to include hearings in arbitration proceedings. *See* Proposing Release note 19. One commenter expressed concern that this interpretation would prevent a plaintiff in arbitration from making a whistleblower submission on the basis of his allegations and the evidence adduced at the hearing. *See* letter from Stuart D. Meissner, LLC. However, in that instance, the plaintiff would qualify as the source of the allegations, and nothing in the definition of "original information" would preclude the plaintiff from using evidence adduced at the hearing to support his or her submission to the Commission. Rather, our inclusion of arbitration hearings within the scope of the rule would preclude others who are involved with the arbitration—such as the reporter, or an arbitrator—from using the plaintiff's allegations to make a whistleblower submission for their own benefit.

[88] *See* letter from Bijan Amin; *see also* pre-proposal letter from James Hill.

[89] *See* letter from Hunton & Williams LLP.

[90] *See* letter from DC Bar.

[91] *See* letters from ICI and SIFMA.

[92] *See* letter from ICI.

[93] *See* letter from ABA.

[94] Section 924(b) of Dodd-Frank provides that "Information provided to the Commission in writing by a whistleblower shall not lose the status of original information * * *, if the information is provided by the whistleblower after the effective date of this subtitle."

4(b)(1)(iii). A whistleblower who learns about possible violations only through a company's internal investigation will ordinarily be excluded from claiming "independent knowledge" by operation of either the exclusions from "independent knowledge" set forth in Rules 21F–4(b)(4)(i), (ii), and (iii) (relating to attorneys, auditors, and other persons who may be involved in the conduct of internal investigations), or by Rule 21F–4(b)(4)(vi) (excluding information learned from such individuals). To the extent that information about an investigation or proceeding is publicly available, it is excluded from consideration as "independent knowledge" under Rule 21F–4(b)(2).[95]

3. Rule 21F–4(b)(2)—Independent Knowledge

Proposed Rule 21F–4(b)(2) defined "independent knowledge," one of the constituent elements of "original information," as factual information not derived from publicly available sources. We are adopting the rule as proposed.

a. Proposed Rule

Under our proposed rule, "independent knowledge" was defined to mean factual information in the whistleblower's possession that is not derived from publicly available sources. As we explained in our Proposing Release, publicly available sources may include both sources that are widely disseminated (such as corporate press releases and filings, media reports, and information on the Internet), and sources that, though not widely disseminated, are generally available to the public (such as court filings and documents obtained through Freedom of Information Act requests). Further, as proposed, the definition of "independent knowledge" did not require that a whistleblower have direct, first-hand knowledge of possible violations. Instead, knowledge could be obtained from any of the whistleblower's experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources, and subject further to the exclusions set forth in Rule 21F–4(b)(4)).

b. Comments Received

Several commenters supported our proposed definition of "independent knowledge."[96] Others were critical of the definition for different reasons. Some commenters criticized our exclusion of information derived from publicly available sources, and urged that awards be available for tips that are based upon various kinds of public information.[97] One of these commenters argued that, because Section 21F does not contain an express exclusion for all information derived from publicly available sources, the only public information that can be excluded from award consideration is information that is derived from the sources that are set forth in Section 21F(a)(3)(C)—*i.e.,* a judicial or administrative hearing, a government report, hearing, audit, or investigation, or the news media.[98] This commenter stated that this interpretation would be consistent with the application of the "public disclosure bar" of the False Claims Act, 31 U.S.C. § 3730(e)(4)). Similarly, this commenter argued that our proposal to exclude publicly-available information from the definition of "independent knowledge" was unsupportable because the statute only excludes claims based upon information that is "already known to the Commission."[99]

We requested comment on whether it is appropriate to consider knowledge that is not direct, first-hand knowledge as "independent knowledge" In response, one commenter urged that we limit "independent knowledge" to first-hand knowledge of the whistleblower.[100] This commenter expressed concerned about the reliability of second-hand information, and the potential that our rule could harm companies by creating an incentive for whistleblowers to report unsubstantiated rumors and other unreliable information. This commenter also suggested that the absence of a first-hand knowledge requirement would encourage circumvention of the statute by permitting persons who are ineligible for awards to give information to third persons in order to enable them to become whistleblowers.

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(2) as proposed. Accordingly, "independent knowledge" means any factual information in the whistleblower's possession that is not derived from publicly available sources. Congress primarily intended our whistleblower program "* * * to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *."[101] It is consistent with this purpose to require that "independent knowledge" be derived from a whistleblower's own experiences, observations, or communications, and not from information that is available to the general public.[102]

The objection that our rule should permit submissions based upon public information as long as the information is not derived from a judicial or administrative hearing, a governmental report, hearing, audit, or investigation, or from the news media is not supported by the plain language of Section 21F. The definition of "original information" found in Section 21F(a)(3) requires both that the information be derived from the whistleblower's independent knowledge or analysis (Section 21F(a)(3)(A)), and that it also not be exclusively derived from an allegation in one of these fora (Section 21F(a)(3)(C)). If "independent knowledge" were interpreted to mean merely that the information could not be derived from one of the sources specified in Section 21F(a)(3)(C), then the separate requirement that the whistleblower also have "independent knowledge" would have no meaning.[103]

The same analysis applies to the suggestion that "independent knowledge" cannot exclude publicly-available information and can only exclude information that is "not known to the Commission" from any other

[95] Further, Form TCR, to be used for whistleblower submissions, requires the whistleblower to state, under penalty of perjury, how he or she obtained the information that is the subject of the submission. A truthful answer that the whistleblower obtained the information from an investigation by a securities exchange or a self-regulatory organization—if the staff were not already aware of the investigation—would likely lead the staff to contact the other authority directly for additional information. In these circumstances, where information is obtained through the normal cooperative arrangements between the Commission and other regulators, the whistleblower's submission would not be deemed to have caused the opening of an investigation, or to have significantly contributed to the success of any action, such as to make the whistleblower eligible for an award under Rule 21F–4(c).

[96] *See* Letters from Institute of Internal Auditors, Patrick Burns, Auditing Standards Committee, Georg Merkl.

[97] *See* Letters from the VOICES, Wanda Bond, Michael Lawrence, and TAF; *see also* pre-proposal letter from Robin McLeish.

[98] *See* letter from TAF; *see also* letter from VOICES.

[99] Section 21F(a)(3)(B), 15 U.S.C. 78u–6(a)(3)(B). *See* letter from TAF.

[100] *See* letter from ABA.

[101] S. Rep. No. 111–176 at 110 (2010).

[102] However, publicly available information can be included as part of a submission of "independent analysis" under Rule 21F–4(b)(3). *See* discussion below.

[103] The "public disclosure bar" of the False Claims Act operates differently. There, "independent knowledge" is not a separate requirement, but instead is one element of an exception to the rule that otherwise requires a court to dismiss an action if substantially the same allegations or transactions were publicly disclosed in certain specified fora, such as a Federal hearing in which the Government is a party, a Federal government report or investigation, or the news media. 31 U.S.C. 3730(e)(4).

source. The requirement of "independent knowledge" is set forth in Section 21F(a)(3)(A) of the Exchange Act, and is distinct from the requirement in Section 21F(a)(3)(B) that information be not already known to the Commission. In other words, both tests must be met separately as part of the determination of whether information qualifies as "original information."

While we thus exclude information derived from publicly available sources from the definition of "independent knowledge," we do not believe that "independent knowledge" should be further limited to direct, first-hand knowledge. Such an approach could prevent the Commission from receiving valuable information about possible violations from whistleblowers who are not themselves involved in the conduct at issue, but who learn about it through their observations, relationships, or personal diligence.[104] Our final rules provide that, in order to be considered eligible for an award, a whistleblower must provide information that is sufficiently specific, credible, and timely that it causes the staff to open an investigation, or significantly contributes to the success of an enforcement action.[105] We believe that commenters' concerns about whistleblowers providing wholly speculative or unsubstantiated information is most effectively addressed in connection with these determinations rather than by requiring first-hand knowledge as a threshold limitation for whistleblower submissions.[106]

4. Rule 21F–4(b)(3)—Definition of Independent Analysis

a. Proposed Rule

Under Proposed Rule 21F–4(b)(3), "analysis" was defined to mean the whistleblower's own examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public. Analysis was defined as "independent" if it was the whistleblower's own analysis, whether done alone or in combination with others. As was explained in our Proposing Release, this definition was intended to recognize that there are circumstances where individuals can review publicly available information, and, through their additional evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying securities violations.

b. Comments Received

Although we received few responses to our request for comment on suggested alternative definitions of "independent analysis,"[107] most commenters who addressed the proposed rule appeared to agree with the rule's fundamental premise that "independent analysis" anticipates that the whistleblower will apply his or her own evaluation and insight to information that may be derived from publicly available sources.[108] Two commenters suggested we clarify that "independent analysis" can be based on public sources, including the sources described in Section 21F(a)(3)(C) and Proposed Rule 21F–4(b)(1)(iii).[109] One commenter criticized our proposed definition of "independent analysis" on the ground that the requirement that analysis reveal information that is "not generally known or available" would preclude an award to a whistleblower who caused us to focus on publicly available information of which we were not otherwise aware.[110] Another commenter urged that "independent analysis" be restricted to analysis of the whistleblower's own "independent knowledge," defined by the commenter to be limited to first-hand knowledge, along with other purely objective facts such as share price or trading volume.[111]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(3) as proposed, with a slight modification to clarify that "independent analysis" can be based upon the whistleblower's evaluation of publicly available sources.[112] Thus, as adopted, Rule 21F–4(b)(3) defines "analysis" to mean the whistleblower's own examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.

We believe that "independent analysis" requires that the whistleblower do more than merely point the staff to disparate publicly available information that the whistleblower has assembled, whether or not the staff was previously "aware of" the information. "Independent analysis" requires that the whistleblower bring to the public information some additional evaluation, assessment, or insight.

As with other elements of the definition of "original information," we anticipate that whether "independent analysis" provided to the Commission may be eligible for award consideration will primarily depend (assuming all other requirements are met) on an evaluation of whether the analysis is of such high quality that it either causes the staff to open an investigation, or significantly contributes to a successful enforcement action, as set forth in Rule 21F–4(c). This analysis is discussed further below.

For reasons similar to those discussed above with respect to the definition of "independent knowledge," we also do not believe it would be consistent with the purposes of Section 21F to restrict "independent analysis" to analysis based upon facts of which the whistleblower has direct, first-hand knowledge. Such an interpretation would preclude award consideration even for highly-probative, expert analysis of data that may suggest an important new avenue of inquiry, or otherwise materially advance an existing investigation. We do not believe that Congress intended this result.

5. Rules 21F–4(b)(4)(i) through (vi)—Exclusions From Independent Knowledge and Independent Analysis

Proposed Rules 21F–4(b)(4)(i) through (vii) described circumstances under

[104] Further, as discussed in our Proposing Release, Congress recently amended the "public disclosure bar" provisions of the False Claims Act, replacing the requirement that a qui tam plaintiff have "direct and independent knowledge" of information with one requiring only "knowledge that is independent and materially adds to the publicly-disclosed allegations or transactions * * *" 31 U.S.C. 3130(e)(4), Public Law 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23, 2010). Courts generally defined "direct knowledge" to mean first-hand knowledge from the relator's own work and experience, with no intervening agency. *E.g., United States ex rel. Fried* v. *West Independent School District,* 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005). Although, as noted in our Proposing Release, we do not believe that False Claims Act interpretations and precedent are necessarily authoritative for purposes of Section 21F, we note that Congress recently amended the False Claims Act to eliminate the requirement of first-hand knowledge.

[105] *See* Rule 21F–4(c), discussed below.

[106] We have addressed commenters' concern about possible collusion through our revised Rule 21F–8(c)(6).

[107] *See* letters from Wanda Bond, Auditing Standards Committee, and Kurt S. Schulzke.

[108] *See* letters from Wanda Bond, Auditing Standards Committee, Kurt S. Schulzke, POGO (referencing the importance of whistleblowers "who often perform original analysis based on publicly available sources").

[109] *See* letters from POGO and VOICES.

[110] *See* letter from TAF.

[111] *See* letter from ABA.

[112] This would include public information that may be derived from the sources identified in Section 21F(a)(3)(C) and Rule 21F–4(b)(1)(iii); *i.e.,* a judicial or administrative hearing, a government report, hearing, audit, or investigation, or the news media.

which we would not consider a whistleblower's submission to be derived from independent knowledge or independent analysis. We are adopting a number of these exclusions, but with significant revisions in response to comments that we received.[113] These comments and the resulting modifications to the rules are discussed below with respect to the specific exclusions. In this section, we briefly address the exclusions as a whole.

a. Proposed Rules

As proposed, Rule 21F–4(b)(4) provided that the Commission would not credit a whistleblower with "independent knowledge" or "independent analysis" where the whistleblower obtained the knowledge, or the information upon which the whistleblower's analysis was based, under certain circumstances. These included information that was: (1) Subject to attorney-client privilege or otherwise obtained in connection with the legal representation of a person or entity (proposed Rules 21F–4(b)(4)(i) and (ii)); (2) obtained through the performance of an engagement required under the securities laws by an independent public accountant, if the information related to a violation by the engagement client, or the client's officers, directors, or employees (proposed Rule 21F–4(b)(4)(iii)); (3) communicated to a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity with the reasonable expectation that he or she would cause the entity to respond appropriately (proposed Rule 21F–4(b)(4)(iv)); (4) otherwise obtained through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with law (proposed Rule 21F–4(b)(4)(v)); (5) obtained in violation of Federal or state criminal law (proposed Rule 21F–4(b)(4)(vi)); and (6) obtained from any of the persons excluded by Rule 21F–4(b)(4). Certain of these exclusions were subject to exceptions that are discussed below in connection with the specific rules.

b. Comments Received

Some commenters generally criticized our approach of defining exclusions from "independent knowledge" and "independent analysis." These commenters argued that Section 21F does not permit any exclusions from award eligibility other than those expressly provided for in Section 21F(c)(2). They also expressed concern that the proposed exclusions were vague and uncertain, and therefore would discourage potential whistleblowers from taking the personal and professional risks associated with coming forward. These commenters also believed that the exclusions would operate to disqualify broad categories of individuals who are most likely to have information about misconduct.[114]

In our Proposing Release, we requested comment on whether we should extend the exclusions from "independent knowledge" and "independent analysis" to other professionals (in addition to attorneys and independent public accountants) who may obtain information about possible securities violations in the course of their work for clients. A number of commenters urged that we do so. These commenters emphasized that boards and companies frequently retain outside consultants to advise them on matters such as compensation, business strategies, risk, and the effectiveness of their ethics and compliance programs. These commenters expressed concern that permitting such outside advisers and consultants to become whistleblowers will harm the free flow of candid advice and information that is necessary to these relationships.[115]

c. Final Rules

After considering the comments, we have made several changes to the exclusions set forth in Rules 21F–4(b)(4)(i) through (vii), which we have renumbered as Rules 21F–4(b)(4)(i) through (vi). We have determined not to extend the exclusions to other outside professionals.

We believe that the exclusions, as modified, are reasonable in scope and consistent with effective enforcement of the securities laws.[116] The exclusions generally apply to narrow categories of individuals whose knowledge does not, in our view, constitute "independent knowledge or analysis *of a whistleblower,*" because the information or analysis was acquired by an individual: (1) On behalf of a third party operating in a sensitive legal, compliance, or governance role (exclusions (i), (ii) and (iii)(A)–(C)); or (2) in the performance of an engagement required by the Federal securities laws (exclusion (iii)(D)); or (3) by illegal means (exclusion (iv)). Only when one of the exceptions to these exclusions set forth in the rules applies should information acquired in these situations constitute independent knowledge or analysis of the whistleblower.

We believe this result is consistent with the purpose of promoting effective enforcement of the securities laws. Consultation with attorneys can improve compliance on the part of entities and individuals.[117] The

[113] We have also added the phrase "in any of the following circumstances" in the opening clause of Rule 21F–4(b)(4) in order to make clear that information is excluded from being considered as "independent knowledge" or "independent analysis" if any one of the exclusions apply.

[114] *See* letters from TAF and NWC; *see also* letter from Stuart D. Meissner, LLC.

[115] *See* letters from NACD (advocating excluding individuals hired by boards of directors for purposes of advice and consultation); the Ethisphere Institute (exclusions should extend to external advisers who evaluate corporate ethics and compliance programs); GE Group (should exclude professionals that have relationships of trust and confidence with companies, including investment bankers, financial advisers, compensation consultants, and other consultants); TRACE International, Inc. (noting particular role of outside experts in FCPA compliance efforts, and advocating that exclusions include professionals who are regularly engaged by companies to assist with auditing, creating and implementing robust anti-bribery compliance programs and internal controls, including professionals who perform due diligence on third party relationships as required by the securities laws).

[116] Section 21F does not define the terms "independent knowledge" or "independent analysis," but Section 21F(j) authorizes the Commission to issue rules "to implement the provisions of [Section 21F] consistent with the purposes of [Section 21F]." A substantial purpose of Section 21F is to promote effective enforcement of the securities laws.

[117] A number of comments asserted that, in addition to the attorney-client privilege, any information received in breach of other confidential relationships recognized by common-law evidentiary privileges should be excluded from the definition of independent knowledge. *See, e.g.,* joint letter from Alcoa Inc., Celanese Corporation, Citigroup, Ingersoll-Rand plc, Intel Corporation, Johnson & Johnson, JPMorgan Chase & Co., Kraft Foods Inc., Pfizer Inc., Prudential Insurance Company America, and Tyco International Ltd. ("Alcoa Group"); Auditing Standards Committee; TRACE International, Inc. *But see* letter from NWC (opposing any exclusion for privileged information). Those commenters generally took the position that these relationships have historically been recognized as deserving protection based on public policy considerations, and creating a monetary incentive for those holding this sort of privileged information to divulge it to us is contrary to those public policy considerations. We have determined to exclude (subject to the exceptions set forth in these rules) only information received in breach of the attorney-client privilege, not the other confidential relationships recognized at common-law. Although we recognize the significant public policies underlying all of these confidential relationships, we believe that for purposes of the whistleblower program the attorney-client privilege stands apart because of the significance of attorney-client communications for achieving compliance with the Federal securities laws. We will continue to address assertions of other evidentiary privileges through our normal investigative and litigation processes. *See e.g.,* SEC Division of Enforcement Manual § 3.3.1. In addition, contrary to the suggestion from a number of commenters, *see, e.g.,* letter from PricewaterhouseCoopers, LLP ("PwC"), we are not excluding information that is received in breach of state-law confidentiality requirements, such as those imposed on auditors, because to do so could inhibit important Federal-law enforcement interests.

recommended exclusions for certain company officials and third parties who assist companies in investigations of possible violations of law are narrowly focused, and promote the goal of ensuring that the persons most responsible for an entity's conduct and compliance with law are not incentivized to promote their own self-interest at the possible expense of the entity's ability to detect, address, and self-report violations. The exclusion for auditors performing engagements required by the securities laws reflects the fact that these individuals occupy a special position under the securities laws to perform a critical role for investors. Further, as adopted, our rule permits such individuals to become whistleblowers under certain circumstances.[118]

Finally, although we recognize the important role that outside advisers and consultants play in many aspects of corporate policy and decision-making, we believe that additional exclusions for such professionals would too broadly preclude individuals with possible inside knowledge of violations from coming forward to assist the Commission in identifying and prosecuting persons who have violated the securities laws.

(a) Attorney-Client Privilege and Other Attorney Conduct

a. Proposed Rule

As proposed, Rule 21F–4(b)(4)(i) excluded from the definition of "independent knowledge" or "independent analysis" information that was obtained through a communication that is subject to the attorney-client privilege. In addition, Proposed Rule 21F–4(b)(4)(ii) excluded from the definition of "independent knowledge" or "independent analysis" information that a potential whistleblower obtained as the result of the legal representation of a client on whose behalf the whistleblower's services, or the services of his or her employer or firm had been retained, unless the disclosure had been authorized as stated above. Neither of these exclusions applied where an attorney is permitted to disclose otherwise privileged information; for example, if the privilege has been waived or if the disclosure is permissible pursuant to the Commission's attorney conduct rules[119] or applicable state statutes or bar rules governing the ethical behavior of attorneys.[120]

The proposed exclusions in 21F–4(b)(4)(i) and (ii) recognized the prominent role that attorneys play in all aspects of practice before the Commission and the special duties they owe to clients. We observed that compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about possible violations, and the attorney-client privilege furthers such consultation.[121] This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about possible securities violations in violation of their ethical duties to maintain client confidentiality.[122]

The proposed exceptions for information obtained through privileged attorney-client communications and for information obtained in the legal representation of others did not apply, however, where the attorney is already permitted to disclose the substance of a communication that would otherwise be privileged. This included, for example, circumstances where the privilege has been waived, or where disclosure of confidential information to the Commission without the client's consent is permitted pursuant to either 17 CFR 205.3(d)(2) or the applicable state bar ethical rules.[123]

The exclusions did not preclude an individual who has independent knowledge of facts indicating possible securities violations from becoming a whistleblower if that individual chooses to consult with an attorney. Facts in the possession of such an individual do not become privileged simply because he or she consulted with an attorney.

b. Comments Received

The Commission received a number of comments related to the exclusions set forth in Proposed Rules 21F–4(b)(4)(i) and (ii). Most commenters were generally supportive of the exclusions for the reasons that we identified in our proposing release.[124] A few commenters, however, asserted that the exclusions are unnecessary, and that instead we should rely upon judicial decisions and state bar opinions to decide on a case-by-case basis whether we could use information that would otherwise be covered by the proposed exclusions.[125]

Many commenters who were generally supportive of the exclusions suggested modifications.[126] Several commenters recommended that the exclusions expressly apply to all information coming from

[118] *See* Rule 21F–4(b)(4)(vi). The exclusions for information obtained in violation of Federal or state criminal law and for information obtained from excluded sources are discussed below.

[119] 17 CFR 205.3(d)(2). This Commission Rule permits attorneys representing issuers of securities to reveal to the Commission "confidential information related to the representation to the extent the attorney reasonably believes necessary" (1) to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (2) to prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury, suborning perjury, or committing any act that is likely to perpetrate a fraud upon the Commission; or (3) to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

[120] *E.g.,* California Evidence Code § 956 ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or plan to commit a crime or fraud.").

[121] *See Upjohn Co.* v. *U.S.,* 449 U.S. 383, 389 (1981) ("[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

[122] *United States of America ex rel Fair Laboratory Practices Associates* v. *Quest Diagnostics, Inc.,* 2011 WL 1330542 (S.D.N.Y. Apr. 5, 2011) (emphasizing "the great Federal interest in preserving the sanctity of the attorney-client relationship," the court dismissed a False Claims Act *qui tam* action brought by a partnership where the suit was based on attorney-client privileged information that one of the relator's partners, an attorney, disclosed in violation of New York's attorney ethics laws).

[123] *See* Model Rules of Professional Conduct 1.6(b), 1.13(c). Model Rule 1.6(b), variants of which have been adopted by nearly every state in the country and the District of Columbia, permits the disclosure of information relating to the representation of a client, among other things, where the lawyer reasonably believes the disclosure is necessary (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; and (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. *See* Model Rule 1.6(b)(1)–(3). Model Rule 1.13(c) provides that where an attorney reports violations of law to the highest authority within an organization, and "despite the lawyer's efforts * * * the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization," the lawyer may reveal information relating to the representation., notwithstanding Rule 1.6, but only to the extent "the lawyer reasonably believes necessary to prevent substantial injury to the organization."

[124] *See, e.g.,* letters from NSCP; Grohovsky Group.

[125] *See, e.g.,* letters from TAF; Stuart D. Meissner, LLC.

[126] *See, e.g.,* letters from M.J. O'Loughlin; joint letter from Apache, Cardinal Health, Goodyear, HP, Merck, Microsoft, Proctor & Gamble, TRW, United Technologies ("Apache Group"); Financial Services Roundtable; and GE Group; Arent Fox LLP; CCMC.

communications subject to the attorney-client privilege, whether or not the whistleblower was an attorney, because non-attorneys are often in possession of information that is subject to the privilege.[127] Other commenters wanted us to modify the rules to ensure that we are not receiving privileged information.[128] For example, one commenter requested that the rule explicitly state that we are not seeking privileged information, and, that if such information is provided to us, we will not argue that the privilege was waived.[129] Other commenters recommended that the rule should exclude all information coming from communications with attorneys, even if the privilege had been waived.[130]

One commenter recommended that we narrow the scope of the exclusions so that, if the privileged information relates to an entity's wrong-doing and the entity does not appropriately handle the information, a whistleblower will be eligible for an award if he submits it to us.[131]

c. Final Rule

After reviewing the comments, we are adopting proposed Rules 21F–4(b)(4)(i) and (ii) with several modifications.[132]

First, we have modified the language to clarify that both exclusions apply to non-attorneys. Thus, if an attorney in possession of the information would be precluded from receiving an award based on his or her submission of the information to us, a non-attorney who learns this information through a confidential attorney-client communication would be similarly disqualified. Correspondingly, if an attorney could submit the information to us under the same circumstances consistent with applicable state bar rules (*e.g.,* based on waiver of the privilege or a crime-fraud exception), then a non-attorney would similarly be eligible for an award for disclosing the information.

Second, we have modified Rule 21F–4(b)(4)(ii) to clarify that it applies to attorneys who work in-house for an entity and provide legal services (*e.g.,* attorneys in an entity's general counsel's office). The proposing rule may have been unclear about whether in-house attorneys would be covered by Rule 21F–4(b)(4)(ii) because language in the rule stated that the individual's services, or the services of his or her employer or firm, need to "have been retained." Additional ambiguity was created by proposed Rule 21F–(4)(b)(4)(iv), which would have created a separate exclusion for individuals who have "legal" responsibilities for an entity. The changes to the final rule clarify our intention that all attorneys—whether specifically retained or working in-house—are eligible for awards only to the extent that their disclosures to us are consistent with their ethical obligations and our Rule 205.3.

With regard to the comments that we ensure that whistleblowers are not providing us with privileged information, we believe that Rules 21F–4(b)(4)(i) and (ii) sufficiently address this concern because these rules make clear that we will not reward attorneys or others for providing us with information that could not otherwise be provided to us consistent with an attorney's ethical obligations and Rule 205.3.[133] While some comments suggested expanding[134] or narrowing[135] the exclusions in Rules 21F(B)(4)(i) and (ii), we believe that the final rule strikes the right balance because these exclusions are consistent with the public policy judgments that have been made as to when the benefits of permitting disclosure are justified notwithstanding any potential harm to the attorney-client relationship.

Nor do we agree with the comments suggesting that the exclusions are unnecessary because even if we receive attorney-client privileged information we can thereafter rely upon judicial opinions and ethics decisions to determine whether we can use it.[136] In our view, the exclusions send a clear, important signal to attorneys, clients, and others that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations.

(b) Responsible Company Personnel, Compliance Processes, and Independent Public Accountants

As proposed, Rule 21F–4(b)(4)(iii) excluded independent public accountants who obtained information through an engagement required under the Federal securities laws in certain circumstances. Proposed Rules 21F–4(b)(4)(iv) and (v) provided that certain responsible company officials and others who learned information through or in relation to a company's processes for identifying and addressing possible violations of law would not be able to use that information as the basis for a whistleblower submission, subject to certain exceptions set forth in the rules. We have made substantial changes to the proposed rules. As modified, we are adopting these provisions as Rules 21F–4(b)(4)(iii) and (v).

(i) Proposed Rule 21F–4(b)(4)(iii)

a. Proposed Rule

Proposed Rule 21F–4(b)(4)(iii) excluded from the definition of "independent knowledge" or "independent analysis" information that was obtained through the performance of an engagement required under the securities laws by an independent public accountant, if that information related to a violation by the engagement client or the client's directors, officers or other employees. This proposed exclusion would have applied only if the information related to a violation by the engagement client or the client's directors, officers or other employees.

b. Comments Received

We received many comments related to this rule. Several commenters submitted substantially similar comments about the proposed rule.[137] Generally these commenters recommended expanding the statutory

[127] *See* letters from Apache Group; Financial Services Roundtable; and GE Group.

[128] *See, e.g.,* letters from Arent Fox LLP; CCMC.

[129] *See* letter from Apache Group.

[130] *See* letter from NACD. *See also* letter from Eric Dixon, LLC.

[131] Letter from the Institute of Internal Auditors.

[132] In addition, we made several stylistic changes to Rules 21F–4(b)(4)(i) and (ii) that do not affect the substance of either provision. We have replaced "authorized" with "permitted" in stating that attorney-client privileged information, or information learned from the legal representation of a client, may qualify as independent knowledge if its disclosure "would otherwise be permitted by an attorney." *See* letter from M.J. O'Loughlin. We have also moved the phrase "If you obtained the information" from Proposed Rule 21F–4(b)(4) into both Rules 21F–4(b)(4)(i) and (b)(4)(ii).

[133] We have, however, modified Form TCR to ask whether the whistleblower's submission relates to an entity of which the whistleblower is or was a "counsel." *See* Form TCR, Item D5a. In addition, we modified Item 8 on proposed form TCR to ask the whistleblower to identify with particularity any information submitted by the whistleblower that was obtained from an attorney or in a communication where an attorney was present. These questions will enhance the staff's ability to identify the risk of receiving privileged information and provide an appropriate way to balance the Commission's interest in receiving information with the policy goal of protecting the privilege. In addition, knowing this information may allow the staff to quickly segregate potentially privileged information for more detailed review and consideration.

[134] *See, e.g.,* letter from NACD (suggesting that Rule 21F–4(b)(4)(i) exclude all information coming from communications with attorneys, even if the privilege had been waived).

[135] *See, e.g.,* letter from Institute of Internal Auditors (suggesting the exclusion for information subject to the attorney-client privilege should be conditioned on the company in question having investigated and reported the violation in question, so that if the entity does not appropriately handle the information, an individual should be able to report the violation and participate in any whistleblower award).

[136] *See* letters from TAF; NSCP.

[137] Letters from PwC; Ernst & Young; KPMG; the Center for Audit Quality.

exclusion to disqualify submissions that identified violations in connection with the firm's own conduct,[138] as well as through the performance of non-audit services for audit clients,[139] and audit or other services for non-public clients.[140] These commenters cited to duties of confidence and reporting requirements to which independent public accountants are subject under state law and professional conduct codes, the importance of candor in the audit relationship, and practical problems associated with permitting employees of accounting firms to become whistleblowers in some relationship contexts but not in others.

One commenter urged that the exclusion for independent public accountants should also extend to information obtained by internal company personnel in connection with their role supporting an independent public accountant conducting an audit required under the securities laws."[141]

One commenter similarly urged that the exclusion be extended to all employees who provide information at the request of auditors (both independent and internal) and observed that under the proposed rule company accountants providing information at the request of external auditors will still be considered to have "independent knowledge and 'independent analysis."[142]

Another commenter expressed the view that independent public accountants (as well as attorneys) should be permitted to become whistleblowers, but with certain limitations.[143] This commenter pointed out that a junior member of the team may not be able to effect change within a client if the senior members are unwilling to oppose management. According to this commenter, auditors and attorneys should be required to report violations internally first, have the ability to do so anonymously, and then be permitted to make a whistleblower submission to the Commission 75 days after making an internal report (but not later than 90 days after their report) if the entity does not respond appropriately.

One commenter was concerned about circumstances where an independent public accounting firm might violate its duties to report under Exchange Act Section 10A.[144] This commenter argued that proposed Rule 21F–4(b)(4)(iii) should be revised to permit whistleblowing when information about illegal acts is not reported to the Commission by the client or the public accounting firm within the time periods specified in Section 10A.

Finally, as noted above, a number of commenters strongly objected in principle to all of our efforts to create exclusions from independent knowledge that are not expressly set forth in Section 21F, including those for independent public accountants.[145]

(ii) Proposed Rules 21F–4(b)(4)(iv) and (v)

a. Proposed Rules

Proposed Rule 21F–4(b)(4)(iv) excluded from the definitions of "independent knowledge" and "independent analysis" information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity if the information was communicated to that person with the reasonable expectation that he or she would take appropriate steps to cause the entity to respond to the violation. Proposed Rule 21F–4(b)(4)(v) excluded information that was otherwise obtained from or through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law. Each rule was subject to an exception that made the exclusion inapplicable if the entity did not disclose the information to the Commission in a reasonable time, or proceeded in bad faith.

As we explained in our Proposing Release, the rationale for these proposed exclusions was our interest in not implementing Section 21F in a way that created incentives for responsible persons who are informed of wrongdoing, or others who obtain information through an entity's legal, audit, compliance, and similar functions, to circumvent or undermine the proper operation of the entity's internal processes for responding to violations of law. We were concerned about creating incentives for company personnel to seek a personal financial benefit by "front running" internal investigations and similar processes that are important components of effective company compliance programs. On the other hand, we proposed that these exclusions would no longer apply if the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith, thereby making an individual who knew this information eligible to become a whistleblower based upon his or her "independent knowledge" of the violations.

b. Comments Received

We received many comments expressing sharply different views on these rules. Several commenters expressed strong opposition to the proposed rules. Among other things, these commenters said that the proposed rules would preclude submissions from large numbers of individuals who were in the best position to know about misconduct at companies; that such deference to internal compliance processes is not warranted; that compliance and audit officials may be subject to retaliation, in particular in cases where senior management is implicated in wrongdoing; that the proposed rules were overly broad in their potential application to all supervisors and all employees who had any exposure to compliance and related processes even if the employee had other sources of knowledge; and that the exceptions to the proposed rules suffered from a lack of clarity that would make them unworkable in practice and would strongly discourage potential whistleblowers.[146]

Other commenters generally supported these exclusions in concept, but offered numerous and varied suggestions for expanding, clarifying, or modifying the proposed rules. For example, some recommended broadening the exclusions to encompass other categories of employees, or clarifying that the proposed rules would cover specific functions, including operations, finance, technology, credit, risk, and similar internal control functions; product management or other personnel responsible for independent valuations of positions at financial services firms; persons who perform the designated functions at subsidiaries or other units of an entity; persons involved in processes relating to required officer certifications and management disclosures under Sections 302, 404, and 906 of the Sarbanes-Oxley Act; and persons performing or supporting an internal audit function, including those individuals who may perform the functions of internal audit but whose job titles and responsibilities may differ.[147]

[138] Letters from PwC; Ernst & Young; KPMG.

[139] Letters from PwC; Deloitte & Touche, LLP ("Deloitte"); KPMG.

[140] Letters from PwC; Deloitte; KPMG.

[141] Letter from ABA.

[142] Letter from NACD.

[143] Letter from DC Bar.

[144] Letter from TAF.

[145] Letters from NWC; NCCMP; Stewart D. Meissner, LLC; TAF.

[146] *See* letters from NWC; Stuart D. Meissner, LLC; Daniel J. Hurson; TAF; POGO; and Mark Thomas.

[147] *See* letters from ABA; SIFMA; Davis Polk; NSCP; and NACD.

Commenters also offered different views on the exceptions to the proposed rules permitting use of the excluded information if the entity failed to disclose the information to the Commission within a reasonable time or acted in bad faith. A number of commenters argued against the exceptions and in favor of an absolute preclusion of persons in the designated categories from becoming whistleblowers. These commenters generally took the view that the persons described in Proposed Rules 21F–4(b)(4)(iv) and (v) should promote a culture of compliance and should be required to utilize internal procedures and systems to address and report instances of noncompliance in all circumstances.[148] Certain other commenters recommended that our rules provide that persons who have a legal, compliance, or similar function in a company would be ineligible for an award unless they have first reported the information to an entity's chief legal officer, chief compliance officer, or a member of the board of directors.[149]

A number of commenters took issue with the "reasonable time" language in Proposed Rules 21F–4(b)(4)(iv) and (v) and suggested alternative approaches for determining when persons described in the rules might be permitted to make whistleblower submissions.[150] Many of these commenters argued that the "reasonable time" standard would, in practice, require companies to disclose all allegations of wrongdoing, regardless of considerations such as the materiality or credibility of the allegations, or the results of the company's investigation. Others pointed out that, because the standard lacked clarity, it would be difficult for persons in these categories to determine whether the company had disclosed the violation and whether it had done so within a "reasonable time." Some commenters recommended that we define a "reasonable time" as some fixed period; *e.g.,* 90–180 days.[151]

Finally, commenters from diverse perspectives shared the view that aspects of the proposed rules were vague and open to subjective interpretations. Some believed that the lack of clarity could have the effect of discouraging potential whistleblowers because they would not want to risk their livelihoods and reputations in the face of uncertainty concerning whether they might be eligible for an award.[152] However, others suggested that vagueness would encourage persons in the categories designated in the proposed rules to make their own subjective determinations (for example, of whether a "reasonable time" had passed), and would therefore prove disruptive to internal compliance mechanisms.[153]

(iii) Final Rules 21F–4(b)(4)(iii) and (v)

After considering the comments, we are adopting the proposed rules with substantial modifications. These provisions have been combined and are now set forth in Rules 21F–4(b)(4)(iii) and (v).

As adopted, Rules 21F–4(b)(4)(iii)(A) through (C) address responsible company personnel with compliance-related responsibilities. Rule 21F–4(b)(4)(iii)(D) (in conjunction with Rule 21F–8(c)(4), discussed below) addresses independent public accountants.[154] Rule 21F–4(b)(4)(v) sets forth exceptions that apply to these exclusions. These rules are discussed separately below.

a. Rules 21F–4(b)(4)(iii)(A) Through (C)

As discussed above, we believe there are good policy reasons to exclude information from consideration as "independent knowledge" or "independent analysis" in the hands of certain persons, and in certain circumstances, where its use in a whistleblower submission might undermine the proper operation of internal compliance systems. At the same time, we do not think it serves the purposes of Section 21F to apply this principle in a manner that creates expansive new exclusions for broad categories of company personnel (*e.g.,* any supervisor, or any employee involved in control functions or in processes related to required CEO and CFO certifications). Instead, we believe that the better approach, and one consistent with Congressional intent, is to adopt more tailored exclusions for "core" persons and processes related to internal compliance mechanisms, and to enhance the incentives for employees to report wrongdoing through their company's established internal procedures.[155]

In addition, we agree with the commenters who stated that greater clarity in these rules will assist both whistleblowers and companies. For this reason, we have identified by title or function specific categories of personnel to whom the rules apply.

Thus, as adopted, Rules 21F–4(b)(4)(iii)(A) through (C) describe three categories of persons whom we will not treat as having "independent knowledge" or "independent analysis" for purposes of a whistleblower submission, unless one of the exceptions listed in paragraph (b)(4)(vi) applies.[156] The first category, set forth

[148] *See* letters from Davis Polk; Jones Day; National Association of Criminal Defense Lawyers; Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings"); Financial Services Roundtable; Alcoa Group; Michael Davis; Les M. Taeger; AT&T Inc.; Eric Dixon, LLC; Valspar; joint letter from Joseph Murphy, Esq., Donna Boehme, Esq., Rebecca Walker, Esq. ("Murphy"); Ethisphere Institute.

[149] *See* joint letter from U.S. Chamber of Commerce, Americans for Limited Government, Ryder Systems, Inc. Financial Services Institute, Inc., Verizon, White & Case, LLP ("Chamber of Commerce Group"); letters from AT&T; National Association of Criminal Defense Lawyers and Apache Group; *see also* letter from DC Bar (suggesting that individuals in these categories be required to report violations internally first and wait 75 days for the entity to respond appropriately before they are eligible to become whistleblowers).

[150] *See* letters from ABA (eliminate "reasonable time" standard and only permit use of information in the event of bad faith); Society of Corporate Secretaries (same); DC Bar (require individuals in these categories to report violations internally first and wait 75 days for the entity to respond appropriately before they are eligible to become whistleblowers.); Cleary Gottlieb Steen & Hamilton LLP (replace "reasonable time" with "reasonable and appropriately substantiated basis for believing that the company has failed to remediate the alleged problem or has acted in bad faith"); Apache Group (permit compliance personnel to become whistleblowers if company failed to investigate and remediate, including consideration of whether to self-report, within a reasonable time); Chamber of Commerce Group (permit personnel in these categories to use information only after reporting internally, and if company failed to disclose information concerning substantiated violations in a reasonable time).

[151] *See* letters from Patrick Burns, NACD, John G. Connolly, Auditing Standards Committee, Financial Services Roundtable.

[152] *See* letters from TAF, DC Bar, Daniel J. Hurson, Stuart D. Meissner LLC.

[153] *See* letters from ABA, Financial Services Roundtable, Society of Corporate Secretaries, Protiviti, Alcoa Group.

[154] We are addressing independent public accountants through the rules noted above instead of adopting proposed Rule 21F–4(b)(4)(iii). Paragraph (D) of Rule 21F–4(b)(4)(iii), discussed below, excludes from the definition of independent knowledge or analysis information that an accountant learns because of his work on an engagement required under the Federal securities laws unless certain enumerated exceptions apply. Rule 21F–8(c)(4) makes a whistleblower ineligible from being considered for an award if the information is gained through an audit of financial statements required under the securities laws and the submission is "contrary to the requirements of Section 10A * * *" as provided for in Section 21F(c)(2)(C) (15 U.S.C. 78u–6(c)(2)(C)). After considering the competing views of commenters, we believe these provisions, taken together, strike a balance between the statute's goal of encouraging high quality submissions by whistleblowers and a policy of preventing auditors from getting a windfall from performing their duties.

[155] With respect to enhanced incentives, as discussed below, we are adopting a rule that creates additional opportunities for employees to obtain whistleblower awards by reporting information through a company's internal whistleblower, legal, or compliance mechanisms before or at the same time that they file a whistleblower submission with us. *See* Rule 21F–4(c).

[156] Rule 21F–4(b)(4)(iii) only applies to the extent that an individual is not subject to any of the exclusions set forth in Rules 21F–4(b)(4)(i) or (ii). Thus, for example, if a company officer receives a

Continued

in paragraph (A), is officers, directors, trustees, or partners of an entity if they obtained the information because another person informed them of allegations of misconduct, or they learned the information in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with law. The term "officer" is defined in Rule 3b–2 under the Exchange Act,[157] and means "a president, vice president, secretary, treasurer or principal financial officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated." For example, a managing member of a limited liability company who performs these types of functions would ordinarily fall within this rule.

This provision combines and modifies several concepts that were previously included in Proposed Rules 21F–4(b)(4)(iv) and (v). As noted, we have identified with greater specificity the persons who are covered by the rule. Further, instead of making the exclusion applicable when information is communicated to one of these persons "with the reasonable expectation that [the recipient] would take steps to cause the entity to respond appropriately to the violation," the rule applies whenever one of the designated persons is "informed * * * of allegations of misconduct." Thus, when an officer or one of the other designated persons receives a report of possible illegal conduct, the rule applies without the recipient having to evaluate the "expectations" of the person who made the report.[158] We have also narrowed the scope of the proposed rule by removing non-officer supervisors from the list of designated persons. We agree with those commenters who stated that including all supervisors at any level would create too sweeping an exclusion of persons who may be in a key position to learn about misconduct, and that such an exclusion would not further the purposes of Section 21F.[159]

Paragraph (A) does not preclude officers and the other designated persons from obtaining an award for a whistleblower submission in all circumstances. As noted, the rule applies when someone else informs a person in the designated categories about allegations of misconduct, or the designated individual learns the information in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with law.[160] Examples include learning about a violation because an employee reports misconduct to the designated person, being informed of an allegation of misconduct that came into the company's hotline, or learning of a report from the company's auditors regarding a potential illegal act. Paragraph (A) is not intended to establish a general bar against officers, directors, and other designated persons becoming whistleblowers any time they observe possible violations at a company or other entity. For example, paragraph (A) does not prevent an officer from becoming eligible for a whistleblower award if the officer discovers information indicating that other members of senior management are engaged in a securities law violation.

The second category of persons that Rule 21F–4(b)(4)(iii) excludes from the definitions of "independent knowledge" and "independent analysis," as set forth in paragraph (B), are employees whose principal duties involve compliance or internal audit responsibilities, as well as employees of outside firms that are retained to perform compliance or internal audit work for an entity. For example, a compliance officer is subject to the rule whether he or she learns about possible violations in the course of a compliance review or another employee reports the information to the compliance officer. Unlike the proposed rule, the rule does not include a company's lawyers in either of paragraphs (A) or (B), because lawyers are subject to professional obligations in their dealings with clients, and these are specifically addressed in Rules 21F–4(B)(4)(i) and (ii).[161]

Paragraph (C) of Rule 21F–4(b)(4)(iii) excludes information learned by employees or other persons associated with firms that are retained to conduct an internal investigation or inquiry into possible violations of law in circumstances (as noted above), where the information is not already excluded under Rules 21F–4(b)(4)(i) or (ii).

b. Rule 21F–4(b)(4)(iii)(D)

Paragraph (D) of Rule 21F–4(b)(4)(iii) excludes information that is learned by employees of, or other persons associated with, a public accounting firm through an audit or other engagement required under the Federal securities laws, if that information relates to a violation by the engagement client or the client's directors, officers, or other employees. It only applies to those engagements which are not covered by Rule 21F–8(c)(4).

Similar to other provisions under Rule 21F–4(b)(4), we are adopting this new paragraph based on our concern about creating incentives for independent public accountants to seek a personal financial benefit by "front running" the firm's proper handling of information obtained through engagements required under the Federal securities laws. Examples include engagements for broker dealer annual audits pursuant to Rule 17a–5 under the Exchange Act[162] and compliance with the custody rule by advisors.[163]

Paragraph (D), however, does not limit an individual from making a specific and credible submission alleging that the public accounting firm violated the Federal securities laws or professional standards.[164] If a whistleblower makes such an allegation, and if that submission leads to a successful action against the engagement client, its officers, or employees, then the whistleblower can obtain an award for that action as well. Moreover, this exclusion does not apply whenever the facts and circumstances fall within the scope of exceptions contained in Rule 21F–4(b)(4)(v).

c. Rule 21F–4(b)(4)(v)

Rule 21F–4(b)(4)(v) sets forth exceptions to the application of Rule 21F–4(b)(4)(iii). If any one of these circumstances is present, a person in one of the designated categories under Rule 21F–4(b)(4)(iii) may be eligible for a whistleblower award using information that is otherwise excluded to that individual by operation of Rule 21F–4(b)(4)(iii).

The first exception to the operation of Rule 21F–4(b)(4)(iii) applies when the designated person has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors.[165] For purposes of

report that is covered by attorney-client privilege, paragraph (i) would govern use of the information for purposes of our rules.

[157] 17 CFR 240.3b–2.

[158] *See* letter from ABA (noting problem of requiring the recipient of information to ascertain the "reasonable expectation" of the person who reported the information).

[159] *See* letter from TAF.

[160] The phrase "in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with law" requires that the officer, director, or other designated individual learn the information through official responsibilities that relate to such processes.

[161] *See* letter from SIFMA.

[162] *See* § 240.17a–5.

[163] *See* § 275.206(4)–2.

[164] *See infra* discussion of Rule 21F–8(c)(4).

[165] This provision is similar to the standard that governs the circumstances in which an attorney appearing and practicing before the Commission in the representation of an issuer may reveal

Rule 21F–4(b)(4)(v), in order for a whistleblower to claim a reasonable belief that disclosure of information to the Commission is necessary to prevent the relevant entity from committing substantial harm, we expect that in most cases the whistleblower will need to demonstrate that responsible management or governance personnel at the entity were aware of the imminent violation and were not taking steps to prevent it. In short, the whistleblower must have a reasonable basis for believing that the entity is about to engage in conduct that is likely to cause substantial injury to the financial interests of the entity or investors, and that notification to the Commission is necessary to prevent the entity from engaging in that conduct. In such cases, we believe it is in the public interest to accept whistleblower submissions and to reward whistleblowers—whether they are officers, directors, auditors, or similar responsible personnel—who give us information that allows us to take enforcement action to prevent substantial injury to the entity or to investors.

The second exception to the operation of Rule 21F–4(b)(4)(iii) applies when the designated person has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct. Our proposed rule included a similar exception for the entity's "bad faith," and the language, as adopted, is intended to make this standard clearer. Thus, for example, an officer or other individual covered by Rule 21F–4(b)(4)(iii) is not subject to the exclusion of that paragraph if he or she has a reasonable basis to believe that the entity is destroying documents, improperly influencing witnesses, or engaging in other improper conduct that may hinder our investigation.

Finally, under the third exception to Rule 21F–4(b)(4)(iii), an officer, director, auditor or one of the other designated persons can become a whistleblower after at least 120 days have elapsed since the whistleblower provided the information to the audit committee, chief legal officer, or chief compliance officer (or their equivalents) of the entity at which the violation occurred, or to his or her supervisor, or since the whistleblower received the information, if he or she received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or his or her supervisor was already aware of the information. As noted above, many commenters criticized as too vague and unpredictable our proposed rule that would have permitted one of the designated persons to make a whistleblower submission if an entity failed to disclose the information to the Commission within a reasonable time. In response to these comments, we have instead adopted an exception that will permit a person in one of the designated categories to become a whistleblower after a fixed period.

The 120-day period begins to run either from the date the whistleblower informed other senior responsible persons at the entity, or his or her supervisor, about the violations, or from the date the whistleblower received the information, if the whistleblower was aware that these other persons already knew of the violations. Thus, an officer, director, or other designated person cannot receive a report of misconduct, and keep silent about it while waiting for the 120-day period to run, in order to become eligible for a whistleblower award.

The inclusion of a fixed 120-day period is intended for the benefit of potential whistleblowers, so that they will have a date certain after which they will no longer be ineligible to make a submission based upon the information in their possession. It is not intended to suggest to entities that they have a 120-day "grace period" for determining their response to the violations. Furthermore, when considering whether and to what extent to grant leniency to entities for cooperating in our investigations and related enforcement actions, the promptness with which entities voluntarily self-report their misconduct to the public, to regulatory agencies, and to self-regulatory organizations is an important factor.[166]

At the same time, it is important to note that this rule is not intended to, and does not, create any new or special duties of disclosure on entities to report violations or possible violations of law to the Commission or to other authorities. The provisions of this rule are solely designed to provide greater specificity to certain types of potential whistleblowers about the circumstances in which their submissions will or will not make them eligible to receive an award.

Nor do we intend to suggest that an internal investigation should in all cases be completed before an entity elects to self-report violations, or that 120 days is intended as an implicit "deadline" for such an investigation. Companies frequently elect to contact the staff in the early stages of an internal investigation in order to self-report violations that have been identified. Depending on the facts and circumstances of the particular case, and in the exercise of its discretion, the staff may receive such information and agree to await further results of the internal investigation before deciding its own investigative course. This rule is not intended to alter this practice in the future.

(c) Rule 21F–4(b)(4)(iv)—Conviction for Violations of Law

a. Proposed Rule

Proposed Rule 21F–4(b)(4)(iv) excluded from the definition of "independent knowledge" information that a whistleblower obtained by a means or in a manner that violates applicable Federal or state criminal law. We explained our preliminary view that a whistleblower should not be rewarded for violating a Federal or state criminal law.

b. Comments Received

Comments on this proposal were divided. Several commenters argued that the proposal went too far in excluding information provided by whistleblowers.[167] One commenter explained that the exclusion would raise difficult questions involving state or Federal criminal law, including who would decide whether evidence was gathered in violation of State or Federal criminal law and under what standard of proof".[168]

Another commenter stated that the Government has historically been permitted to use documents without concern for how a whistleblower obtained them as long as the Government did not direct a whistleblower to take documents[169] and there is no reason to bar a whistleblower

confidential information related to the representation without the issuer's consent. *See* 17 CFR 205.3(d). However, we have not included a requirement of a "material violation," as is found in the attorney conduct rule. As most whistleblowers under this provision will not be attorneys, we have decided not to require that they make legal judgments about whether a material violation has occurred, but simply consider whether they have a reasonable basis to believe that a report to the Commission is necessary to prevent conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors.

[166] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions,* SEC Rel. Nos. 34–44969 and AAER–1470 (Oct. 23, 2001) (*http://www.sec.gov/litigation/investreport/34–44969.htm.*)

[167] *See, e.g.,* letters from Stuart D. Meissner, LLC; False Claims Act Legal Center; NWC; Kurt Schulzke; Patrick Burns.

[168] *See* letter from Stuart D. Meissner, LLC.

[169] *See* letter from False Claims Act Legal Center. *See also* letter from Patrick Burns.

from obtaining an award if the Government would be permitted to use those documents.

Several commenters were supportive of the exclusion.[170] One, for example, stated that, even if additional securities law violations might be uncovered by illegal acts, the result would be to undermine respect for the rule of law.[171] Another commenter recommended that the exclusion should go beyond domestic criminal law violations to include, among other things, state and Federal civil law.[172]

With respect to whether the exclusion should extend to violations of foreign criminal law, comments were divided.[173] One commenter stated that, without such an exclusion, individuals might be encouraged to break the laws of foreign countries by the prospect of a whistleblower award.[174] Other commenters urged the Commission not to extend the exclusion to violations of foreign criminal laws. One commenter, for example, argued that there may be situations in which a violation of a foreign criminal law is not a violation of a U.S. Federal or state law, and that in such situations a whistleblower should be able to obtain an award.[175]

In addition, commenters were sharply divided on whether we should exclude information obtained in violation of a judicial or administrative protective order.[176] Commenters that supported the exclusion expressed concern that trade secrets and other sensitive information might be disclosed if we were to permit awards for information provided in violation of judicial or administrative protect orders.[177] Other commenters expressed a general concern that protective orders are often negotiated between the parties and entered in private litigation as a way to protect proprietary information and should not operate to shield from the Commission information related to securities law violations.[178]

c. Final Rule

After reviewing the comments, we have decided to adopt the proposed rule, renumbered as Rule 21F–4(b)(4)(iv), but with a modification. Under Rule 21F–4(b)(4)(iv), a whistleblower's information will be excluded from the definition of "independent knowledge" if he or she obtained the information by a means or in a manner that is determined by a domestic court to violate applicable Federal or state criminal law.[179]

We continue to believe that this exclusion is consistent with the intent of Congress that the whistleblower award program not be used to encourage or reward individuals for obtaining information in violation of Federal or state criminal law—even if the information might otherwise assist our enforcement of the Federal securities laws. Nonetheless, we have decided that the exclusion will only apply where a domestic court determines that the whistleblower obtained the information in violation of Federal or state criminal law.[180] We believe that Federal and state courts are better positioned than we are to determine whether a whistleblower obtained the information in violation of criminal law.

We have determined not to extend the exclusion to cover information obtained in violation of domestic civil or foreign law, or judicial or administrative protective orders. Commenters raise a number of persuasive points supporting and opposing these additional exclusions. With respect to foreign law, we recognize that other countries often have legal codes that vary greatly from our own, and we are not in a position to decide as a categorical rule when it is appropriate to deny an award based on foreign law.[181] With respect to material that may have been obtained in violation of domestic civil law, we believe that, on balance, these exclusions would sweep too broadly and be difficult to apply consistently given the patchwork of state and municipal civil laws that might be implicated.

Finally, we find persuasive the comments that protective orders are frequently negotiated between parties to private litigation and are generally intended to protect proprietary information against public disclosure or improper use. It would be against public policy for litigants to obtain a protective order, or to seek enforcement of such an order, for the purpose of preventing the disclosure of information regarding violations of law to a law enforcement agency. For this reason, we have determined not to exclude whistleblowers who provide us with information that an opposing party may contend comes within the scope of a protective order.

(d) Rule 21F–4(b)(4)(vi)—Information Obtained From Excluded Persons

Proposed Rule 21F–4(b)(4)(vii) excluded persons from making whistleblower submissions based upon information they obtained from other persons in whose hands the same information would be excluded as "independent knowledge" or "independent analysis." We are adopting the proposed rule with slight modifications to respond to comments and to increase clarity. This provision is now set forth at Rule 21F–4(b)(4)(v).

a. Proposed Rule

The proposed rule provided that we would not treat a whistleblower submission as derived from "independent knowledge" or "independent analysis" if the whistleblower obtained the information on which the submission was based from any of the individuals described in Proposed Rules 21F–4(b)(4)(i) through (vi) (the other exclusion provisions).

b. Comments Received

One commenter expressed the view that the proposed rule effectively created a "hearsay" exception to the whistleblower provisions that could produce unintended results.[182] The commenter offered the example of an employee who overhears a conversation in which a compliance officer admits to participation in a Ponzi scheme. Under the proposed rule, the commenter pointed out, the employee would be ineligible to receive a whistleblower award.

c. Final Rule

After considering the comments, we are adopting a modified version of the

[170] *See, e.g.,* letters from the NSCP; the American Accounting Association; GE Group. *See also* letter from Wanda Bond.

[171] *See* letter from the NSCP.

[172] *See* letter from Financial Services Roundtable.

[173] *Compare* letters from Financial Services Roundtable, American Accounting Association, National Society of Corporate Responsibility, TRACE International, Inc. (supporting extending exclusion to violations of foreign law); *with* letters from VOICES, POGO, and Georg Merkl (opposing extending exclusion to violations of foreign law).

[174] *See* letter from TRACE International, Inc. *See also, e.g.,* letters from the American Accounting Association; Financial Services Roundtable; NSCP.

[175] *See* letter from POGO. *See also* letters from VOICES and Georg Merkl.

[176] Pursuant to Rule 21F–17(a), protective orders entered in SRO proceedings may not be used to prohibit parties from providing the Commission with information about a possible securities law violation.

[177] *See, e.g.,* letters from Alcoa Group; Financial Services Roundtable; and GE Group.

[178] *See, e.g.,* letters from VOICES; Georg Merkl; Patrick Burns.

[179] This exclusion is also supported by Section 21F(c)(2)(B) of the Exchange Act.

[180] If a criminal case is pending or known to be contemplated against a whistleblower, we may defer decision on an award application until the criminal matter is resolved.

[181] While the proposed rule does not extend the exclusion to information obtained or disclosed in violation of foreign law, we recognize that potential whistleblowers in foreign jurisdictions may have obligations to comply with applicable foreign laws. For instance, some foreign jurisdictions impose criminal penalties for unlawfully obtaining certain information or for unlawfully disclosing certain information to authorities outside their borders.

[182] *See* letter from NWC.

rule. As adopted, Rule 21F–4(b)(vi) provides that a submission will not be deemed to be derived from "independent knowledge" or "independent analysis" if the whistleblower obtained the information for the submission from a person who is subject to this section unless the information is not excluded from that person's use, or the whistleblower is providing the Commission with information about possible violations involving that person.

We added the phrase "unless the information is not excluded from that person's use" to the proposed rule in order to clarify that Rule 21F–4(b)(4)(vi) is intended to be purely derivative; *i.e.,* if the person from whom the information was obtained is free to use the information in a submission (for example, pursuant to the exceptions for officers, directors, auditors and others found in Rule 21F–4(b)(4)(v)), then this rule does not bar use of the information. In order to address the potential for the unintended consequence suggested in the comment, we also added the proviso that this exclusion does not apply if the whistleblower is providing information about violations involving the person from whom the information was obtained.

We expect that Rule 21F–4(b)(4)(vi) will work in tandem with the other exclusions set forth in Rule 21F–4(b)(4) to preclude submissions in a limited set of circumstances. Thus, for example, if an employee only learns about possible violations because he or she is interviewed in the course of a company internal investigation, Rule 21F–4(b)(4)(vi) will not permit that employee to file a whistleblower submission claiming the information as his or her "independent knowledge" or "independent analysis".[183] Similarly, if a senior company officer, after receiving a report concerning possible securities violations, gives the information to his or her assistant, the assistant will not be able to seek an award based on the information as long as the officer is barred from doing so.

6. Rule 21F–4(b)(5)—Original Source

Proposed Rule 21F–4(b)(5) described how we would determine if a whistleblower was the "original source" of information that we received from another source. We are adopting the rule as proposed, with a slight modification to maintain consistency with other rule changes.

a. Proposed Rule

The proposed rule provided that we would consider a whistleblower to be the "original source" of the same information that we obtained from another source if the information satisfied the definition of original information and the other source obtained the information from the whistleblower or the whistleblower's representative. If the whistleblower claimed to be the "original source" of information provided to us by any of the authorities set forth in Proposed Rule 21F–4(a) (relating to the "voluntary" submission of information), then the whistleblower would be required to have "voluntarily" provided the information to the other authority within the meaning of Proposed Rule 21F–4(a).

The proposed rule also required that the whistleblower establish his or her status as the original source of information to our satisfaction. In the event that the whistleblower claimed to be the original source of information provided to us by one of the authorities set forth in the rule or by another entity (including the whistleblower's employer), the proposed rule further stated that we might seek assistance and confirmation of the whistleblower's status from the other entity.

b. Comments Received

The few comments we received on this proposed rule primarily sought clarification on its application to particular circumstances.

One commenter requested that we clarify the situation in which one person makes a submission based upon information obtained from a second person, and the second person (the original source of the information) later submits the same information.[184] Another commenter noted the potential for inequity that may result if the person who makes the first whistleblower submission is later displaced from award eligibility because the second submitter (*e.g.,* the first person's supervisor) claims to be "the original source" of information submitted by the first person. The commenter expressed concern that the second submitter might obtain the award, to the exclusion of the first person, even though the second person may have known about the violations for an extended period, done nothing to stop them, and only made a submission after learning about the first person's submission.[185]

Another commenter suggested we make clear that if an individual reports misconduct through a company's internal compliance or other reporting processes, and the company subsequently self-reports the violations to the Commission, the individual will be eligible for an award as the "original source" of the information reported by the company.[186]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(5) as proposed with a slight modification to conform to other rule changes. Specifically, we are modifying the list of governmental and other authorities set forth in the rule to conform to the revised list set forth in Rule 21F–4(a) (see discussion above).

In addition, we provide the following clarifications to address the comments. As the language of our rule indicates, if B makes a whistleblower submission based upon information obtained from A, and A later makes his or her own submission of that information, then A will be considered the "original source" of the information (assuming that A establishes his or her status as the original source and that the information otherwise qualifies as "original information").[187]

However, A's status as the "original source" of the information does not exclude B from award eligibility. In this example, because B obtained the facts underlying his or her submission from A, and those facts were not derived from publicly available sources, B would also be deemed to have submitted information derived from his or her "independent knowledge." Thus, both submissions could qualify as "original information;" B's because he or she was first to bring the Commission information derived from "independent knowledge," and A's because he or she was the "original source" of information that, as of B's submission, was already known to the Commission.

Further, by virtue of being first-in-time, B may have an advantage over A. If B's submission were sufficiently specific, credible, and timely that it caused us to open an investigation, and if a successful enforcement action

[183] This assumes that the employee learns the information in the interview from an attorney or other person subject to Rules 21F–4(b)(4)(i) or (ii), or from someone subject to Rule 21F–4(b)(4)(iii)(C). Depending on all of the facts and circumstances, the employee could also be directly excluded under Rule 21F–4(b)(4)(i) if the interview is determined to be covered by the attorney-client privilege.

[184] *See* letter from SIFMA.

[185] *See* letter from TAF.

[186] *See* letter from Baron & Budd, P.C.

[187] This does not by itself mean that an award is due. The submitter must still satisfy all of the other requirements of Section 21F and of our rules, including that the information was submitted voluntarily, it led to a successful Commission enforcement action or related action, and the submitter is not ineligible for an award.

resulted, then we would consider whether B's submission "led to" our successful action under the lower standard set forth in Rule 21F–4(c)(1). Correspondingly, if A made his or her submission after we were already investigating the matter that B brought to us, then A's information would be evaluated under Rule 21F–4(c)(2), and A would have to meet the additional requirement that his or her information "significantly contributed" to the success of the action. In this regard, we note that A would also be considered the "original source" of any additional information he or she provided that materially added to our base of knowledge.[188]

An individual can also be the "original source" of information that we receive from an entity, including, for example, other government authorities, the whistleblower's employer, or other entities to which the individual may report misconduct. For example, an individual would be the original source of information provided to the Commission by his or her employer if the individual reports possible violations in the first instance through his or her employer's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, the company later self-reports the individual's information to the Commission, and the individual thereafter files a whistleblower submission. In fact, as is further described below, our final rules seek to enhance the incentives for employees to utilize their company's internal reporting systems, and we provide a clear alternate path for persons who do so to be considered eligible for an award if the company later self-reports violations to the Commission as result of the individual's internal report.[189]

7. Rule 21F–4(b)(6)—Original Source; Additional Information

a. Proposed Rule

Proposed rule 21F–4(b)(6) addressed circumstances where we already know some information about a matter from other sources at the time that we receive a whistleblower submission related to the same matter. In that case, the proposed rule provided that we would consider the whistleblower to be an "original source" of any information he or she provided that was derived from the whistleblower's independent knowledge or independent analysis, and that materially added to the information already in our possession. As our Proposing Release explained, this standard was modeled after the definition of "original source" that Congress included in the False Claims Act through recent amendments.[190]

b. Comments Received

One commenter suggested that we clarify how we plan to address the situation where one whistleblower provides original information that leads to successful enforcement of an action, and a second whistleblower provides additional information that "materially aids" the enforcement of the same case.[191]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(6) as proposed. Accordingly, a whistleblower will be deemed to be an "original of source" of information he or she provides that materially adds to the Commission's base of knowledge about a matter. In cases where a second whistleblower voluntarily provides information that materially adds to what we already know about the matter, and assuming that all of the other requirements of our rules are satisfied, we will assess whether the additional information provided by the second whistleblower also led to successful enforcement of our action pursuant to the standards described in Rule 21F–4(c). If so, and if, as a result, we determine that the second whistleblower is also entitled to an award, then we will determine an award allocation among whistleblowers pursuant to the criteria set forth in Rule 21F–6.

8. 21F–4(b)(7): Original Source: Lookback

a. Proposed Rule

Proposed Rule 21F–4(b)(7) provided that, if a whistleblower reported the original information to other authorities or people identified in Proposed Rules 21F–4(b)(4)(iv) and (v) (personnel involved in compliance or similar functions, or who are informed about possible violations with the expectation that they will take steps to address them), and the whistleblower within 90 days submitted the same information to the Commission, we would consider that the whistleblower provided the information as of the date of his or her original disclosure to one of these other authorities or people. In proposing this rule in this manner, we were seeking to protect the ability of the whistleblower to pursue internal or other channels to quickly address the violation while ensuring that the Commission receives this critical information in a timely fashion.

b. Comments Received

The Commission received numerous comments suggesting that we extend the lookback period or eliminate it altogether. Commenters suggested that 90 days was not sufficient time for an internal compliance or review program to conduct a sufficiently thorough investigation and suggested extending the period to 120 days, 180 days, or a reasonable period of time.[192] Others, also calling for a longer lookback period or none at all, suggested that the time limit would burden whistleblowers seeking to complete their own investigations and complicate the process.[193] Some commenters suggested that the Commission should coordinate with other authorities to determine timing rather than burden a whistleblower with proving the timing.[194]

c. Final Rule

In response to the almost uniform view of commenters suggesting a longer lookback period, we are modifying the proposed rule to extend the lookback period to 120 days. Thus, a whistleblower who first reports to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law and within 120 days reports to the Commission could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date. This means that even if, in the interim, another whistleblower has made a submission that caused the staff to begin an investigation into the same matter, the whistleblower who had first reported internally will be considered the first whistleblower who came to the Commission, assuming that his information was sufficiently specific and credible to have caused the staff to begin an investigation.[195]

We are balancing priorities with the length and existence of this lookback

[188] *See* Rule 21F–4(b)(6).

[189] *See* Rules 21F–4(b)(7) and 4(c).

[190] 31 U.S.C. 3730(e)(4)(B), Public Law 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23. 2010).

[191] *See* letter from SIFMA.

[192] *See, e.g.,* letters from Association of Criminal Defense Lawyers, AT&T, Business Roundable Institute for Corporate Ethics ("Business Roundtable"), NSCP.

[193] *See, e.g.,* letters from Georg Merkl, NWC.

[194] *See e.g.* letter from Storch, Amini & Munves PC.

[195] However, in that instance, the other whistleblower would still be considered for an award if his information significantly contributed to the success of our enforcement action. *See* Rule 21F–4(c)(2).

period, each with the ultimate objective of identifying and remedying violations of the Federal securities laws quickly. On the one hand, the Commission's primary goal, consistent with the congressional intent behind Section 21F, is to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program. For this reason, we are not requiring that a whistleblower utilize an available internal compliance program prior to submission to the Commission, and we are not providing for a lookback period as long as requested by some commenters. Because of our strong law enforcement interest in receiving high quality information about misconduct quickly we have chosen a lookback period shorter than the 180 days or more that some commenters requested.

On the other hand, compliance with the Federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees. The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program. This objective is also important because internal compliance and reporting systems are essential sources of information for companies about misconduct that may not be securities-related (*e.g.,* employment discrimination or harassment complaints), as well as for securities-related complaints. We believe that the balance struck in the final rule will promote the continued development and maintenance of robust compliance programs. As we noted in our proposing release, we are not seeking to undermine effective company processes for receiving reports on possible violations including those that may be outside of our enforcement interest, but are nonetheless important for companies to address.

The inclusion of this provision is designed for the benefit of whistleblowers by providing a reasonable period of time to make their decisions. As discussed elsewhere in this release, we are not requiring potential whistleblowers to use internal compliance and reporting procedures before they make a whistleblower submission to the Commission. Among our concerns was the fact that, while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others do not. Thus, there may well be instances where internal disclosures could be inconsistent with effective investigation or the protection of whistleblowers. Ultimately, we believe that whistleblowers are in the best position to assess whether reporting potential securities violations through their companies' internal compliance and reporting systems would be effective.

Nevertheless, as we noted in our proposing release, we expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back. The company's actions in these circumstances will be considered in accordance with the Commission's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions.[196] This has been the approach of the Enforcement staff in the past, and the Commission expects that it will continue in the future. Thus, in this respect, we do not expect our receipt of whistleblower complaints to minimize the importance of effective company processes for addressing allegations of wrongful conduct.[197]

9. Rule 21F–4(c)—Information That Leads to Successful Enforcement

a. Proposed Rule

As proposed, Rule 21–4(c) explained when we would consider original information to have led to successful enforcement. The Proposed Rule distinguished between information regarding conduct not under investigation or examination and information regarding conduct already under investigation or examination.

For information regarding conduct not under investigation or examination, the Proposed Rule established a two-part test for determining whether the information led to successful enforcement. First, the information must have caused the staff to commence an investigation or examination, reopen an investigation that had been closed, or to inquire into new and different conduct as part of an existing examination or investigation. Second, the information must have "significantly contributed" to the success of an enforcement action filed by the Commission.

For information regarding conduct under investigation or examination, the Proposed Rule provided a significantly higher standard. To establish that information led to successful enforcement, a whistleblower would need to demonstrate that the information: (1) would not have otherwise been obtained; and (2) was essential to the success of the action.

b. Comments Received

Although a few commenters approved of the standards in the Proposed Rule,[198] most stated that the standards were too high, ambiguous, or both.[199] Several commenters criticized the requirement that information not only cause the staff to open an investigation or examination but also that it "significantly contributed" to the success of the action, noting that the "significantly contributed" element is not contained in the statute and is too high a standard.[200] Commenters also expressed concern that the standard would create uncertainty over when awards would be granted, which in turn would make potential whistleblowers less likely to come forward with information.[201] One commenter suggested that we should examine whether the whistleblower has provided "enough information to get the Commission to open an investigation."[202]

Commenters also criticized the proposed standard applicable when there is already an examination or investigation underway, arguing that it would be almost impossible for whistleblowers to show that information

[196] Exchange Act Release No. 44969 (October 23, 2001).

[197] *See* Rule 21F–6. In addition, as discussed below, in order to encourage whistleblowers to utilize internal reporting processes, we expect to give credit in the calculation of award amounts to whistleblowers who utilize established internal procedures for the receipt and consideration of complaints about misconduct. And, in determining whether to give a company the opportunity to investigate and report back, we may consider a number of factors, including, but not limited to, information we have concerning the nature of the alleged conduct, the level at which the conduct allegedly occurred, and the company's existing culture related to corporate governance. We may also consider information we have about the company's internal compliance programs, including what role, if any, internal compliance had in bringing the information to management's or the Commission's attention.

[198] *See* Chris Barnard; American Accounting Association, Auditing Standards Committee.

[199] *See, e.g.,* TAF; VOICES.

[200] *See* letters from American Association for Justice; Grohovsky Group; Cornell Securities Law Clinic; TAF; VOICES; NWC.

[201] Letters from TAF; VOICES.

[202] *See* letter from Grohovsky Group.

would not have otherwise been obtained and was essential to the success of the action.[203] One commenter expressed concern that the standards could result in anomalous outcomes, providing an example where one whistleblower provides a bare-boned tip that causes the staff to open an investigation (but does not "significantly contribute" to the success of the action), and another whistleblower provides a subsequent tip that is a complete roadmap of the case after the investigation has been opened (but the information is not "essential" to the success of the action), yet neither would receive an award.[204]

As noted, we requested comment on whether our rules should require whistleblowers to report violations of the securities laws through their internal compliance and reporting systems before submitting the information to us. Comments on this issue were sharply divided. Many commenters strongly supported such a requirement. In particular, commenters argued that we should require internal reporting because doing so will:

1. Allow companies to take appropriate actions to remedy improper conduct at an early stage;[205]
2. Allow companies to self-report;[206]
3. Avoid undermining internal compliance programs and preserve systems companies have installed designed to deter, indentify, and correct violations;[207]
4. Allow the whistleblower program to supplement, rather than supersede the internal control requirements under the Sarbanes-Oxley Act of 2002;[208]
5. Allow the Commission to preserve its scarce resources by relying upon corporate internal compliance programs;[209]
6. Promote a working relationship between the Commission and companies;[210]
7. Allow compliance personnel to address conduct that does not yet rise to the level of a violation or is not a violation (based on a misunderstanding of fact or law);[211]
8. Increase the quality of tips the Commission receives;[212] and
9. Avoid internal investigations being compromised by unwillingness on the part of whistleblowers to participate.[213]

Many other commenters strongly opposed a requirement that whistleblower report internally before reporting to the Commission. Several commenters argued that doing so would:

1. Prohibit whistleblowers from reporting fraud directly and immediately to the Commission;[214]
2. Be inconsistent with Congressional intent;[215]
3. Create unnecessary and improper hurdles for whistleblowers;[216]
4. Place whistleblowers at risk of retaliation;[217]
5. Result in whistleblowers deciding not to report misconduct;[218]
6. Eliminate incentives for companies to improve their internal compliance programs.[219]
7. Contravene an employee's right to disclose information anonymously and directly to the Commission;[220] and
8. Be inconsistent with the DOJ and IRS whistleblower programs.[221]

c. Final Rule

After considering the comments, we have significantly modified Rule 21F–4(c). First, we are persuaded by those commenters who stated that the standards in the Proposed Rule were too high. As such, we have adopted standards that should be easier to satisfy—both for information regarding conduct not under investigation or examination and information regarding conduct already under investigation or examination—in the Final Rule.

Moreover, as further described below, internal compliance programs are not substitutes for rigorous law enforcement. However, we believe that internal compliance programs play an important role. While we are not requiring whistleblowers to report misconduct internally before reporting to us, we agree that the incentives to do so should be strengthened. Accordingly, the Final Rule includes a provision for a new standard applicable to a whistleblower who reports information internally. The details of the final rule are discussed below.

i. *Rule 21F–4(c)(1): Standard for information concerning conduct not under investigation or examination.*

We have decided to lower the standard applicable to information that concerns conduct not under investigation or examination. As noted above, the Proposed Rule required that the information must have "significantly contributed" to the success of the action. In the Final Rule, we have deleted "significantly contributed" from the standard. Under the Final Rule, information will be considered to have led to successful enforcement when it is sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brings a successful judicial or administrative action based in whole or in part on the conduct identified in the original information.

We do not anticipate a rigid, mechanical application of this standard. As a general matter, in assessing whether information 'led to' a successful enforcement action, we will examine the relationship between the information in a submission and the allegations in the Commission's complaint filed in the civil action or order filed in the administrative proceeding. Our inquiry will focus on whether the submission identifies persons, entities, places, times and/or conduct that correspond to those alleged by the Commission in the judicial or administrative action. As part of this analysis, we may consider whether, and the extent to which, the information included: (1) Allegations that formed the basis for any of the Commission's claims in the judicial or administrative action; (2) provisions of the securities laws that the Commission alleged as having been violated in the judicial or administrative action; (3) culpable persons or entities (as well as offices, divisions, subsidiaries or other subparts of entities) that the Commission named as defendants, respondents or uncharged wrongdoers in the judicial or administrative action; or (4) investors or a defined group of investors that the Commission named as victims or injured parties in the judicial or administrative action.

The Final Rule also states that the information submitted by the whistleblower must be sufficiently "specific, credible and timely" to cause

[203] Letter from VOICES (arguing that, particularly given our funding issues, we should not condition awards on the theoretical possibility that the staff could uncover the evidence).

[204] Letter from Grohovsky Group.

[205] *See* letters from Lum; Chamber of Commerce Group.

[206] *See* letter from Baker, Donaldson, Bearman, Caldewell & Berkowitz ("Baker Donaldson").

[207] *See* letters from Baker Donaldson; Chamber of Commerce Group; Foster Wheeler; Apache Group; Alcoa Group; Allstate Group.

[208] *See* letters from Arent Fox; Alcoa Group.

[209] *See* letter from ALG.

[210] *Id.*

[211] *See* letters from Foster Wheeler; Apache Group.

[212] *See* letter from Apache Group.

[213] *See* letter from Apache Group.

[214] *See* letter from NWC.

[215] *See* letters from TAF; POGO. *See also* Letter from Senator Charles Grassley ("requiring whistleblowers to first go through internal compliance programs would be at odds with the law Congress wrote").

[216] *See* letter from TAF.

[217] *See* letters from TAF; Grohovsky Group; POGO.

[218] *See* letters from Grohovsky Group; POGO.

[219] *See* letter from POGO.

[220] *See* letters from NWC and Daniel J. Hurson.

[221] *See* letters from TAF and NWC.

the Commission to commence an investigation or examination. This new language is intended to describe generally the type of information that would cause our staff to open an investigation or examination. While we believe it is appropriate to adopt a lower standard in the Final Rule, due to our limited resources and the high volume of tips that we receive each year, high-quality tips—ones that are specific, credible and timely—are most likely to lead to a successful enforcement action.

ii. *Rule 21F–4(c)(2): Standard for information concerning conduct already under investigation or examination.*

We have also decided to lower the standard applicable for information that concerns conduct already under investigation or examination. We agree with the commenters who expressed concern that the standard in the Proposed Rule—that the information would not have otherwise been obtained and was essential to the success of the action—in practice might be too difficult to satisfy. As a result, for information concerning conduct already under investigation or examination, we will find information to have led to successful enforcement when the information "significantly contributed" to the success of our action.

While we continue to believe that the primary focus of the program is to encourage the submission of information regarding conduct not already known to us, we recognize that in some cases information voluntarily provided by a whistleblower can play a vital role in advancing an existing investigation. Thus, a whistleblower will be eligible for an award in a matter already under investigation if his or her information "significantly contributes" to our success. In applying this standard, among other things, we will look at factors such as whether the information allowed us to bring: (1) Our successful action in significantly less time or with significantly fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities.

At the same time, we do not want to reward a whistleblower who has obstructed an ongoing investigation in an effort to obtain an award. In this regard, absent extraordinary circumstances, we will not consider information to have "significantly contributed" to the success of our action if: (i) We or some other law enforcement agency has issued a subpoena or other document request, inquiry or demand to an entity or an individual other than the whistleblower; (ii) there is evidence that the whistleblower was aware of the investigative request, inquiry, or demand; and (iii) the whistleblower withheld or delayed providing responsive documents prior to making the related submission to the Commission. This approach is consistent with one of the principal goals of the program: To incentivize whistleblowers to come forward early with information of possible violations of the securities laws rather than wait until they become aware of an investigation by the Commission or other agency.[222] Further, it would not be good policy for a person to be rewarded for "significantly contributing" to the success of an action when he has knowingly obstructed the investigation of the misconduct.

iii. *Rule 21F–4(c)(3): Additional incentives to encourage reporting through internal compliance programs.*

Paragraph (3) of Rule 21F–4(c) is a new provision that has been added, in response to comments, to create a significant financial incentive for whistleblowers to report possible violations to internal compliance programs before, or at the same time, they report to us. The final rule provides that if: (1) A whistleblower reports original information through his or her employer's internal whistleblower, legal or compliance procedures before or at the same time he or she reports them to the Commission; (2) the employer provides the Commission with the whistleblower's information or with the results of an investigation initiated in response to the whistleblower's information; and (3) the information provided by the employer to the Commission "led to" successful enforcement under the criteria of Rule 21F–4(c)(1) or (2) discussed above, then the whistleblower will receive full credit for the information provided by the employer as if the whistleblower had provided the information to us.[223] Thus, when the employer provided information "led to" a successful enforcement action, the whistleblower will be eligible for an award, even if the information the whistleblower originally provided to the employer would not have satisfied the "led to" requirements.

To qualify for an award under this new provision, the rule requires that a whistleblower must provide information "through an entity's internal whistleblower, legal or compliance procedures for reporting allegations of possible violations of law." A report to a supervisor will qualify under this standard if the entity's internal compliance procedures require or permit reporting misconduct in the first instance to supervisors. Furthermore, if an entity does not have established internal procedures for reporting violations of law, we will consider an employee who reports a possible violation to the entity's legal counsel, senior management, or a director or trustee to have provided the information through the appropriate "internal whistleblower, legal or compliance procedures."[224]

Rule 21F–4(c)(3) incentivizes whistleblowers to report internally in appropriate circumstances by providing them a meaningful opportunity to increase their probability of receiving an award. In effect, reporting internally provides a second potential path to an award. We anticipate that not only individuals who were predisposed to report internally prior to the enactment of the whistleblower award program, but also some who would not have been inclined to report internally, will respond to Rule 21F–4(c)(3)'s financial incentive by utilizing internal reporting procedures. Put differently, the rule's financial incentives should both mitigate any diversion from internal reporting of individuals who would be predisposed to report internally in the absence of the whistleblower program, and incentivize new individuals who otherwise might never have reported internally to enter the pool of potential internal whistleblowers. As a result, the provision should increase the likelihood that individuals will report misconduct to effective internal reporting programs, allowing such programs to continue to play an important role in facilitating compliance with the securities laws.

Although many commenters argued that we should require whistleblowers to report possible violations internally either before or contemporaneously with reporting to us, we are not

[222] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws * * *.").

[223] Employees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by Section 21F(h)(1)(A)(iii) of the Exchange Act, which incorporates the broad anti-retaliation protections of Sarbanes-Oxley Section 806, *see* 18 U.S.C. 1514A(b)(2).

[224] To qualify for consideration under Rule 21F–4(c)(3), a whistleblower must establish that he or she provided original information through the appropriate "internal whistleblower, legal or compliance procedures." Accordingly, prospective whistleblowers will be better able to support their claims under this provision if they generate, obtain and retain contemporaneous documentation (*e.g.,* e-mails or other written records) demonstrating their compliance with the requirements of the Rule, including documents evidencing: (i) the substance of the information; (ii) the means by which the information was provided; (iii) the recipients of the information; and (iv) the date on which the information was provided.

persuaded that such a requirement would achieve better overall enforcement of the Federal securities laws than the approach we are adopting for several reasons. First, we believe that there are a significant number of whistleblowers who would respond to the financial incentive offered by the whistleblower program by reporting *only* to the Commission, but who would not come forward *either* to the Commission or to the entity if the financial incentive were coupled with a mandatory internal reporting requirement.[225] In those cases, the Commission would not receive critical information about possible securities law violations, and companies and investors would suffer harm as ongoing violations remained undetected and unremedied.

Second, our approach should encourage companies to continue to strengthen their internal compliance programs in an effort to promote internal reporting. Potential whistleblowers are more likely to respond to Rule 21F–4(c)(3)'s financial incentive by reporting internally when they believe that the company or entity has a good internal compliance program—*i.e.,* a compliance program that will take their information seriously and not retaliate.[226] We anticipate that companies will recognize this, take steps to promote a corporate environment where employees understand that internal reporting can have a constructive result, and that the net effect of this will be enhanced corporate compliance with the Federal securities laws.

Third, while internal compliance programs are valuable, they are not substitutes for strong law enforcement. In some cases, law enforcement interests will be better served if we know of potential fraud before the entities or individuals involved learn of our investigation. This is particularly true when there is a risk that an entity or individual may try to hinder or impede our investigation by, for example, destroying documents or tampering with witnesses.[227] Similarly, there are circumstances where a whistleblower may have legitimate reasons for not wanting to report the information internally, for example, legitimate concerns about misconduct by the company's management or within the internal compliance program, or a reasonable basis to fear retaliation or personal harm.

In addition, we do not believe that a general requirement on whistleblowers to report possible violations through internal compliance procedures would be consistent with the language of, or legislative intent underlying, Section 21F. As evidenced by the text of Section 21F, the broad objective of the whistleblower program is to enhance the Commission's law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.[228] However, as discussed above, a general requirement that employees report internally as a condition of participating in the whistleblower program would impose a barrier that in some cases would dissuade potential whistleblowers from providing information to the Commission, contrary to the purpose of the whistleblower provision.[229]

Moreover, a mandatory internal reporting requirement would deviate from the operation of other established Federal whistleblower award programs, and there is no indication in the text or legislative history of Section 21F that Congress intended that result.[230]

At the same time, we also do not agree with the comment that no provisions should be made in our rule to encourage internal reporting because whistleblowers would do so anyway.[231] Although some evidence suggests that many whistleblowers will continue to

[225] Specifically, the fear of retaliation and other forms of harassment, as well as other social and psychological factors, can have a chilling effect on certain whistleblowers who, absent a mandatory internal reporting requirement, would respond to the financial incentive offered by the whistleblower program by providing the Commission with information about possible securities law violations. *See* discussion in Part IV(A)(7) of the Economic Analysis. A number of commenters who routinely work with whistleblowers supported this assessment. *See, e.g.,* letters from Grohvosky (explaining that if potential whistleblowers were required to report internally, many would remain silent); TAF (same).

[226] *See generally* Richard E. Moberly, Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers, 2006 BYU L. REV. 1107, 1144 (2006).

[227] Similarly, we note that a requirement for mandatory internal reporting before reporting to the Commission would result in undesirable outcomes in the case of entities' with ineffective internal compliance processes. In these cases, mandatory internal pre-reporting would lead to unnecessary delays before the violation can be addressed by the Commission, resulting in potentially increased injuries to the company and investors.

[228] The statute incentivizes whistleblowers to report possible securities law violations to the Commission by offering them financial awards, reducing the risks from employment retaliation, and lowering the barriers through user-friendly procedures and appellate redress. *See* Section 21F(b)–(c) of the Exchange Act (10–30% awards); *id.* 21F(d) (whistleblower anonymity); *id.* 21F(e) (no contractual obligations can be imposed on whistleblowers unless provided for in a Commission rule or regulation); *id.* 21(f) (right of appeal); *id.* 21F(h) (anti-retaliation protection and heightened confidentiality requirements for whistleblower identifying information). *See also* Section 922(d) of Dodd-Frank Act (mandating a study of the "whistleblower protections" established in Section 21F of the Exchange Act).

[229] Similarly, an internal reporting requirement would appear inconsistent with the provisions of Section 21F that are designed to protect the identity of a whistleblower. *See* Section 21F(d)(2) & (h)(2). Simply put, even where an entity may have implemented generally effective procedures for anonymous reporting, there will be situations where a whistleblower's tip might, by the nature of the information it discloses, reveal the identity of the whistleblower—*e.g.,* situations where only a few people would have assess to the information. The financial incentives approach that we are adopting allows the whistleblower to access whether an internal report might disclose his identity and, if so, whether he wishes to report internally notwithstanding this possibility.

[230] We also considered suggestions by some commenters that we should require internal reporting by employees of issuers that are subject to Section 301 of the Sarbanes-Oxley Act of 2002 ("SOX") in order to harmonize Section 21F with the requirement of Section 301 that listed companies have audit committee procedures for the receipt, retention, and treatment of complaints regarding accounting, internal accounting control, and auditing matters, including procedures for the submission of information anonymously. *See, e.g.* letters from Business Roundtable; ABA; U.S. Chamber of Commerce Group; Alcoa Group. In Section 301 of SOX, Congress mandated that listed companies establish structural mechanisms to facilitate internal whistleblowing by employees. In Section 21F, however, Congress chose a wholly different model—one that provides financial incentives for employees and others to report violations directly to the Commission. *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers,* 2006 BYU L. REV. 1107, 1108 n.5 (2006); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 B.U.L.Rev. 91 (2007). We do not think it appropriate to limit the path opened by Section 21F by a Commission-imposed requirement that employees of listed companies also utilize internal audit committee or other complaint procedures. Further, even if a company has anonymous complaint procedures consistent with Section 301 of SOX, in some cases an anonymous whistleblower's identity can be gleaned from the facts and circumstances surrounding the whistleblower's complaint. In those situations, requiring the whistleblower to report internally would be in tension with the mandate of Section 21F that we protect information that could reasonably be expected to reveal the identity of a whistleblower. *See* Section 21F(h)(2) of the Exchange Act. Finally, as discussed above, we believe that our approach will incentivize individuals who were pre-disposed to report internally to continue to do so, and thus will significantly mitigate the concern of commenters that our rules will undermine internal reporting processes established pursuant to Section 301.

[231] *See, e.g.,* letter from NWC ("NWC strongly urges that the Commission rules be revised and * * * treat employees equally whether they choose to make their disclosures internally, externally, or both."). *But cf.* Chamber of Commerce Group ("In the absence of an affirmative restriction on external reporting when effective internal compliance channels are available, *or provision of a significant incentive for using those internal channels,* employees will face an irresistible temptation to go to the SEC with their report.") (emphasis added).

report misconduct internally,[232] we understand that the financial incentives established by Section 21F could have the potential to divert other whistleblowers away from reporting internally. If this diversion were significant, it might impair the usefulness of internal compliance programs, which can play an important role in achieving compliance with the securities laws. Accordingly, we believe that it is appropriate for us to provide significant financial incentives as part of the whistleblower program to encourage employees and other insiders to report violations internally, while still leaving the ultimate decision whether to report internally to the whistleblower.

10. Rule 21F–4(d)—Action

Proposed Rule 21F–4(d) defined the term "action" to mean a single captioned judicial or administrative proceeding. We are revising the proposed rule to permit consideration of multiple cases that arise out of a common nucleus of operative facts as a single "action."

a. Proposed Rule

For purposes of calculating whether monetary sanctions in a Commission action exceed the $1,000,000 threshold required for an award payment pursuant to Section 21F of the Exchange Act, as well as determining the collected sanctions on which awards are based,[233] proposed rule 21F–4(d) defined "action" to mean a single captioned civil or administrative proceeding. Under the proposed rule, "action" included all defendants or respondents and all claims brought within that proceeding without regard to which specific defendants or respondents, or which specific claims, were included in the action as a result of the information that the whistleblower provided.

Also, the proposed rule meant that the Commission would not aggregate sanctions that are imposed in separate judicial or administrative actions for purposes of determining whether the $1,000,000 threshold is satisfied, even if the actions arise out of a single investigation. For example, if a whistleblower's submission leads to two separate enforcement actions, each with total sanctions of $600,000, then no whistleblower award would be authorized because no single action will have obtained sanctions exceeding $1,000,000.

b. Comments Received

Commenters offered competing views on the proposed interpretation of "action." A number of commenters supported our proposed definition.[234] Several commenters disagreed with the proposal, urging that the Commission should aggregate multiple Commission actions arising out of a whistleblower's submission for purposes of satisfying the $1,000,000 threshold [235] because to do otherwise was to put form over substance and not fully reward whistleblowers for the information they provided that led to successful actions.[236]

Two other commenters argued that our definition of "action" should be narrowed so that, in a case involving multiple counts, only the counts resulting from the whistleblower's information are considered.[237] These commenters were concerned that, without this limitation, the rules would encourage whistleblowers to report even minor violations in the hope that they will be grouped with more serious violations in a single action with the result that all of the sanctions in the action together meet the covered action threshold.

c. Final Rule

After reviewing the comments, we are adopting the rule with substantial modifications. Notwithstanding the use of the singular term "action" in Section 21F, we agree with the commenters who urged that Congress did not intend for a meritorious whistleblower to be denied consideration for an award simply because we chose to bring separate proceedings against respondents or defendants involved in the same or closely related conduct.[238]

Accordingly, as adopted, Rule 21F–4(d) defines the term "action" generally to mean a single captioned judicial or administrative proceeding brought by the Commission. However, the rule also identifies two exceptions to this general definition. First, an "action" will constitute two or more Commission proceedings arising from the same nucleus of operative facts for purposes of making an award under Rule 21F–10. Second, for purposes making payments under Rule 21F–14 on a Commission action for which we have already made an award, we will treat as part of that same action any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.

The same-nucleus-of-operative-facts test is a well-established legal standard that is satisfied where two proceedings, although brought separately, share such a close factual basis that the proceedings might logically have been brought together in one proceeding.[239] In exercising our discretion and deciding whether two or more proceedings arise from the same nucleus of operative

[232] *See* letter from NWC. This comment included a study indicating that roughly 90% of individuals who eventually filed *qui tam* suits under the False Claims Act also reported the misconduct internally, without any incentives for internal reporting. It is not clear that data about whistleblower behavior under the False Claims Act necessarily will be an accurate predictor of behavior under our program. The barriers to participation as a False Claims Act whistleblower are appreciably higher than in our program: for example, to be eligible for an award under the False Claims Act, a *qui tam* relator must file a Federal court complaint alleging fraud with specificity as required by Rule 9(b) of the Federal Rules of Civil Procedure, whereas under our program, a whistleblower only needs to complete a Form TCR, sworn under penalty of perjury.

[233] *See* Proposed Rule 21F–5.

[234] *See* letters from Chris Barnard, Auditing Standards Committee, and Institute of Internal Auditors.

[235] *See,* letters from VOICES, NWC, Stuart D. Meissner, LLC, Georg Merkl, and Wanda Bond.

[236] *See* letter from the NWC.

[237] *See* letters from the NSCP and SIFMA.

[238] As noted above, two commenters argued that we should interpret "action" narrowly such that we would only pay an award to a whistleblower for monetary sanctions related to specific counts in an action that were based upon the whistleblower's information. We decline to do so. First, we do not believe that such a narrow interpretation is consistent with the purpose of the whistleblower program, which is to encourage whistleblowers to provide the Commission with information that leads to successful enforcement actions. The proposed narrow interpretation of action would reduce incentives for whistleblowers to provide the Commission with information because (i) it would create uncertainty regarding how monetary sanctions may be assigned to specific counts and (ii) it would not reward whistleblowers who provide the Commission with information regarding lesser misconduct (although misconduct sufficient to cause the Commission to open an investigation) but which led the Commission to uncover much more significant misconduct. Second, we do not believe that such a narrow interpretation of action is practical. In contested actions, courts often do not assign monetary sanctions against a single defendant on a per count basis, and neither do Commission settlements. As such, we would have no reasonable basis to assign specific amounts to various counts in an action.

[239] *See, e.g., Harper* v. *AutoAlliance Intern., Inc.,* 392 F.3d 195, 209 (6th Cir. 2004) ("Claims form part of the same case or controversy [for purposes of supplemental jurisdiction] when they 'derive from a common nucleus of operative facts.'") (quoting *Ahearn* v. *Charter Township of Bloomfield,* 100 F.3d 451, 454–55 (6th Cir. 1996)). To determine whether two or more proceedings involve the same nucleus of operative facts, courts look at "factors such as 'whether the facts are related in time, space, origin or motivation,' 'whether they form a convenient trial unit,' and whether treating them as a unit 'conforms to the parties' expectations.'" *In re Iannochino,* 242 F.3d 36, 46 (1st Cir. 2001) (quoting *Restatement (Second) of Judgments* § 24 (1982)) (internal quotation marks omitted). *See also Airframe Systems, Inc.* v. *Raytheon Co.,* 601 F.3d 9, 15 (1st Cir. 2010). Put another way, "as long as the new complaint grows out of the same transaction or series of connected transactions as the old complaint, the causes of action are considered to be identical." *Kale* v. *Combined Ins. Co.,* 924 F.2d 1161, 1166 (1st Cir. 1991) (internal quotation marks and citations omitted).

facts, we intend to apply a flexible approach and will consider a number of factors, including whether the separate proceedings involve the same or similar: (1) Parties (whether named as defendants/respondents or simply named within the complaint or order); (2) factual allegations; (3) alleged violations of the Federal securities laws; or (4) transactions or occurrences.[240]

Paragraph (d)(1) allows us to treat together as a covered action for purposes of making an award under Rule 21F–10, two or more administrative or judicial proceedings brought by the Commission if those proceedings arise from the same nucleus of operative facts. So, for example, if we bring multiple proceedings during the course of an investigation, and these proceedings involve the same nucleus of operative facts but none yields a monetary sanction in excess of $1,000,000, we may nonetheless issue a Notice of Covered Action and treat these proceedings as one covered action for purposes of making an award under Rule 21F–10. Thus, if a qualified whistleblower provided us with original information that led to the successful enforcement of any one of the proceedings, we will make an award to that whistleblower for 10 to 30 percent of the total monetary sanctions collected in those proceedings.

Similarly, we will treat together a proceeding that yielded a monetary sanction of $1,000,000 or less with a Commission proceeding that alone would qualify as a covered action if the two proceedings involve the same nucleus of operative facts. Here again, we believe this is consistent with Congress's intent that qualified whistleblowers who provide us with original information that leads to enforcement proceedings yielding monetary sanctions in excess of $1,000,000 should receive an award payout that fully reflects the monetary sanctions collected.

Paragraph (d)(1) also authorizes us to treat as a covered action under Rule 21F–10 two or more Commission proceedings that otherwise might individually qualify as covered actions where these proceedings involve the same nucleus of operative facts. We believe that treating these proceedings together under the Rule 21F–10 procedures as one covered action, rather than processing them as separate covered actions, will help make the awards procedures more efficient and user-friendly, thereby further encouraging whistleblowers to come forward.

Finally, paragraph (d)(2) provides that, for purposes of determining the payment on an award pursuant to Rule 21F–14, we will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.[241] For example, if we make a whistleblower award for a covered action brought against an entity, but thereafter bring a separate proceeding against the officer who was responsible for the entity's conduct in which we do not recover in excess of $1,000,000, we may in our discretion determine to treat the second proceeding as part of the previous covered action and provide a payment based on the total of the two proceedings.

11. Rule 21F–4(e)—Monetary Sanctions

Proposed Rule 21F–4(e) tracked the definition of "monetary sanctions" found in Section 21F(a)(4) of the Exchange Act to mean any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 as a result of a Commission action or a related action.[242] We received no comments on the proposed rule. We are adopting the rule as proposed. As was explained in our Proposing Release, we interpret the reference in Section 21F(a)(4) to "penalties, disgorgement, and interest" to be examples of monetary sanctions, and not exclusive. Thus, regardless of how designated, we will consider all amounts that are "ordered to be paid" in a Commission action or a related action as "monetary sanctions" for purposes of Section 21F.

12. Rule 21F–4(f)—Appropriate Regulatory Agency

a. Proposed Rule

Section 3(a)(34) of the Exchange Act defines the term "appropriate regulatory agency." Consistent with this definition, the proposed rule defined the term "appropriate regulatory agency" to mean the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and any other agencies that may be added to Section 3(a)(34) of the Exchange Act by future amendment.[243] Although Section 3(a)(34) defines the Commission and these other agencies to be "appropriate regulatory agencies" for specified functions and purposes, we stated in our Proposing Release that we would treat these agencies as "appropriate regulatory agencies" for all purposes under these rules. This would mean that, under Section 21F(c)(2)[244] and Rule 21F–8, a member, officer, or employee of one of the designated agencies would be ineligible to receive a whistleblower award even if the information that the person possesses is unrelated to the agency's regulatory function. This interpretation would place members, officers, and employees of appropriate regulatory agencies on equal footing with those of other organizations, such as the Public Company Accounting Oversight Board and law enforcement organizations, who are also statutorily ineligible to receive whistleblower awards.[245]

b. Comments Received

Two commenters supported our definition.[246] One commenter suggested that, in cases involving auditors, we should treat the PCAOB as an "appropriate regulatory agency."[247]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(f) as proposed. As Congress placed Section 21F in the Exchange Act, we believe it appropriate to define "appropriate regulatory agency" for purposes of Section 21F consistently with the existing Exchange Act definition of the same term. For this reason, we have determined not to define "appropriate regulatory agency" to include the PCAOB or any other authority not set forth in Section 3(a)(34) of the Exchange Act.

This approach does not inappropriately exclude the PCAOB for any relevant purposes under our rules. Section 21F(c)(2)(A)[248] and Rule 21F–8(c)(1) exclude from award eligibility members, officers, or employees of "appropriate regulatory agencies," and

[240] An administrative or judicial proceeding brought by the Commission will be treated as part of only one covered action.

[241] If a subsequent Commission proceeding arises from the same nucleus of operative facts as two covered actions for which we have already made awards, we will treat the subsequent proceeding as part of the covered action to which it bears the closest relationship.

[242] 15 U.S.C. 78u–6(a)(4).

[243] Title III of Dodd-Frank abolishes the Office of Thrift Supervision and transfers its functions to other agencies one year after the date of enactment, unless the transfer date is extended.

[244] 15 U.S.C. 78u–6(c)(2).

[245] *See* Section 21F(c)(2)(A), 15 U.S.C. 78u–6(c)(2)(A).

[246] *See* letters from Chris Barnard and Georg Merkl.

[247] *See* letter from Auditing Standards Committee.

[248] 15 U.S.C. 78u–6(c)(2)(A).

of the PCAOB. Similarly, under Section 21F(h)(2)(D)[249] and Rule 21F–7(a)(2), the PCAOB is separately set forth as an authority with which we may share whistleblower-identifying information.[250]

13. Rule 21F–4(g)—Appropriate Regulatory Authority

Rule 21F–4(g) defines an "appropriate regulatory authority" to mean an appropriate regulatory agency other than the Commission.

Section 21F(h)(2)(D)[251] of the Exchange Act provides that, without the loss of its status as confidential in the hands of the Commission, we may provide information that identifies a whistleblower to other authorities set forth in the statute, including "an appropriate regulatory authority." Through the operation of Section 21F(a)(5),[252] we are also directed to pay awards on related actions brought by an "appropriate regulatory authority."

The proposed rules did not include a definition of "appropriate regulatory authority." Instead, we used the defined Exchange Act term "appropriate regulatory agency" for purposes of the provisions dealing with ineligibility for awards, where that term expressly appears,[253] as well as the provisions dealing with sharing of whistleblower-identifying information and awards in connection with related actions, where the statute actually uses the term "appropriate regulatory authority."[254] As a result of this approach, the proposed rules could have been read to mean that an action brought by the Commission was a "related action," even though our intention was to consider only actions brought by authorities other than the Commission as "related actions."

In response to comments, and as discussed above, we have revised our definition of "action" in order to provide for payment of awards on additional Commission enforcement actions that might otherwise have qualified as "related actions" under a literal reading of the proposed rules. As a result of that revision, there is no other reason to treat the Commission as an "appropriate regulatory authority" for the purposes set forth in the statute. Accordingly, in order to avoid confusion and to establish a single consistent route to payment of an award based on Commission enforcement actions, we have determined to adopt a separate definition of the term "appropriate regulatory authority" that excludes the Commission.[255]

14. Rule 21F–4(h)—SRO

Proposed Rule 21F–4(g) defined the term "self-regulatory organization" to mean any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act. As was explained in our Proposing Release, Section 3(a)(26) includes each of these organizations as a "self-regulatory organization," except that the Municipal Securities Rulemaking Board is designated as a self-regulatory organization solely for purposes of Sections 19(b) and (c) of the Exchange Act (relating to rulemaking).[256] Consistent with the approach taken with regard to the definition of "appropriate regulatory agency" (see discussion above), Proposed Rule 21F–4(g) would make clear that the Municipal Securities Rulemaking Board is considered to be a "self-regulatory organization" for all purposes under Section 21F.

The few commenters on this proposal all supported it.[257] We are adopting Rule 21F–4(g) as proposed, but re-designating it as Rule 21F–4(h).

E. Rule 21F–5—Amount of Award

a. Proposed Rule

Proposed Rule 21F–5 stated that, if all conditions are met, the Commission will pay an award of at least 10 percent and no more than 30 percent of the total monetary sanctions collected in successful Commission and related actions. This is the range that is specified in Section 21F(b)(1) of the Exchange Act.

b. Comments Received

We received few comments on this section. One commenter, a Member of Congress, suggested that we should consider placing an upper-end limit on the dollar amount that any one whistleblower could receive to avoid giving excessive awards.[258] Another commenter suggested that we should give further guidance on how award percentages would be determined as between Commission and related actions.[259]

c. Final Rule

We are adopting the final rule as proposed, except that we have added a new paragraph (a) to reflect Congress's clear direction that the determination of the amount of an award lies in our discretion.[260]

Paragraph (b) of Section 21F of the Exchange Act states that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected in the Commission's action and the related action. Our final rule tracks this provision. Thus, for example, one whistleblower could receive an award of 25 percent of the collected sanctions, and another could receive an award of 5 percent, but they could not each receive an award of 30 percent. As we noted in our proposed rule, since the Commission anticipates that the timing of award determinations and the value of a whistleblower's contribution could be different for the Commission's action and for related actions, the proposed rule would provide that the percentage awarded in connection with a Commission action may differ from the percentage awarded in related actions. But, in any case, the amounts would, in total, fall within the statutory range of 10 to 30 percent. As to the suggestion that we use our discretion to avoid giving excessive awards, we note that the statute requires that we give an award of a minimum of 10 percent of the amount collected regardless of the overall size, and we do not have discretion to reduce that statutory minimum.

F. Rule 21F–6—Criteria for Determining Amount of Award

Assuming that all of the conditions for making an award to a whistleblower have been satisfied, Rule 21F–6 sets forth the criteria that the Commission will take into consideration in determining the percentage of the award between 10 and 30 percent.

[249] 15 U.S.C. 78u–6(h)(2)(D).

[250] However, Section 21F does not permit us to treat PCAOB actions as "related actions" for purposes of payment of an award. *See* Sections 21F(a)(5), 15 U.S.C. 78u–6(a)(5) and 21F(h)(2)(D), 15 U.S.C. 78u–6 (h)(2)(D).

[251] 15 U.S.C. 78u–6(h)(2)(D).

[252] 15 U.S.C. 78u–6(a)(5).

[253] Section 21F(c)(2), 15 U.S.C. 78u–6(c)(2); Proposed Rule 21F–8(c).

[254] Section 21F(a)(5) and (h)(2)(D)(i), 15 U.S.C. 78u–6(a)(5) and (h)(2)(D)(i); Proposed Rules 21F–3(b) and 21F–7(a)(2).

[255] As noted, Section 21F(h)(2)(D) provides that, "without the loss of its status as confidential in the hands of the Commission," we may provide whistleblower-identifying information to "an appropriate regulatory authority." Thus, it seems clear that for that purpose the term "appropriate regulatory authority" must apply to entities other than the Commission.

[256] 15 U.S.C. 78s(b) and (c).

[257] *See* letters from Auditing Standards Committee, Georg Merkl, and Chris Barnard.

[258] Letter from Senator Carl Levin.

[259] Letter from Auditing Standards Committee, Institute of Internal Auditors.

[260] *See* Section 21F(c)(1)(A), 15 U.S.C. 78u–6(c)(1)(A).

a. Proposed Rule

As proposed, Rule 21F–6 provided that the Commission would consider four general criteria, when determining the percentage of a whistleblower award: (1) Significance of the information provided by a whistleblower to the success of the Commission action or related action; (2) degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (3) programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to successful enforcement actions; and (4) whether an award otherwise enhances the Commission's ability to enforce the Federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers. The proposing release also stated that, when determining the percentage of a whistleblower award, the Commission would also be authorized to consider the following optional considerations: (1) Character of the enforcement action; (2) dangers to investors or others presented by the underlying violations involved in the enforcement action; (3) timeliness, degree, reliability, and effectiveness of the whistleblower's assistance; (4) time and resources conserved as a result of the whistleblower's assistance; (5) whether the whistleblower encouraged or authorized others to assist the staff who might otherwise not have participated in the investigation or related action; (6) any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action; (7) degree to which the whistleblower took steps to prevent the violations from occurring or continuing; (8) efforts undertaken by the whistleblower to remediate the harm caused by the violations; (9) whether the information provided by the whistleblower related to only a portion of the successful claims brought in the Commission or related action; (10) culpability of the whistleblower; and (11) whether, and the extent to which, a whistleblower reported the possible violation through effective internal whistleblower, legal, or compliance procedures before reporting the violations to the Commission.

b. Comments Received

We received a wide range of comments on Proposed Rule 21F–6. The comments addressed the general methodology for making award determinations, and suggestions for additional criteria to be included in the rule. Commenters also responded to our specific questions about whether to include in the rule criteria concerning whether to increase awards to whistleblowers who reported into an internal compliance or reporting system and whether to reduce awards to culpable whistleblowers.

With respect to methodology, some commenters recommended that we adopt a more transparent methodology for making award determinations.[261] Others urged we adopt a methodology in which certain criteria would have the same impact on our award determinations in all cases, such as by giving the factor greater weight than other criteria,[262] or by using a factor to decrease a whistleblower's award [263] or to cap a whistleblower's award at 10 percent.[264] Several commenters suggested that some of the optional considerations for making awards outlined in the release should be required and placed into the rule text.[265] Other commenters recommended additional factors that should be considered by the Commission when making an award.[266]

Commenters expressed strong and divergent views on whether to include a factor related to a whistleblower's use of internal compliance and reporting systems. Many commenters suggested that the optional award consideration relating to whether a whistleblower reported a possible securities violation through effective internal whistleblower, legal, or compliance procedures before reporting it to the Commission should be listed as a required factor in the rule text.[267] Others, however, argued that the optional award consideration should be eliminated because it is inconsistent with the statute's purpose, vague, and impractical because it would require the Commission to independently determine the effectiveness of internal compliance programs and to make subjective conclusions about the whistleblower's specific circumstances and mindset.[268]

In response to our question regarding whether the Commission should consider a whistleblower's role and culpability in the unlawful conduct to exclude the whistleblower from eligibility or as a criteria that would reduce the award amount, comments were also sharply divided.[269] Many commenters recommended that the Commission should reduce a culpable whistleblower's award because the failure to do so would create incentives for individuals to engage in wrongdoing or to conceal wrongdoing.[270] Other commenters suggested that the Commission should place this optional consideration into the rule text so that it would be required to be considered in every case.[271] Many other commenters opposed rules that would exclude culpable whistleblowers from eligibility for awards or would reduce the amount of their awards beyond what is already contained in the statute.[272] These commenters contended that, without sufficient financial incentives, insiders with the most knowledge and evidence about wrongdoing will not come forward, resulting in securities laws violations going undetected (or at least

[261] *See, e.g.,* letters from Harold Burke and Partrick Burns.

[262] *See* the letter from the NSCP.

[263] *See, e.g.,* letters from Valspar, Institute of Internal Auditors, and Washington Legal Foundation.

[264] *See, e.g.,* letters from Anixter Int., Business Roundtable, Taft, Financial Services Roundtable, Alcoa Group.

[265] *See, e.g.,* letters from the Association of Corporate Counsel, Foster Wheeler, Anixter Int., Business Roundtable, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Ethics & Compliance Officer Association, Alcoa Group, Deloitte, CCMC, Apache Group.

[266] *See, e.g.,* letters from Harold Burke (whether the submission exposed a nationwide practice; whether the whistleblower, or whistleblower's counsel, did not provide or offer to provide any help after submitting the tip, or hampered the government's efforts in developing its case; and whether the whistleblower substantially delayed reporting the fraud); John Wahh (whether the whistleblower benefitted from the securities violation); Chris Barnard (the role and culpability of the whistleblower in the reported securities violations); Auditing Standards Committee (the relative amount of the award, rather than the relative percentage amount); Georg Merkl (the economic risk the whistleblower took to come forward and report the securities violations); and DC Bar (new more detailed criteria for encouraging use of existing compliance programs).

[267] *See, e.g.,* letters from the Association of Corporate Counsel, Foster Wheeler, Anixter Int., Business Roundtable, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Ethics & Compliance Officer Association, Alcoa Group, Deloitte, and CCMC.

[268] *See, e.g.,* letters from the NCCMP, Georg Merkl, Daniel J. Hurson, and Auditing Standards Committee.

[269] *See, e.g.,* letters from the Auditing Standards, Apache Group, Georg Merkl, NWC, Connolly & Finkel, Target, SIFMA, Business Roundtable, Washington Legal Foundation, Morgan Lewis, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, TRACE International, Inc, Alcoa Group, Oppenheimer Funds, Association of Corporate Counsel, and CCMC.

[270] *See, e.g.,* letters from Connolly & Finkel, Target, SIFMA, Business Roundtable, Washington Legal Foundation, Morgan Lewis, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Trace, Alcoa Group, Oppenheimer Funds, Association of Corporate Counsel, and CCMC.

[271] *See, e.g.,* letters from Apache Group.

[272] *See, e.g.,* Auditing Standards, Georg Merkl, and NWC.

experiencing a further delay before they are detected).

c. Final Rule

Although we continue to believe the four criteria set forth in Proposed Rule 21F–6—three of which derive from the statute—are important, we have significantly revised and restructured the final rule in response to comments. The changes are designed to describe more specifically the factors relevant to the Commission's determinations, and thus make award determinations more transparent, predictable, and fair. Similar to the approach used by the Department of Justice and Internal Revenue Service,[273] we adopt a methodology for determining awards where some factors suggest an increase and others a decrease in award percentage. This analytical framework incorporates into the final rule text the four required criteria from the proposed rule and the eleven optional considerations from the proposing release.

Under the final rule, when determining the percentage of a whistleblower award, the following required criteria may increase a whistleblower's award percentage: (1) Significance of the information provided by the whistleblower (the first required criteria in the proposed rule and the statute); (2) assistance provided by the whistleblower (the second required criteria in the proposed rule and the statute); (3) law enforcement interest in making a whistleblower award (the third and fourth required criteria in the proposed rule and the third required criteria in the statute); and (4) participation by the whistleblower in internal compliance systems. In contrast, the following required criteria may decrease a whistleblower's award percentage: (1) Culpability of the whistleblower; (2) unreasonable reporting delay by the whistleblower; and (3) interference with internal compliance and reporting systems by the whistleblower. Under many of the required criteria, we have set forth in the final rule related optional considerations that may be taken into account when considering the criteria. These potentially relevant factors are designed to provide greater detail regarding how award determinations will be made and to address commenters' other concerns and recommendations.

Although we have considered the views of commenters who recommended that the presence or absence of certain criteria should have a distinct and consistent impact on our award determinations, the final rule does not establish such a methodology that would permit a mathematical calculation of the appropriate award percentage. Since every enforcement matter is unique, the analytical framework adopted by the Commission in the final rule provides general principles without mandating a particular result. Accordingly, no attempt has been made to list the factors in order of importance, weigh the relative importance of each factor, or suggest how much any factor should increase or decrease the award percentage. Depending upon the facts and circumstances of each case, some factors may not be applicable or may deserve greater weight than others. Furthermore, the absence of any one of the positive factors does not mean that the award percentage will be lower than 30 percent, nor does the absence of negative factors mean the award percentage will be higher than 10 percent. Thus, a whistleblower would not be penalized for not satisfying any one of the positive factors. For example, a whistleblower who provides the Commission with significant information about a possible securities violation and provides substantial assistance in the Commission action or related action could receive the maximum award regardless of whether the whistleblower satisfied other factors such as participating in internal compliance programs. In the end, we anticipate that the determination of the appropriate percentage of a whistleblower award will involve a highly individualized review of the facts and circumstances surrounding each award using the analytical framework set forth in the final rule.

In response to concerns expressed by commenters that the proposed rules could incentivize whistleblowers to bypass corporate compliance programs, delay reporting violations, or otherwise interfere with internal compliance systems in order to enhance their future award, we have taken several steps to address this in the final rule. First, to reflect the important investor protection role that corporate compliance programs can serve and increase the incentive for whistleblowers to participate in these programs, the final rule includes a positive factor that requires the Commission to assess whether the whistleblower participated in his or her company's internal compliance and reporting systems.[274] Second, to minimize ongoing investor harm, maximize the deterrent impact of our enforcement cases, and to discourage delayed reporting by whistleblowers, the final rule includes a negative factor that requires the Commission to assess whether the whistleblower substantially and unreasonably delayed reporting the securities violations. Lastly, to penalize whistleblowers who attempt to undermine their employer's internal compliance or reporting systems, the final rule includes a negative factor that requires the Commission to assess whether there is evidence provided to the Commission that the whistleblower intentionally interfered with his or her company's internal compliance systems. Together, these provisions are designed to give whistleblowers appropriate incentives to report securities violations voluntarily to their corporate compliance programs and not to impair the effectiveness of these important programs.

As discussed in greater detail below in the discussion of Rule 21F–16, we do not believe that a *per se* exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act. By allowing certain less-culpable whistleblowers to receive awards consistent with the limitations set forth in the final rules, we have provided incentives for persons involved in wrongdoing to come forward and disclose illegal conduct involving others while limiting awards to those whistleblowers. However, after considering the public policy concerns expressed by commenters, we have included in the final rule a negative factor that requires the Commission to assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions.

G. Rule 21F–7—Confidentiality of Submissions

a. Proposed Rule

Proposed Rule 21F–7 reflected the confidentiality requirements set forth in

[273] *E.g.,* Internal Revenue Manual § 25.2.2.9.2.

[274] Unlike the optional consideration in the release to the proposed rule, the final rule does not require the Commission to evaluate whether the internal compliance and reporting systems of an entity are "effective." We believe that defining what constitutes "effective" internal compliance procedures for a wide range of entities is beyond the scope of these rules and determining whether such procedures existed at a specific entity would impose an unnecessary administrative burden on the staff. Accordingly, the final rule relies on whistleblowers to determine whether reporting potential securities violations internally would be appropriate or desirable at their entity, without requiring us to independently and subsequently assess the effectiveness of their entity's internal compliance procedures. However, in determining whether to give a company the opportunity to investigate and report back, the Commission may consider information we have about the company's internal compliance programs." *See supra* at n. 199.

Section 21F(h)(2) of the Exchange Act[275] with respect to information that could reasonably be expected to reveal the identity of a whistleblower. As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic. Disclosures of enforcement-related information to any person outside the Commission may only be made as authorized by the Commission and in accordance with applicable laws and regulations. Consistent with Section 21F(h)(2), we proposed Rule 21F–7 to explain that the Commission will not reveal the identity of a whistleblower or disclose other information that could reasonably be expected to reveal the identity of a whistleblower, except under circumstances described in the statute and the rule.[276]

Paragraph (a)(1) of the proposed rule authorized disclosure of information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in a Federal court or administrative action that the Commission files or in another public action or proceeding filed by an authority to which the Commission may provide the information. For example, in a related action brought as a criminal prosecution by the Department of Justice, disclosure of a whistleblower's identity may be required, in light of the requirement of the Sixth Amendment of the Constitution that a criminal defendant have the right to be confronted with witnesses against him.[277] Proposed paragraph (a)(2) authorized disclosure to the Department of Justice, an appropriate regulatory agency, a self regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities when it is necessary to achieve the purposes of the Exchange Act and to protect investors. With the exception of foreign securities and law enforcement authorities, each of these entities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act. Since foreign securities and law enforcement authorities are not bound by these confidentiality requirements, the rule stated that the Commission may determine what assurances of confidentiality are appropriate prior to disclosing such information. Paragraph (a)(3) authorized disclosure in accordance with the Privacy Act of 1974.

Because many whistleblowers may wish to provide information anonymously, paragraph (b) of the proposed rule stated that anonymous submissions will be permitted with certain specified conditions. Proposed paragraph (b)(1) required that anonymous whistleblowers be represented by an attorney and that the attorney's contact information be provided to the Commission at the time of the whistleblower's initial submission. The purpose of this requirement was to prevent fraudulent submissions and to facilitate communication and assistance between the whistleblower and the staff. Any whistleblower may be represented by counsel—whether submitting information anonymously or not.[278] Proposed paragraph (b)(2) required that anonymous whistleblowers and their counsel follow the required procedures outlined in Proposed Rule 21F–9. Paragraph (b)(3) required that anonymous whistleblowers disclose their identity, pursuant to the procedures outlined in Proposed Rule 21F–10, before the Commission will pay any award, as is required by the statute. In the proposing release, we also solicited comments on whether we should include limits on the fees attorneys may collect from whistleblowers under our program.

b. Comments Received

We received few comments related to the confidentiality provisions. One commenter expressed concern about the Commission's exercise of its authority to share the identity of a whistleblower with a foreign law enforcement or regulatory authority because the whistleblower will have no assurance against the possibility of adverse consequences other than "trust[ing] the [foreign] country's regulators".[279] Another commenter stated that the Commission has no authority to compel an attorney to reveal the identity of an anonymous whistleblower, and that, in cases where we know the whistleblower's identity, our rules should require that we notify the whistleblower, and provide the whistleblower an opportunity to seek a protective order, any time the whistleblower's identity may be revealed.[280] A third commenter noted that allowing a whistleblower to remain anonymous could encourage false or overstated claims.[281]

Because an anonymous whistleblower must retain an attorney and because an attorney representing a whistleblower will be deemed to be practicing before the Commission, we requested comments on whether the Commission should adopt rules governing conduct by attorneys representing whistleblowers and in particular rules regarding attorneys' fees in the representation of whistleblowers. The majority of commenters opposed the adoption of a rule regarding fees.[282] The rationales offered in support of this objection included that such a rule would make it nearly impossible for corporate whistleblowers to obtain attorneys to represent them in Dodd-Frank cases; excessive attorneys' fees already are governed by state bar rules; and such a rule would interfere with the contractual relationship between a whistleblower and his or her attorney.

In contrast, several commenters recommended that the Commission adopt by rule or otherwise publicly state that attorneys representing a whistleblower will not be entitled to receive a contingency fee based on any amount ultimately rewarded to the whistleblower.[283] The rationales offered for this recommendation included that a whistleblower's counsel is not likely to participate materially in the investigation of a matter filed through the whistleblower program;[284] public companies may be inundated with frivolous claims or claims based on incomplete information brought by attorneys who represent multiple complainants, hoping that one of them will be successful in an award from the Commission;[285] and a whistleblower in a difficult situation may have limited ability to negotiate appropriate fees for representation.[286]

Other commenters addressed the question of whether the Commission should adopt rules regarding attorney

[275] 15 U.S.C. 78u–6(h)(2).

[276] Under Section 21F(h)(2), whistleblower-identifying information is also expressly exempted from the provisions of the Freedom of Information Act, 5 U.S.C. 552.

[277] *See* U.S. Const. Amend. VI.

[278] *See* Section 21F(d)(1), 15 U.S.C. 78u–6(d)(1). Under the statute, however, an anonymous whistleblower seeking an award is required to be represented by counsel. Section 21F(d)(2), 15 U.S.C. 78u–6(d)(2).

[279] *See* letter from Eric Dixon, LLC; *see also* pre-release letter from Ruby Monroe (expressing concern for confidentiality of whistleblowers from foreign jurisdictions).

[280] Letter from NWC.

[281] Letter from Bruce McPheeters.

[282] *See, e.g.,* NWC; Grohovsky Group; American Association for Justice; Continewity; Stuart D. Meissner, LLC.

[283] Letters from Baker Donelson; Washington Legal Foundation; Institute of Internal Auditors.

[284] Letter from Baker Donelson.

[285] *Id.*

[286] Letter from Institute of Internal Auditors.

conduct generally. Two commenters suggested that the Commission adopt attorney conduct standards for attorneys representing whistleblowers since a myriad of law firms will be advertising and soliciting work on whistleblowing. One suggested adopting, for the representation of whistleblowers, some form of 17 CFR 205.1 *et seq.,* which details the requirements of Section 307 of the Sarbanes Oxley Act addressing standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of issuers.[287] The other noted that the Commission should clarify or confirm that an attorney representing a whistleblower under Section 21F(d)(1) or (2) will be deemed to be "appearing or practicing before the Commission" and thereby be bound by Section 4C of the Exchange Act and Section 102 of the Rules of Practice of the Commission.[288]

c. Final Rule

We are adopting Rule 21F–7 largely as proposed. The rule tracks the provisions of the statute and identifies those instances where the Commission, in furtherance of its regulatory responsibilities, may provide information to certain delineated recipients.

We made two changes. First, we changed the term "appropriate regulatory agency" to "appropriate regulatory authority." As discussed above, our use of this newly-defined term, which excludes the Commission, better reflects the facts that we share information with *other* agencies, and, that under our rules, related actions similarly are actions brought by other agencies that are based upon a whistleblower's information.[289]

Second, where we share information that could reasonably be expected to reveal the identity of a whistleblower with foreign securities or law enforcement authorities, we proposed that we "may determine what assurances of confidentiality" we deem necessary. We have changed that language to state that we "will" make such a determination, thereby making clear, consistent with Section 21F, that we will obtain appropriate assurances of confidentiality before sharing such information with foreign authorities. We plan to work closely with whistleblowers or their attorney in an effort to take appropriate steps to maintain their confidentiality, consistent with the requirements of Section 21F(h)(2).[290] At the same time, however, Congress expressly authorized us to disclose whistleblower-identifying information subject to the limitations and conditions set forth in Section 21F(h)(2). Accordingly, we do not believe it would be consistent with either Congress's intent or with the proper exercise of our enforcement responsibilities to require by rule that our staff notify a whistleblower before any authorized disclosure, and provide the whistleblower with an opportunity to seek a protective order.

In addition, as we noted in our proposing release, pursuant to Rule 102(e) of the Commission's Rules of Practice,[291] the Commission may deny the privilege of practicing before the Commission to any person who, after notice and opportunity for hearing, is found not to possess the requisite qualifications to represent others, to be lacking in character or integrity, to have engaged in unethical or improper professional conduct, or to have willfully violated or willfully aided and abetted the violation of any provision of the Federal securities laws or rules. Practice before the Commission is defined to include transacting any business with the Commission.[292] Representation of whistleblowers will constitute practice before the Commission, and thus, misconduct by an attorney representing a whistleblower can result in the attorney being subject to disciplinary sanctions under any of the conditions set forth in Rule 102(e).

We have also decided not to include a rule regarding attorneys' fees in our Final Rule. While there are reasonable arguments on both sides, we think the better approach is to leave issues of attorneys' fees to state bar authorities and to contractual arrangements between prospective whistleblowers and their attorneys. We believe that both state bar authorities and individual whistleblowers are better equipped than the Commission to make determinations regarding the appropriate amount of attorneys' fees.

H. Rule 21F–8—Eligibility

a. Proposed Rule

Paragraph (a) of Proposed Rule 21F–8 provided that whistleblowers must provide information in the form and manner required by these rules in order to be eligible for a whistleblower award.[293] The proposed rule also stated that the Commission, in its sole discretion, may waive any of these procedural requirements based upon a showing of extraordinary circumstances.

The specific procedures required for submitting original information and making a claim for a whistleblower award were described in Proposed Rules 21F–9 through 21F–11. Proposed Rule 21F–8(b) contained several additional procedural requirements designed to assist the Commission in evaluating and using the information provided. These included that the whistleblower, upon request, agree to provide explanations and other assistance including, but not limited to, providing all additional information in the whistleblower's possession that is related to the subject matter of his submission.

Paragraph (b) of the proposed rule also required whistleblowers, if requested by the staff, to provide testimony or other acceptable evidence relating to whether they are eligible for or otherwise satisfy any of the conditions for an award. Proposed paragraph (b) also authorized the staff to require that a whistleblower enter into a confidentiality agreement in a form acceptable to the Office of the Whistleblower, including a provision that a violation may result in the whistleblower being ineligible for an award.[294]

Paragraph (c) of Proposed Rule 21F–8 recited the categories of individuals ineligible for an award, many of which are set forth in Section 21F(c)(2). These include persons who are, or were at the time they acquired the original information, a member, officer, or employee of the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization; anyone who is convicted of a criminal violation that is related to the Commission action or to a related action for which the person otherwise could receive an award; any person who obtained the information provided to the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act (15

[287] Letter from Americans for Limited Government.

[288] Letter from Baker Donelson, PC.

[289] *See* Rule 21F–4(g).

[290] For example, we are adding a question to our whistleblower submission form that asks whistleblowers to tell us if they are giving us any particular documents or other information in their submission that they believe could reasonably be expected to reveal their identity.

[291] 17 CFR 201.102(e).

[292] 17 CFR 102(f).

[293] *See* Section 21F(c)(2)(D), which prohibits the Commission from paying an award to any whistleblower "who fails to submit information to the Commission in such form as the Commission may, by rule, require. 15 U.S.C. 78u–6(c)(2)(D)."

[294] Section 21F(e) of the Exchange Act authorizes the Commission to require that a whistleblower enter into a contract. 15 U.S.C. 78u–6(e).

U.S.C. 78j–1); and any person who in his whistleblower submission, his other dealings with the Commission, or his dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry. Paragraph (c)(2) of Proposed Rule 21F–8 also made foreign officials ineligible to receive a whistleblower award. In order to prevent evasion of these exclusions, paragraph (c)(5) of the proposed rule also provided that persons who acquire information from ineligible individuals are ineligible for an award. In addition, paragraph (c)(6) made any person ineligible who is the spouse, parent, child, or sibling of a member or employee of the Commission, or who resides in the same household as a member or employee of the Commission, in order to prevent the appearance of improper conduct by Commission employees.

b. Comments Received

We received several comments on these sections. One commenter opposed the provision under which the Commission could require whistleblowers to enter into confidentiality agreements, stating that the statute does not authorize this requirement and it may violate a whistleblower's free speech rights and interfere with a whistleblower's ability to sue Commission staff.[295] Other commenters stated that the Commission should not add to the list of ineligible persons designated by Congress.[296] One commenter suggested that the provision making ineligible any whistleblower who knowingly uses a false writing or document in a submission should be redrafted to clarify that the exclusion only applies if a whistleblower does so with intent to deceive the Commission. The commenter stated that this change would permit a whistleblower to submit a false document created by someone else as evidence of that other person's or entity's wrongdoing.[297]

Another commenter noted that significant information could come from whistleblowers who are employees of state-owned foreign companies, and that our rule would treat those employees as foreign officials and would thus deem them ineligible for an award.[298]

Although proposed Rule 21F–8(c)(5) was intended to prevent evasion of our rules by making ineligible any whistleblower who acquires information from other ineligible persons, some comments suggested that, as proposed, the rule was at once too broad and too narrow in certain respects. One commenter noted that a similar provision in proposed Rule 21F–4(b)(4) created, in effect, a "hearsay exception" that would exclude from eligibility any whistleblower who overheard an excluded individual talking about a fraud in which the other person was a participant.[299] Another commenter pointed out that a culpable whistleblower could evade the limitations of proposed Rule 21F–15 simply by providing information about violations to a third party.[300]

Finally, one commenter urged that we deem ineligible any whistleblower who refused to cooperate with a company's internal investigation, or who provided inaccurate or incomplete information or otherwise hindered such an investigation.[301]

c. Final Rule

After considering these comments, we are adopting the proposed rule with certain modifications. The eligibility requirements reflect the express requirements and limitations set forth in Section 21F, and are otherwise a reasonable exercise of our authority to adopt rules that are necessary or appropriate to implement the provisions of Section 21F.

As adopted, Rule 21F–8(b)(4) provides that a whistleblower may be required to enter into a confidentiality agreement as to any non-public information that the Commission provides to the whistleblower. The addition of the reference to "non-public" information that "the Commission provides" clarifies that the rule does not limit the whistleblower's use of information that he or she already knows, or learns from other sources, and does not acquire through our investigation.

We have also changed proposed Rule 21F–8(c)(5) (now re-designated as Rule 21F–8(c)(6)) to provide that a person is ineligible if he or she acquires original information from either a person who is subject to the auditors exclusion found in paragraph (c)(4) (discussed below), unless the information is not excluded from that person's use, or the whistleblower is providing the Commission with information about possible violations involving that person, or from any person with intent to evade any provision of these rules. The first part of this provision tracks the language of Rule 21F–4(b)(4)(vi), and is simply intended to assure consistent treatment under Rule 21F–8 and Rule 21F–4(b)(4) of potential whistleblowers who obtain their information from independent public accountants involved in engagements required under the Federal securities laws. The second part of this provision is designed to prevent persons who are prohibited or limited in making a claim under any provision of our rules (including culpable whistleblowers under Rule 21F–16) from evading our rules by colluding with a third party. This change also clarifies that the intent of the exclusion is to address efforts to evade our rules, and not persons who legitimately learn about violations being perpetrated by ineligible persons.

We have decided to maintain the exclusion for "foreign officials" as proposed. The exclusion for foreign officials would include employees of foreign instrumentalities, including state-owned entities. Our conclusion is informed by the Foreign Corrupt Practices Act,[302] which includes within its definition of "foreign officials" those who are employed by an instrumentality of a foreign government, which includes state-owned entities.[303] We believe that it is appropriate to treat the exclusion for foreign officials under the whistleblower program consistent with the definition of foreign official under the FCPA, because FCPA enforcement actions are the contexts in which the exclusion is most likely to apply. Inconsistent treatment could, we believe, risk unnecessary confusion as to when and under what circumstances someone is a foreign official for purposes of two closely related provisions of the securities laws.

In addition, whistleblower awards to employees of foreign state-owned

[295] Letter from NWC.

[296] Letters from Stuart D. Meissner, LLC, Chris Barnard.

[297] Letter from Grohovsky Group.

[298] Letter from NWC.

[299] *See* letter from NWC.

[300] *See* letter from ABA.

[301] Letter from SIFMA.

[302] Broadly, the anti-bribery provisions of the FCPA make it unlawful for issuers (and their officers, directors, employees, agents and stockholders), domestic concerns, and foreign persons and entities (acting within the U.S.), to make, offer or authorize the payment of bribes, directly or indirectly, to foreign officials, foreign parties, foreign party officials, and foreign candidates for public office for the purpose of obtaining or retaining business for or with, or directing business to, any person. *See* 15 U.S.C. 78dd–1, *et seq.*

[303] A "foreign official" is defined in the FCPA as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *See* 15 U.S.C. 78dd–2(h)(2)(A).

entities have the potential to create some of the same negative repercussions discussed in the proposed rule, *i.e.,* the perception that the United States is interfering with foreign sovereignty, potentially undermining foreign government cooperation under existing treaties (including multilateral and bilateral mutual legal assistance treaties), the incentive for foreign officials to make reports to the United States rather than to local authorities, and concerns about protection of foreign officials who become whistleblowers.

We have also modified Rule 21F–8(c)(7) to clarify that the exclusion of a whistleblower for using any false writing or document that contains a false, fictitious, or fraudulent statement or entry will only apply when the whistleblower thereby intends to mislead or otherwise hinder the Commission or another authority in connection with a related action.[304]

We have determined not to adopt an eligibility exclusion based on a whistleblower's conduct with respect to an internal investigation. In some cases, a whistleblower may have a reasonable concern that causes him or her to report misconduct directly to the Commission. In other cases, this concern may be less justified. However, we believe that a categorical rule that excludes whistleblowers for failure to reasonably cooperate with internal investigations would create too much uncertainty, and too great a disincentive, for whistleblowers who are considering how to report misconduct. Thus, such a rule would undermine the effectiveness of the whistleblower program. In appropriate circumstances, however, we will consider the whistleblower's conduct in connection with an internal investigation in the determination of whether the whistleblower's conduct "led to" a successful enforcement action,[305] and/or in determining the amount of an award.

Finally, Rule 21F–8(c)(4) reflects the exclusions set forth in Section 21F(c)(2)(C) for persons who obtain information through the performance of an audit of financial statements and for whom a whistleblower submission "would be contrary to the requirements of Section 10A" of the Exchange Act.

We are adopting Rule 21F–8(c)(4) as it was originally proposed without change, as it largely tracked the language of Section 21F(c)(2)(C). The statute prohibits an award "* * * to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1)."

Rule 21F–8(c)(4) accordingly only disqualifies those submissions that are contrary to Section 10A. The most obvious example is where the auditor did not file a "10A Report" with the SEC's Office of Chief Accountant, but instead submitted information about the company's illegal act to us to be considered for the award under the whistleblower program.

In adopting this rule we carefully considered the comments on Rule 21F–4(b)(4)(iii) because those issues are similar to ones implicated in determining eligibility. In connection with that proposal, some commenters advocated that individuals should not be allowed to make a submission alleging that the firm violated Section 10A, while others recommended allowing such a rule.[306] The rule we are adopting today allows an accountant to make a submission alleging that his firm violated Section 10A (or other professional standards), because such a submission is not "contrary to the requirements of Section 10A." If such a submission is made, then, as is the case with Rule 21F–4(b)(4)(iii)(D), the whistleblower will also be able to obtain an award if the information leads to a successful action against the engagement client.

An allegation that a firm violated Section 10A is consistent with the statute especially when the allegation is that an audit firm failed to assess or investigate illegal acts or make a report to the Commission. Accordingly, a person can make a submission that alleges not only that the audit firm failed to make a report with the Commission under Section 10A(b)(3), but also that the firm failed to follow any other procedures set forth in Section 10A or professional standards.[307] By specifically allowing allegations of violations of the Federal securities laws or professional standards the rule may help insure that wrongdoing by the firm (or its employees) is reported in a timely fashion. This is especially important because of the important gatekeeper role that auditors play in the securities markets.

Commission staff will carefully evaluate a submission alleging a Section 10A violation to determine whether it contains a specific and credible allegation of a violation of Section 10A.[308] A specific and credible allegation is one made in good faith and is not a pretext for circumventing the requirements of Section 10A. In assessing whether an allegation of a firm's Section 10A violation is specific and credible, the staff may consider the facts and circumstances surrounding the submission, including the level of detail, documentary support, descriptions of particularized conduct or omissions by identified persons, as well as the materiality or non-triviality of the alleged Section 10A violation. For example, the Commission may consider, among other things:

- Whether the audit firm conducted an assessment of or investigation into the alleged illegal act by the issuer and the quality of that investigation;
- Whether the audit firm followed the requirements of Section 10A and its response to the allegation of an illegal act;
- The position or title of the whistleblower and the role the person played in the firm's violations;
- The role of the whistleblower in the Section 10A investigation or assessment; and
- The timing of the submission.

We are also providing guidance about several important aspects of Rule 21F–8(c)(4). First, the information must be gained through the work done for an audit for an issuer.[309] Non-issuers, such

[304] *See* letter from Grohovsky Group.

[305] For example, if a whistleblower hindered an internal investigation, but the company nonetheless self-reported violations, we could consider the whistleblower's conduct in determining whether the whistleblower caused us to open an investigation into the matter.

[306] Letters from PwC, KPMG, Center for Audit Quality ("CAQ"), Deloitte, Ernst & Young ("EY"), TAF. *Compare,* CAQ ("The CAQ has concerns about the Proposed Rules to the extent that they permit whistleblower awards for information reported by an independent public accountant regarding his or her firm's performance of services related to an engagement required under the securities laws (*i.e.,* whistleblower reporting by an accountant with respect to his or her own firm's performance of services"), *with* TAF ("* * * where that legal duty is not honored, and the audit film fails to comply with its obligations under Section 10A, a whistleblower's submission of the information to the SEC is consistent with both Section 10A and the Commission's overall enforcement mission. In such circumstance, the policies underlying both Section 10A and Dodd Frank weigh in favor of rewarding the whistleblower who reports wrong doing when the audit firm has failed to.").

[307] Violations of law are not restricted to the audit or interim review work performed by an audit firm. For example, if an employee observes insider trading, auditor independence failures at a firm or other quality control failures that are not specific to any particular audit, then a submission containing those allegations is permitted.

[308] As with other submissions, the contents are sworn under penalty of perjury which provides additional safeguards against pretextual submissions.

[309] The text of Section 10A only refers to audits of financial statements of issuers and thus the requirements—including the reporting requirements—are imposed on audits for issuers. Issuer is a defined term under Section 10A.

as broker dealers or investment advisors,[310] are not covered by Section 10A and, subject to Rule 21F–(b)(4)(iii)(D), submissions relating to them are allowed.

Second, we interpret the phrase "through an audit of a company's financial statements" in Rule 21F–8(c)(4) as meaning information that is learned through an audit of a company's financial statements when it is linked to audit procedures or audit work. Accordingly, the phrase clearly and most directly applies to members of an audit engagement team. It applies to the engagement partner, quality review partner, and other people working directly on the engagement. It also applies to foreign affiliates or specialists who are used by the engagement team.[311]

Third, although both Dodd-Frank and Section 10A only refer to "audits of financial statements," we believe this includes quarterly reviews, which are frequently viewed as a step in the annual audit process and therefore may properly be considered as encompassed within Section 10A's scope. Accordingly, if an auditor discovers or detects an illegal act during either a quarterly review or annual audit, it is required to comply with Section 10A.[312] An audit firm's failure to follow the procedures or otherwise comply with Section 10A when confronted with an illegal act—regardless of whether the violation is detected during a year-end audit or an interim review—is a violation of law and an individual would be able to make a submission alleging that his audit firm violated the law or professional standards.

Information gained through the audit of financial statements extends beyond illegal conduct with respect to the financial statements themselves. Section 10A broadly defines "illegal act" as any "act or omission that violates any law, or any rule or regulation having the force of law." Further, the statutory disqualification was not limited to information gained only about financial statements; rather, it disqualified a submission where the person "gains the information through the performance of an audit of financial statements required under the securities laws."

In response to a footnote in the proposing release, certain commenters from the audit profession advocated expanding the scope of the exclusion to disqualify virtually all employees of accounting firms, regardless of whether those employees are performing audit services or are performing services for public companies.[313] The footnote stated: "The Commission anticipates this exclusion would also apply to information gained through another engagement by the independent public accountant for the same client, given that the independent public accountant would generally already have an obligation to consider the information gained in the separate engagement in connection with the Commission-required engagement."

As noted above, we are clarifying the application of information obtained "through an audit of a company's financial statements" with respect to firm personnel outside of the audit engagement team itself. We decline to codify a *per se* exclusion for all employees or all engagements, especially engagements involving non-issuer clients. Persons working on other engagements, to the extent that they are not covered by Section 10A or are not required under the Federal securities laws, will not be deemed ineligible simply because the engagement is with an audit client of the firm.

Several commenters recommended that whistleblowers should have to use internal reporting processes by either reporting up the chain at the audit firm or reporting to the audit client.[314] We are declining to adopt a rule that would require all employees of accounting firms use the internal processes whether at the audit firm or at the audit client. This approach is consistent with the final rule regarding internal compliance persons, and we address certain of these commenters' concerns through our adoption of Rule 21F–4(b)(4)(D).

Finally, a submission is not contrary to 10A—even where the 21F–8(c)(4) exception would otherwise apply—where the whistleblower has a reasonable basis to believe either of the following: (i) The disclosure of the information to the Commission is necessary to prevent the relevant entity from committing a material violation of the securities laws that is likely to cause substantial injury to the financial interest or property of the entity or investors; or (ii) the relevant entity is engaging in conduct that will impede an investigation of misconduct even if the submission does not contain an allegation of audit firm wrongdoing.[315]

I. Rule 21F–9—Procedures for Submitting Original Information

Proposed Rule 21F–9 set forth a two-step process for the submission of original information. The first step required the submission of information either on a standard form or through the Commission's online database for receiving tips, complaints and referrals. The second step required the whistleblower to complete a separate declaration form, signed under penalty of perjury, in which the whistleblower would be required to make certain representations concerning the veracity of the information provided and the

[310] In some instances, broker dealers or investment advisors may also be issuers as that term is defined in Section 10A.

[311] Information is also learned through an audit of a company's financial statements when other professionals learn of a company's illegal act as a result of communications with the audit engagement team as part of the audit. For example, if the national office of an audit firm were consulted about a possible illegal act, including accounting irregularities, then the national office personnel consulted on the matter would not be eligible for a whistleblower award based on that information. Similarly, if a tax professional at an audit firm were consulted to assist in auditing the tax footnote for an issuer and learned of an illegal act, then that person would not be eligible for a whistleblower award. In other words, where professional staff is performing procedures for an audit or have been contacted by someone performing procedures for an audit, the information was gained through an audit. However, if one of these other professionals who are performing work for an audit also learns of a violation by the audit firm or its associated persons, then he may be eligible for an award with respect to a violation by the firm.

[312] Under Section 10A auditors must notify senior management of the issuer and the audit committee of illegal acts even if they are immaterial to the financial statements. *See* Section 10A(b)(1).

[313] *E.g.,* PwC ("The exclusion should extend to all reports by employees of accounting firms with respect to information obtained through performing services of any nature for an audit client. The exclusion should not be limited to information obtained through the engagement required by the securities laws itself."); Deloitte ("Deloitte urges the Commission to provide expressly in the final rules that whistleblowers whose information was obtained through any services to public company audit clients provided by an accounting firm are excluded from eligibility to receive a whistleblower award.")

[314] *E.g.,* letter from Deloitte (""Any final rule should require, as a condition of eligibility to receive a monetary award that whistleblowers report their concerns fully and in good faith through company sponsored whistleblower systems before reporting externally. At a minimum, the final rules should require the concurrent submission of internal and external reports. In the alternative, any final rule should expressly state that good-faith internal reporting prior to making any external report will be considered a strongly positive factor in determining the amount of a whistleblower award, and that a whistleblower's failure to use internal whistleblower systems prior to reporting to the SEC will be considered a strongly negative factor.")

[315] We have not adopted the 120-day exclusion set forth in Rule 4(b)(4)(vi)(C) because we believe it is unnecessary here. Section 10A provides that, if an issuer fails to report to the Commission any securities law violations discovered in the course of the Section 10A audit, the independent public accounting firm must do so. The firm's failure to promptly report the information to the Commission constitutes a violation of Section 10A. A whistleblower may *at any point* thereafter report this Section 10A violation to the Commission, and thus become eligible for an award based on a covered action against the public accountant or the issuer.

whistleblower's eligibility for a potential award. In response to comments, we are adopting a more streamlined process that requires submitting only one form signed under penalty of perjury.

a. Proposed Rule

Paragraph (a) of Proposed Rule 21F–9 required the submission of information in one of two ways. A whistleblower could submit the information electronically through the Commission's Electronic Data Collection System available on the Commission's Web site or by completing and submitting proposed Form TCR—*Tip, Complaint or Referral.*[316] Proposed Form TCR, and the instructions thereto, were designed to capture basic identifying information about a complainant and to elicit sufficient information to determine whether the conduct alleged suggests a violation of the Federal securities laws.[317]

In addition to submitting information in the form and manner required by paragraph (a), we proposed in paragraph (b) of Proposed Rule 21F–9 that whistleblowers who wish to be considered for an award in connection with the information they provided to the Commission must also complete and provide the Commission with a separate form—proposed Form WB–DEC, *Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934.* Proposed Form WB–DEC required a whistleblower to answer certain threshold questions concerning the whistleblower's eligibility to receive an award. The form also contained a statement from the whistleblower acknowledging that the information contained in the Form WB–DEC, as well as all information contained in the whistleblower's submission, was true, correct and complete to the best of the whistleblower's knowledge, information and belief. Moreover, the statement acknowledged the whistleblower's understanding that the whistleblower may be subject to prosecution and be ineligible for an award if, in the whistleblower's submission of information, other dealings with the Commission, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully made any false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contained any false, fictitious, or fraudulent statement or entry.

In instances where information is provided by an anonymous whistleblower, paragraph (c) of Proposed Rule 21F–9 required the attorney representing the whistleblower to provide the Commission with a separate Form WB–DEC certifying that the attorney has verified the identity of the whistleblower, and will retain the whistleblower's original, signed Form WB–DEC in the attorney's files. In the proposing release, we explained that the proposed certification from counsel was an important element of the whistleblower program to help ensure that the Commission is working with whistleblowers whose identities have been verified by their counsel. Additionally, the proposed certification process provided a mechanism for anonymous whistleblowers to be advised by their counsel regarding their preliminary eligibility for an award.[318]

Finally, Proposed Rule 21F–9(d)(1) stated how whistleblowers who provided original information to the Commission in writing after the enactment of Dodd-Frank but before the adoption of final rules could perfect their status as whistleblowers under the Commission's award program. This provision required a whistleblower who provided original information to the Commission in a format or manner other than that required by paragraph (a) of Proposed Rule 21F–9 to either submit the information electronically through the Commission's Electronic Data Collection System or to submit a completed Form TCR within one hundred twenty (120) days of the effective date of the proposed rules, and to otherwise follow the procedures set forth in paragraph (b) of Proposed Rule 21F–9. If the whistleblower provided the original information to the Commission in the format or manner required by paragraph (a) of Proposed Rule 21F–9, paragraph (d)(2) would require the whistleblower to submit Form WB–DEC within one hundred twenty (120) days of the effective date of the proposed rules in the manner set forth in paragraph (b) of Proposed Rule 21F–9.

b. Comments Received

Commenters generally were of the view that our proposed procedures for submitting information should be streamlined.[319] Two commenters recommended that we adopt a process similar to that of the Internal Revenue Service, which requires the submission of only one form.[320] One commenter recommended eliminating the forms altogether and requiring only a written submission.[321] A few commenters urged us to retain the flexibility to exercise our discretion to waive technical

[316] The Electronic Data Collection System is the Commission's interactive, web-based database for submission of tips, complaints and referrals. Both the online database and proposed Form TCR are designed to elicit substantially similar information concerning the individual submitting the information and the violation alleged. On November 9, 2010, we separately submitted a request to the Office of Management and Budget for Paperwork Reduction Act approval of the Electronic Data Collection System. Accordingly, for purposes of these rules, we are only discussing proposed Form TCR.

[317] Items A1 through A4 of proposed Form TCR requested the whistleblower's personal information, including name, contact information and occupation. In instances where a whistleblower submitted information anonymously, the identifying information for the whistleblower would not be required, but proposed Items B1 through B4 of the form required the name and contact information of the whistleblower's attorney. This information could also be included in the case of whistleblowers whose identities are known and who are represented by counsel in the matter. Proposed Items C1 through C4 requested basic identifying information for the individual(s) or entit(ies) to which the complaint relates. Proposed Items D1 through D9 were designed to elicit details concerning the alleged securities violation. The questions posed on proposed Form TCR were designed to elicit the minimum information required for the Commission to make a preliminary assessment concerning the likelihood that the alleged conduct suggested a violation of the securities laws. Moreover, the proposed instructions to Form TCR were designed to assist the whistleblower and facilitate the completion of the form.

[318] Items A1 through A3 of proposed Form WB–DEC requested the whistleblower's name and contact information. In the case of submissions by an anonymous whistleblower, the form required the name and contact information of the whistleblower's attorney instead of the whistleblower's identifying information in proposed Items B1 through B4. This section could also be completed in cases where a whistleblower's identity is known but the whistleblower is represented by an attorney in the matter. Proposed Items C1 through C3 requested information concerning the information submitted by the whistleblower to the SEC. Item C1 required the whistleblower to indicate the manner in which the information was submitted to the Commission. Proposed Item C2 asked for the TCR number assigned to the whistleblower's submission. Proposed Items C3 asked a whistleblower to identify any communications the whistleblower or his counsel may have had with the Commission concerning the matter since submitting the information. Proposed Item C4 asked whether the whistleblower has provided the same information being provided to the Commission to any other agency or organization and, if so, requested details concerning the submission, including the name and contact information for the point of contact at the agency or organization, if known. Proposed Items D1 through D9 required the whistleblower to make certain representations concerning the whistleblower's eligibility for an award. Finally, the form required the sworn declarations from the whistleblower and the whistleblower's counsel discussed above.

[319] *See, e.g.,* letters from NWC; Jane Liu; Patrick Burns; Alexander Hoover; NCCMP; DC Bar; Georg Merkl; Michael Lawrence.

[320] Letter from NCCMP; DC Bar. Two commenters also suggested that we adopt the IRS's certification language in IRS Form 211. *See* NCCMP; NWC.

[321] Letter from NWC.

requirements as appropriate in particular circumstances, so as not to disqualify otherwise meritorious whistleblower tips on technical grounds.[322]

Several commenters recommended that we require proposed Form TCR to be signed under penalty of perjury, similar to the requirement for proposed Form WB–DEC.[323] These commenters expressed the view that the lapse of time between the filing of proposed Form TCR and the sworn Form WB–DEC could cause significant resources to be expended by a company in cases where a TCR containing a false or spurious claim is immediately investigated by the SEC.[324] One commenter recommended that, to protect against submissions that are not necessarily made in bad faith but nevertheless lack merit, the rules should require all submissions for which a whistleblower seeks an award to be certified by third-party professionals (such as attorneys, accountants and individuals with experience in compliance, ombuds and human resources functions) who would attest to their good faith, foundation, accuracy and relevance.[325]

A few commenters recommended modifications to the attorney certification requirement of Proposed Rule 21F–9(c) relating to submissions by anonymous whistleblowers. Two commenters suggested that, to ensure that whistleblowers who engage legal counsel do not submit claims based on mere speculation or hunches, attorneys handling anonymous claims should be required to review the client's information and certify that the client can show "particularized facts suggesting a reasonable probability" that a securities violation has actually occurred or is occurring.[326] By contrast, one commenter opposed the attorney certification requirement on grounds that it inappropriately shifts to attorneys responsibility for a client's fraudulent submission, the nature of which the attorney may be unaware.[327]

We received two comments relating to the proposed process for perfecting whistleblower status under paragraph (d) of Proposed Rule 21F–9. One commenter urged us to eliminate the 120-day deadline for perfecting whistleblower status.[328] Another took issue with the requirement that original information submitted after the date of enactment of the Dodd-Frank Act but before adoption of the final rules must be in writing in order to retain the status of original information.[329]

In the proposing release, we solicited comment on whether it would be appropriate to eliminate the fax and mail options and require that all submissions be made electronically. Some commenters expressed the view that eliminating fax and mail submission could discourage some whistleblowers, such as those with concerns about security and privacy[330] and persons who may be less familiar and comfortable with computers.[331] By contrast, one commenter supported mandating electronic submission for environmental and cost reasons.[332]

A number of commenters did not take issue with our proposed process but suggested specific modifications to the proposed forms. Recommendations included:

- Revising the forms to accommodate joint submissions by more than one person.[333]
- Adding a checkbox to the current TCR form to effectively allow complainants to elect whistleblower status.[334]
- Removing the question concerning the whistleblower's occupation from the TCR form.[335]
- Amending Form WB–DEC to include a question as to whether the whistleblower reported the matter to a company's internal compliance reporting system.[336]
- Revising Item 3 on proposed Form TCR, which asked whether the potential whistleblower held any of a list of positions at the company, to add "company counsel" to the list.[337]
- Adding an item to Proposed Form WB–DEC that requires whistleblowers to identify whether and to what extent the information they are providing was obtained from any lawyer working for or on behalf of the entity that is the subject of the complaint.[338]
- Replacing the phrase "compliance officers" in the instructions for completing Form TCR with the phrase "compliance professionals" to make clear that the question is intended to capture others performing compliance-related functions in companies.[339]

Finally, several commenters advanced what may be characterized as policy-type recommendations for operation of the whistleblower program.[340] Although these comments do not require specific changes to the proposed rules, we have considered them and anticipate that, where appropriate, we will incorporate some of the suggestions in implementing policies and procedures for our whistleblower program.

c. Final Rule

After considering the comments, we have adopted a more streamlined process for submission of information that eliminates the requirement of a separate Form WB–DEC and requires the submission of only one form—Form TCR—signed under penalty of perjury. Form TCR essentially combines the key questions posed in Proposed Form TCR and Proposed Form WB–DEC into a single form. By consolidating the two forms, we have simplified the process

[322] *See, e.g.* letters from DC Bar; NWC.

[323] Letters from ABA; Goodwin Proctor.

[324] *Id.*

[325] Letter from Taft, Stettinius & Hollister, LLP.

[326] Letters from ABA; Goodwin Procter.

[327] *See* letter from Eric Dixon, LLP.

[328] Letter from Georg Merkl.

[329] Letter from Storch Amini. We note that this requirement emanates from the statute and not from our proposed rules.

[330] Letter from Auditing Standards Committee; Institute of Independent Auditors.

[331] Letter from Georg Merkl.

[332] Letter from Continewity LLC.

[333] Letter from Grohovsky Group. This commenter also was of the view that the rules should recognize that there are two distinct situations where more than one person might be considered a "whistleblower" with respect to an enforcement action: "(1) when two or more persons make a joint submission, or (2) when two or more persons, not acting in concert with each other, make submissions at different times that relate to the same enforcement action." In the latter situation, the commenter suggested that there should be a mechanism to encourage those persons to reach an agreement with each other so that, at some point, they can proceed jointly.

[334] Letter from Jane Liu and Michael Lawrence.

[335] Letter from Auditing Standards Committee.

[336] *See, e.g.,* letters from SIFMA; ICI; Society of Corporate Secretaries.

[337] Letter from Auditing Standards Committee ("Knowing from the initial form whether the whistleblower was counsel to a company makes sense as a threshold review issue, and could serve as an important first indicator to the Commission staff reviewing the form that the whistleblower's complaint involved potentially privileged information and documents.")

[338] Letter from Auditing Standards Committee (a specific question "that could elicit whether counsel was the source of information would greatly enhance the staff's ability to identify the risk of receiving privileged information and would be an appropriate means of balancing the Commission's interest in receiving information with the need to protect the privilege * * * "Knowing this information would allow the Commission staff to quickly and efficiently segregate the report for more detailed review and consideration and should present no additional burdens on whistleblowers seeking to submit the form * * * It seems appropriate to exclude any illegally obtained information, whether domestically or abroad.")

[339] Letter from Murphy.

[340] *See, e.g.,* Georg Merkl (rules should require staff to inform potential whistleblowers who submit information that they may be eligible for an award and provide them with information about the program); Harold Burke (Commission should assign case officers to all filed matters, require staff to provide annual updates to whistleblowers and require at least one face-to-face meeting with a whistleblower); Wanda Bond (Commission should provide date and time-stamped receipt of information received from whistleblowers and establish mechanism by which whistleblowers can check the status of their claims).

by eliminating the burden on whistleblowers of having to file a second form and eliminating some duplicative questions that appeared on both proposed forms. Rule 21F–9(b) provides that, to be eligible for an award, a whistleblower at the time he submits his TCR must declare under penalty of perjury that the information he is providing is true and correct to the best of his knowledge and belief.

In response to comments, we also made several modifications to Form TCR. Specifically, we revised Form TCR to allow for joint submissions by more than one whistleblower. This comports with the intent of Section 21F, which defines "whistleblower" as "any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of the securities laws to the Commission * * *"

In addition, to address commenters' concerns regarding the receipt by the Commission of potentially privileged information, we added "counsel" to the list of positions held by a whistleblower, and amended Item 8 on Proposed Form TCR (renumbered as item 10 in the form as adopted), which asks the whistleblower to describe how he or she obtained the information that supports the claim, to identify with particularity any information submitted by the whistleblower that was obtained from an attorney or in a communication where an attorney was present. As explained in our proposing release, the attorney-client privilege could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about potential securities violations that they learned of through privileged communication. In our view, a specific question that could elicit whether counsel was the source of information would enhance the staff's ability to identify the risk of receiving privileged information and would be an appropriate means of balancing the Commission's interest in receiving information with the policy goal of protecting the privilege. In addition, knowing this information would allow the staff to quickly segregate the information for more detailed review and consideration.

As discussed elsewhere, several provisions in our rules encourage, but do not require, whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate. In response to comments urging us to include a question on our form asking whether the whistleblower reported the matter to a company's internal compliance program, and to address those instances in which a whistleblower *chooses* to report the violation internally, we amended questions 4a and 4b of proposed Form TCR, which asked the whistleblower to provide details about any prior action taken regarding the complaint, to specifically state whether the whistleblower reported the violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations. This language borrows from the instructions to question 4a on Proposed Form TCR.

Finally, we added an optional question to Form TCR to enable the whistleblower to identify any particular documents or other information in the submission that the whistleblower believes could reasonably be expected to reveal his or her identity. The purposes of this question is to afford whistleblowers who wish to remain anonymous the opportunity to guard documents or information which, if shown to a third party, may reasonably be expected to reveal their identity. It would also assist the investigative staff utilizing the information in making this determination.[341]

As to the submission of Form TCR, we agree with commenters' suggestion that we should require submissions of information made pursuant to our whistleblower program to be made under penalty of perjury, and accordingly, are requiring that the form be accompanied by sworn certifications by the whistleblower and counsel. We are not adopting the recommendation that all whistleblower submissions be certified by third party professionals because we think that the requirement is inconsistent with our user-friendly mandate and would unnecessarily add to a whistleblower's financial burden of submitting a tip to the Commission. Moreover, in our view, the requirement of a certification by the whistleblower or, in case of anonymous submission, the whistleblower's counsel, is sufficient to deter false or meritless submissions.

In response to comments that the counsel certification places an undue burden on counsel for anonymous whistleblowers, we have amended the counsel certification provision to include the phrase "true, correct and complete to the best of [counsel's] knowledge, information and belief." The addition of this phrase makes clear that we will not hold attorneys accountable if they possess a good-faith belief that the information they are submitting on behalf of the whistleblower is true, correct and complete. The addition of this phrase also achieves consistency with the whistleblower's certification, which contained this language.

Form TCR as adopted also includes in the counsel certification a representation by the attorney representing an anonymous whistleblower that the attorney has "obtained the whistleblower's non-waiveable consent to provide the Commission with his or her original signed Form TCR upon request in the event that the Commission requests it "due to concerns that the whistleblower may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry." Moreover, the certification reflects the attorney's consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commission. We believe that this modification to the attorney certification is necessary to effectuate the "penalty of perjury" provision in the whistleblower's declaration, and to enable the Commission to enforce the provision in appropriate cases.

Although some commenters recommended that we require attorneys to certify that the client can show "particularized facts suggesting a reasonable probability" that a securities violation has actually occurred or is occurring, we have decided not to adopt this standard. In our view, requiring attorneys to verify the form for completeness and accuracy and certify that the information is true, correct and complete to the best of the attorney's knowledge, information and belief is sufficient to discourage frivolous submissions to the Commission. We further believe that a higher standard that might require a "reasonable probability" that a securities violation actually has occurred or is occurring is unnecessary in light of an attorney's already existing ethical obligations in dealing with the Commission.

With regard to other comments relating to the process for submitting information and our proposed forms, we have decided to keep the fax and mail submissions as options to ensure that whistleblowers who do not have access to a computer or who may be averse to electronic transmissions have an alternative means of submitting

[341] The Commission will reach its own conclusion about whether the information that the whistleblower identifies in fact could be reasonably expected to reveal the whistleblower's identity, but we believe this analysis could be significantly aided by a whistleblower's identification of documents that he or she believes might reasonably reveal his or her identity.

information to us. In addition, we made the response to item A4 of Form TCR, which asked for the whistleblower's occupation, optional.

In response to comments that we should eliminate the form requirement so as not to disqualify whistleblowers on technical grounds, we note that we address such instances elsewhere in our rules. Specifically, Rule 21F–8(a) retains the Commission's discretion to waive the procedural requirements of the rules upon a showing of extraordinary circumstances.

A. Procedure for Submitting Original Information

As adopted, paragraph (a) of Rule 21F–9 requires whistleblowers to submit their information in one of two ways: (1) Through the Commission's Web-based, interactive database for the submission of tips, complaints and referrals; or (2) by completing Form TCR (*Tip, Complaint or Referral*) and mailing or faxing the form to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549–5631, Fax (703) 813–9322. Paragraph (b) provides that, to be eligible for an award, a whistleblower must submit his or her original information under penalty of perjury.

In instances where information is provided by an anonymous whistleblower, paragraph (c) of Rule 21F–9 provides that the attorney for the whistleblower must submit the information on the whistleblower's behalf pursuant to paragraph (a). In addition, the attorney must retain a copy of the submission, signed by the whistleblower under penalty of perjury, and must sign the counsel certification discussed above.

In response to commenters' general suggestion that we make the application process more user friendly, we have eliminated the proposed requirement that whistleblowers who made their submission after the date of enactment of Dodd-Frank but before the effective date of these rules must perfect their whistleblower status by re-submitting their information in the format required by these rules. We agree that it would be unnecessarily burdensome to require these whistleblowers to make a duplicative submission to us. To the extent that there is additional information that the TCR form might otherwise solicit and which we might desire prior to the award application phase, the staff can contact these whistleblowers (or their counsel if applicable) to obtain that information. For those whistleblowers who submitted their information anonymously during this period, however, we are requiring them to provide their attorney with a completed and signed copy of Form TCR within 60 days of the effective date of these rules. This is generally consistent with our proposed rule, and we believe that it is necessary and appropriate because, unlike whistleblowers whose identity we are aware of, we are more constrained in our ability to confirm an anonymous whistleblower's information and eligibility. We believe that requiring whistleblowers to provide their attorney within 60 days the signed declaration from the Form TCR may help ensure earlier in the process that these whistleblowers are eligible for an award and have provided truthful information to us.

Thus, as adopted, paragraph (d) provides that, if a whistleblower submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date of these rules, the whistleblower's submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b). However, if the whistleblower submitted the information anonymously, paragraph (d) requires the whistleblower to provide his or her attorney with a completed and signed copy of Form TCR within 60 days of the effective date of these rules. In addition, the attorney must retain the signed form in his or her records, and the whistleblower must provide a copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to the whistleblower in connection with the submission. Notwithstanding the foregoing, paragraph (d) provides that the whistleblower must follow the procedures and conditions for making a claim for a whistleblower award described in Rules 21F–10 and F–11.

B. Form TCR

As adopted, items A1 through A3 of Form TCR request name and contact information for each whistleblower submitting the information. In instances where a whistleblower submits information anonymously, the identifying information for the whistleblower is not required, but items B1 through B4 require the name and contact information of the whistleblower's attorney. This information may also be included in the case of whistleblowers whose identities are known and who are represented by counsel in the matter. Items C1 through C4 request basic identifying information for the individual(s) or entit(ies) to which the complaint relates. Items D1 through D12 are designed to elicit details concerning the alleged securities violation. Items D1 and D2 ask the whistleblower to provide the date of the occurrence and describe the nature of the complaint. Items D3 and D4 correspond to the same-numbered items on former Proposed Form WB–DEC. Items 3a and 3b ask whether the complainant or their counsel had any prior communications with the SEC concerning the matter and, if so, the name or the person with whom they communicated. Items 4a through 4c ask whether the whistleblower has provided the same information to any other agency or organization, or whether any other agency or organization has requested the information from the whistleblower and, if so, to provide details, including the name and contact information for the point of contact at the other agency or organization, if known.

Item 5a of Section D asks whether the complaint relates to an entity of which the whistleblower is or was an officer, director, counsel, employee, consultant or contractor. Items 5b through 5d ask whether the whistleblower has reported the violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.

Items 6a and 6b ask whether the whistleblower took any other action regarding the complaint and request details regarding any such action. Although our rules do not mandate internal reporting prior to providing information to the SEC, this question is designed to address instances in which a whistleblower chooses to report the violation to his or her company first and will afford such whistleblowers the opportunity to provide the Commission with any additional relevant details relating to their internal reporting.

Item D7 asks about the type of security or investment involved, the name of the issuer and the ticker symbol or CUSIP number, if applicable. Item D8 asks the whistleblower to state in detail all facts pertinent to the alleged violation and to explain his or her belief that the acts described constitute a violation of the Federal securities laws. Item D9 asks for a description of all supporting materials in the whistleblower's possession and the availability and location of any additional supporting materials not in the whistleblower's possession. Item D10 asks for an explanation of how and from whom the whistleblower obtained the information that supports the claim. In addition, the whistleblower is asked to identify any information that was

obtained from an attorney or in a communication where an attorney was present. Item D11 asks the whistleblower to identify any particular documents or other information in their submission that they believe could reasonably be expected to reveal their identity, and requests the whistleblower to explain the basis for his or her belief that his or her identity would be revealed if the documents were disclosed to a third party. Item D12 provides the whistleblower with an opportunity to furnish any additional information the whistleblower thinks may be relevant to his submission.

Section E of Form TCR corresponds to Section D on Proposed Form WB–DEC. Items E1 through E9 require the whistleblower to make certain representations concerning the whistleblower's eligibility for an award.[342]

[342] Item E1 asks the whistleblower to state whether he or she is currently, or was at the time the whistleblower acquired the original information that is being submitted to the SEC, a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board. Item 2 asks the whistleblower to state whether he or she is, or was at the time the whistleblower acquired the original information being submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934. Item 3 asks if the whistleblower acquired the information through the performance of an engagement required under the securities laws by an independent public accountant. Item 4 asks whether the whistleblower is providing the information pursuant to a cooperation agreement with the SEC or with any other agency or organization. In item 5, we ask the whistleblower to state whether he or she is a spouse, parent, child or sibling of a member or employee of the SEC, or whether the whistleblower resides in the same household as a member or employee of the SEC. Item 6 asks whether the whistleblower is providing the information before the whistleblower (or anyone representing the whistleblower) received any request, inquiry or demand that relates to the subject matter of the submission (i) From the SEC, (ii) in connection with an investigation, inspection or examination by the PCAOB, or any SRO; or (iii) in connection with an investigation by the Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority. In item 7, we ask whether the whistleblower is the subject or target of a criminal investigation or has been convicted of a criminal violation in connection with the information being submitted to the SEC and request details concerning any such investigation or conviction. Item 8 asks whether the whistleblower acquired the information being submitted to the Commission from any person described in Item E1 through E6. Item 9 requests additional details concerning the whistleblower's responses to items 1 through 8.

In Section F, the whistleblower is required to declare under penalty of perjury under the laws of the United States that the information contained in the form is true, correct and complete to the best of the whistleblower's knowledge, information and belief. In addition, the whistleblower acknowledges his understanding that he may be subject to prosecution and ineligible for a whistleblower award if, in his submission of information, his other dealings with the SEC, or his dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

The counsel certification in Section G requires an attorney for an anonymous whistleblower to certify that the attorney reviewed the form for completeness and accuracy and that the attorney has verified the identity of the whistleblower on whose behalf the form is being submitted by viewing the complainant's valid, unexpired government issued identification (*e.g.,* driver's license, passport). In addition, the attorney must certify that he or she will retain an original, signed copy of the form, with Section F signed by the whistleblower, in his or her records. Finally, the attorney must indicate that the attorney has obtained the whistleblower's non-waiveable consent to provide the Commission with his or her original signed Form TCR upon request in the event that the Commission requests it due to concerns that the whistleblower may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry. The certification also reflects the attorney's consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commission.

J. Rule 21F–10—Procedures for Making a Claim Based on a Successful Commission Action

a. Proposed Rule

In Proposed Rule 21F–10, we described the procedures that a whistleblower would be required to follow in order to make a claim for an award based on a Commission action, and the Commission's proposed claims review process. The proposed process would begin with the publication of a "Notice of a Covered Action" ("Notice") on the Commission's Web site. Whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000, the Office of the Whistleblower would cause this Notice to be published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold. If the monetary sanctions are obtained without a judgment or order—as in the case of a contribution made pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002—the Notice would be published within thirty (30) days of the deposit of monetary sanctions into a disgorgement or other fund pursuant to Section 308(b) that causes total monetary sanctions in the action to exceed $1,000,000. The Commission's proposed rule would require claimants to file their claim for an award within sixty (60) days of the date of the Notice. A claimant's failure to timely file a request for a whistleblower award would bar that individual from later seeking a recovery.

Paragraph (b) of Proposed Rule 21F–10 described the procedure for making a claim for an award. Specifically, a claimant would be required to submit a claim for an award on Proposed Form WB–APP, *Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934.* Proposed Form WB–APP, and the instructions thereto, would elicit information concerning a whistleblower's eligibility to receive an award at the time the whistleblower files his claim. The purpose of the form is, among other things, to provide an opportunity for the whistleblower to "make his case" for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission's successful action. Proposed Items A1 through A3 required the claimant to provide basic identifying information, including first and last name and contact information. Proposed Items B1 through B4 requested the name and contact information for the whistleblower's attorney, if applicable. Proposed Items C1 and C2 requested information concerning the original tip or complaint underlying the claim, including the TCR number, the date the information was submitted and the subject of the tip, complaint or referral. Proposed Items D1 through D3

requested information concerning the Notice of Covered Action to which the claim relates, including the date of the notice, notice number, and the name and case number of the matter to which the notice relates. Proposed Items E1 through E3 requested information concerning related actions. A whistleblower would be required to complete Section E in cases where the whistleblower's claim was submitted in connection with information submitted to another agency or organization in a related action (the questions pertaining to related actions are explained in the discussion of Proposed Rule 21F–11, below). Proposed Items F1 through F9 required the claimant to make certain representations concerning the claimant's eligibility to receive an award at the time the claim is made. In Item G, a claimant may set forth the grounds for the claimant's belief that he is entitled to an award in connection with the information submitted to the Commission, or to another agency or organization in a related action. Finally, item H contained a declaration, to be signed by the claimant, certifying that the information contained on the form is true, correct and complete to the best of the claimant's knowledge, information and belief. The declaration would further acknowledge the claimant's understanding that he may be subject to prosecution and ineligible for a whistleblower award for knowingly and willfully making any false, fictitious, or fraudulent statements or representations in his or her submission or dealings with the SEC or other authority.

Paragraph (b) of Proposed Rule 21F–10 provided that a claim on Form WB–APP, including any attachments, must be received by the Office of the Whistleblower within sixty (60) days of the date of the Notice of Covered Action in order to be considered for an award.

Paragraph (c) required a whistleblower who submitted information to the Commission anonymously to disclose his identity to the Commission on Proposed Form WB–APP and to verify his identity in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of an award. This requirement is derived from Subsection 21F(d)(2)(B) of the Exchange Act.

Paragraph (d) of Proposed Rule 21F–10 described the Commission's claims review process. The claims review process would begin once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded.

Under the proposed process, the Office of the Whistleblower and designated Commission staff (defined in Proposed Rule 21F–10 as the "Claims Review Staff") would evaluate all timely whistleblower award claims submitted on Form WB–APP. In connection with this process, the Office of the Whistleblower could require that claimants provide additional information relating to their eligibility for an award or satisfaction of any of the conditions for an award, as set forth in Proposed Rule 21F–8(b). Following that evaluation, the Office of the Whistleblower would send any claimant a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

The proposed rule would allow a claimant the opportunity to contest the Preliminary Determination made by the Claims Review Staff. Under paragraph (e) of Proposed Rule 21F–10, the claimant could take any of the following steps:

- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request that the Office of the Whistleblower make available for the claimant's review the materials that formed the basis of the Claims Review Staff's Preliminary Determination.
- Within thirty (30) days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (1) above, then within thirty (30) days of the Office of the Whistleblower making those materials available for the claimant's review, a claimant may submit a written response to the Office of the Whistleblower setting forth the grounds for the claimant's objection to either the denial of an award or the proposed amount of an award. The claimant may also include documentation or other evidentiary support for the grounds advanced in his response.
- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request a meeting with the Office of the Whistleblower. However, such meetings are not required and the Office of the Whistleblower may in its sole discretion decline the request.

Paragraph (f) of Proposed Rule 21F–10 made clear that if a claimant fails to submit a timely response pursuant to paragraph (e), then the Preliminary Determination of the Claims Review Staff would be deemed the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination would be deemed a Proposed Final Determination, which would make it subject to review by the Commission under paragraph (h)). In addition, a claimant's failure to submit a timely response to a Preliminary Determination where the determination was to deny an award would constitute a failure to exhaust the claimant's administrative remedies, and the claimant would be prohibited from pursuing a judicial appeal.

Paragraph (g) of Proposed Rule 21F–10 described the procedure in cases where a claimant submits a timely response pursuant to Paragraph (f). In such cases, the Claims Review Staff would consider the issues and grounds advanced in the claimant's response, along with any supporting documentation provided by the claimant, and would prepare a Proposed Final Determination. Paragraph (h) provides that the Office of the Whistleblower would notify the Commission of the Proposed Final Determination, but would not make the Proposed Final Determination public. Within thirty (30) days thereafter, any Commissioner would be able to request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requested such a review within the 30-day period, then the Proposed Final Determination would become the Final Order of the Commission. In the event a Commissioner requested a review, the Commission would review the record that the staff relied upon in making its determination, including the claimant's previous submissions to the Office of the Whistleblower. On the basis of its review of the record, the Commission would issue its Final Order, which the Commission's Secretary will provide to the claimant.

b. Comments Received

We received a number of comments suggesting that the claims process be simplified, streamlined, or made less formal. Several commenters criticized the initial requirement that a whistleblower submit an award application within 60 days of a Notice of Covered Action.[343] These commenters generally stated that this requirement could be eliminated if the Office of the Whistleblower were required to contact whistleblowers directly to inform them that a covered action has been successfully litigated and contended that the proposal places an undue burden on whistleblowers to monitor the SEC Web site to learn of

[343] *See, e.g.,* letters from VOICES; Grohovsky Group; NWC; Wanda Bond; False Claims Act Legal Ctr.

their potential eligibility for an award.[344]

A few commenters stated that claims resolution process should be less formal and more focused on reaching a negotiated settlement. One such comment asserted that the procedures for determining awards seemed "overly formalistic," noting that negotiation has been highly effective in resolving issues in *qui tam* cases under the False Claims Act.[345] Another commenter recommended that a settlement process be built into the claims resolution process.[346]

Finally, several commenters suggested additional procedures or guidance that we could employ to assist whistleblowers with the claims process. One commenter recommended that the application form should be simplified.[347] Another commenter recommended that we send whistleblowers a checklist of any further requirements once the whistleblower submits information, including how and where the whistleblower can find the 'Notice of Covered Action' on the SEC's Web site and a contact for any further questions.[348] This commenter also recommended that we provide a method for whistleblowers to check on the progress of the claims process.[349]

c. Final Rule

After reviewing the comments, we are adopting the rule with several modifications.

We have decided not to eliminate the Notice of Covered Action or to otherwise model the procedures after those employed in the *qui tam* context. The *qui tam* context is substantially different from our situation because *qui tam* actions necessarily will involve one or more known relators with whom the Department of Justice will have worked. By contrast, in enforcement actions that we institute and litigate (based in part on information and assistance from one or more whistleblowers), there may be one whistleblower with whom we have worked closely, but other claimants who have a potential basis for award eligibility as well. Our procedures must provide due process to *all* potential claimants and accordingly cannot be tailored only to those claimants with whom the staff has worked closely. For that reason, we believe the "Notice of Covered Action" procedure provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action's success. Nevertheless, we anticipate that the Office of the Whistleblower's standard practice will be to provide actual notice to whistleblowers with whom the staff has worked closely. We also believe the application form, preliminary determination, opportunity for response, and final determination together should operate to ensure that all potential claimants have a fair opportunity to pursue an award claim. A more informal process modeled after the *qui tam* procedures might favor those whistleblowers who have worked closely with our staff and might not provide a full and fair opportunity for claims by others who nonetheless may have provided original information that led to the successful covered action.[350]

Nonetheless, to respond to some of the concerns raised by commenters and to make the process more accessible to whistleblowers, we have made several modifications in the final rule. First, we have decided to increase the period for claimants to file their claim for an award from sixty (60) days to ninety (90) days. This additional time should provide claimants with a better opportunity to review the Commission's Web site and file an application following the publication of a Notice. In our view, this 90-day period strikes an appropriate balance between competing whistleblower interests—allowing all potential whistleblowers a reasonable opportunity to periodically review the Commission's Web site and to file an application, on the one hand, but providing finality to the application period so that the Commission can begin the process of assessing any applications and making a timely award to any qualifying whistleblowers, on the other hand.[351]

Second, in light of comments that we simplify the WB–APP form, we have made Section G of the form optional. As commenters stated, when a whistleblower has worked closely with the staff on a matter, requiring that whistleblower to furnish a submission explaining the degree and value of his or her assistance may well be unnecessary. At the same time, such a whistleblower—or other claimants who have not worked as closely with the staff and wish to advocate the value of their assistance—should have the opportunity to do so. We have determined not to make any further modifications to the form, however, because the remaining information that we request is in our view necessary so that we have a sufficient record to consider the claimant's application (and, if a petition for review is filed, so that the court of appeals has a sufficient record to conduct a review).

Third, in paragraph (d), we have provided the Director of Enforcement with express authority to designate the staff members to serve on the Claims Review Staff. The Director of Enforcement may designate staff from the Enforcement Division, the Office of the Whistleblower, or other Commission divisions or offices to serve on the Claims Review Staff, either on a case-by-case basis or for fixed periods, as the Director deems appropriate.

Fourth, in paragraph (e), we have clarified that any response a claimant files to a Preliminary Determination must be in a form and manner that the Office of the Whistleblower shall require. Fifth, in paragraph (e)(1)(i), we have added a reference to new Rule 21F–12, clarifying that a claimant can request that the Office of the Whistleblower make available for his or her review the materials from among those set forth in Rule 21F–12 that the Claims Review Staff used as the basis for its Preliminary Determination.[352]

[344] *See* letters from VOICES; Grohovsky Group; False Claims Act Legal Center.

[345] *See* letter from Grohovsky Group.

[346] *See* letter from NWC.

[347] *See* letter from NWC (recommending that a whistleblower should submit a "simplified form, consistent with the form recommended by the Inspector General," rather than the proposed WB–APP).

[348] *See* letter from Wanda Bond.

[349] *See* letter from Wanda Bond.

[350] In addition, in those situations where the Claims Review Staff determines that it may be appropriate, the rule provides the Office of the Whistleblower with a mechanism to engage in discussions with known whistleblowers. Indeed, paragraph (e)(1)(ii) provides claimants with an opportunity to request a meeting with the Office of the Whistleblower following a Preliminary Determination. The Office of the Whistleblower could use these meetings in appropriate cases as an opportunity to reach a tentative agreement with a meritorious whistleblower on the terms of a Proposed Final Determination, which could then be presented to the Commission for approval.

[351] Two commenters asserted that there is no support in the statute for a rule barring a whistleblower from obtaining an award if he fails to file a timely claim after the 60-day notice. *See* letter from VOICES. *See also* letter from False Claims Act Legal Center. We disagree. The statutory authority to adopt rules necessary or appropriate to implement the awards program, which is contained in Section 21F(j), plainly permits the Commission to establish procedures for submitting information and making claims for awards. See also Section 21F(b)(1) (providing for payments "under regulations promulgated by the Commission"). The 90-day bar provides finality at the end of a reasonable application period so that we may assess the award applications and conclusively determine which applicant, if any, is entitled to an award, and in what percentage amount.

[352] We have also revised final rule 21F–10 (and made a corresponding revision in final rule 21F–11) to provide that the Final Order of the Commission will be provided to a claimant by the Office of the Whistleblower instead of the SEC Office of the Secretary (although the Office of the Secretary will continue to issue the Order). We have done so to reflect the fact that the Office of the Whistleblower

Continued

The following chart represents a general overview of the process that we are adopting:

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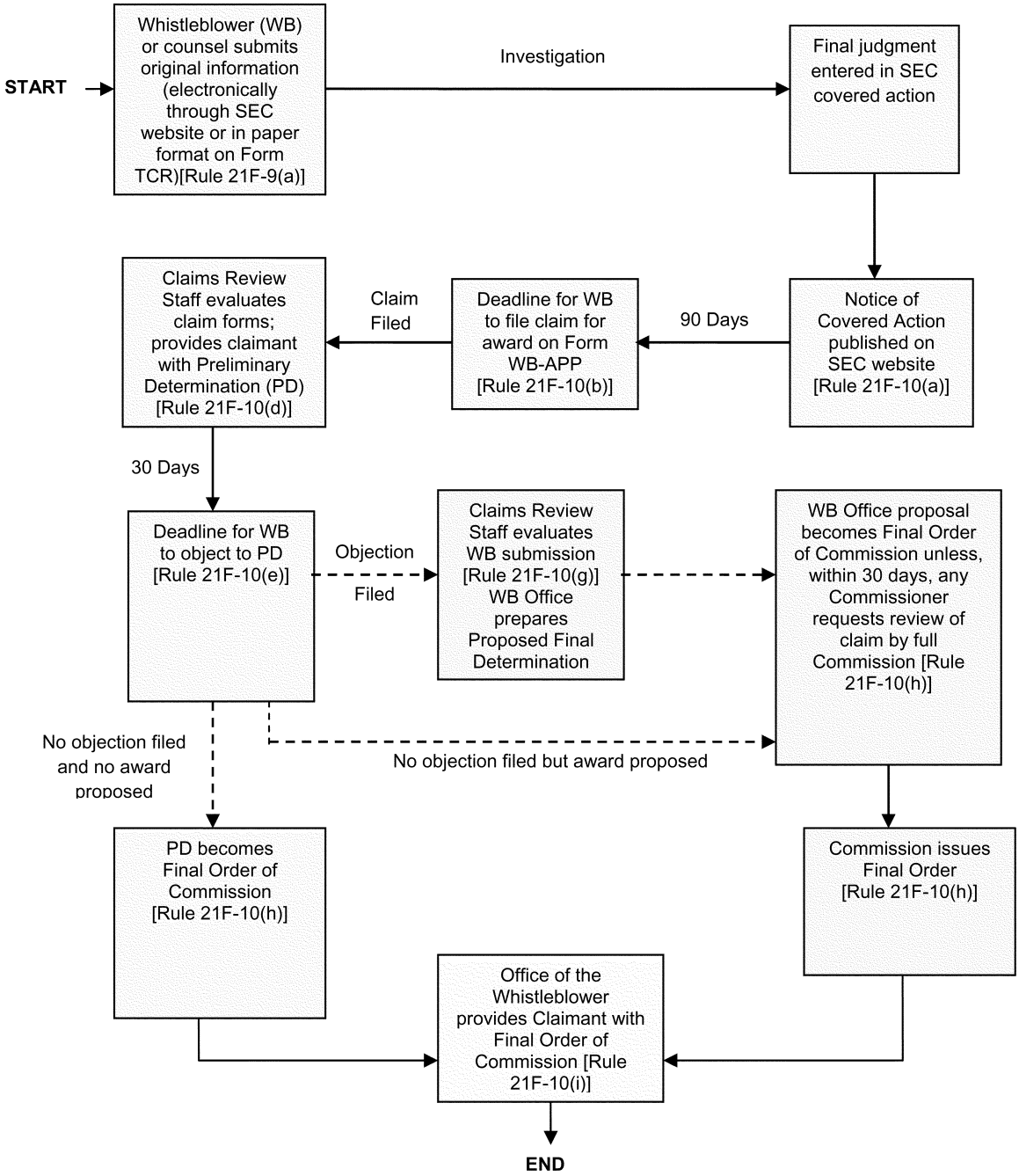

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K. Rule 21F–11—Procedure for Making a Claim Based on a Successful Related Action

a. Proposed Rule

Proposed Rule 21F–11 set forth the procedures for determining awards based upon related actions. Paragraph (a) of Proposed Rule 21F–11 informed a whistleblower who is eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000 that the whistleblower may also be eligible to receive an award based on the monetary sanctions that are collected from a related action.

Paragraph (b) of Proposed Rule 21F–11 described the procedures for making a claim for an award in a related action. The process essentially mirrored the procedure for making a claim in connection with a Commission action

is the appropriate Commission liaison with whistleblower claimants.

and would require the claimant to submit the claim on Form WB–APP. In addition to the questions previously described in our discussion of Proposed Rule 21F–10, the claimant in a related action would be required to complete Section D of Proposed Form WB–APP. Proposed Items D1 through D4 requested the name of the agency or organization to which the whistleblower provided the information and the date the information was provided, the name and telephone number for a contact at the agency or organization, if available, and the case name, action number and date the related action was filed.

Paragraph (b) of Proposed Rule 21F–11 set forth the deadline by which a claimant must file his or her Form WB–APP in a related action. Specifically, under proposed paragraph (b)(1), if a final order imposing monetary sanctions has been entered in a related action at the time the claimant submits the claim for an award in connection with a Commission action, the claimant would be required to submit the claim for an award in that related action on the same Form WB–APP used for the Commission action. Under proposed paragraph (b)(2), if a final order imposing monetary sanctions in a related action has not been entered at the time the claimant submits a claim for an award in connection with a Commission action, then the claimant would be required to submit the claim on Form WB–APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.

The proposed rule provided that the Office of the Whistleblower may request additional information from the claimant in connection with the claim for an award in a related action to demonstrate that the claimant directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. In addition, the Office of the Whistleblower may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

Paragraphs (d) through (i) of Proposed Rule 21F–11 described the Commission's claims review process in related actions. The Commission proposed to utilize the same claims review process in related actions that it would utilize in connection with claims submitted in connection with a covered Commission action.

b. Comments Received

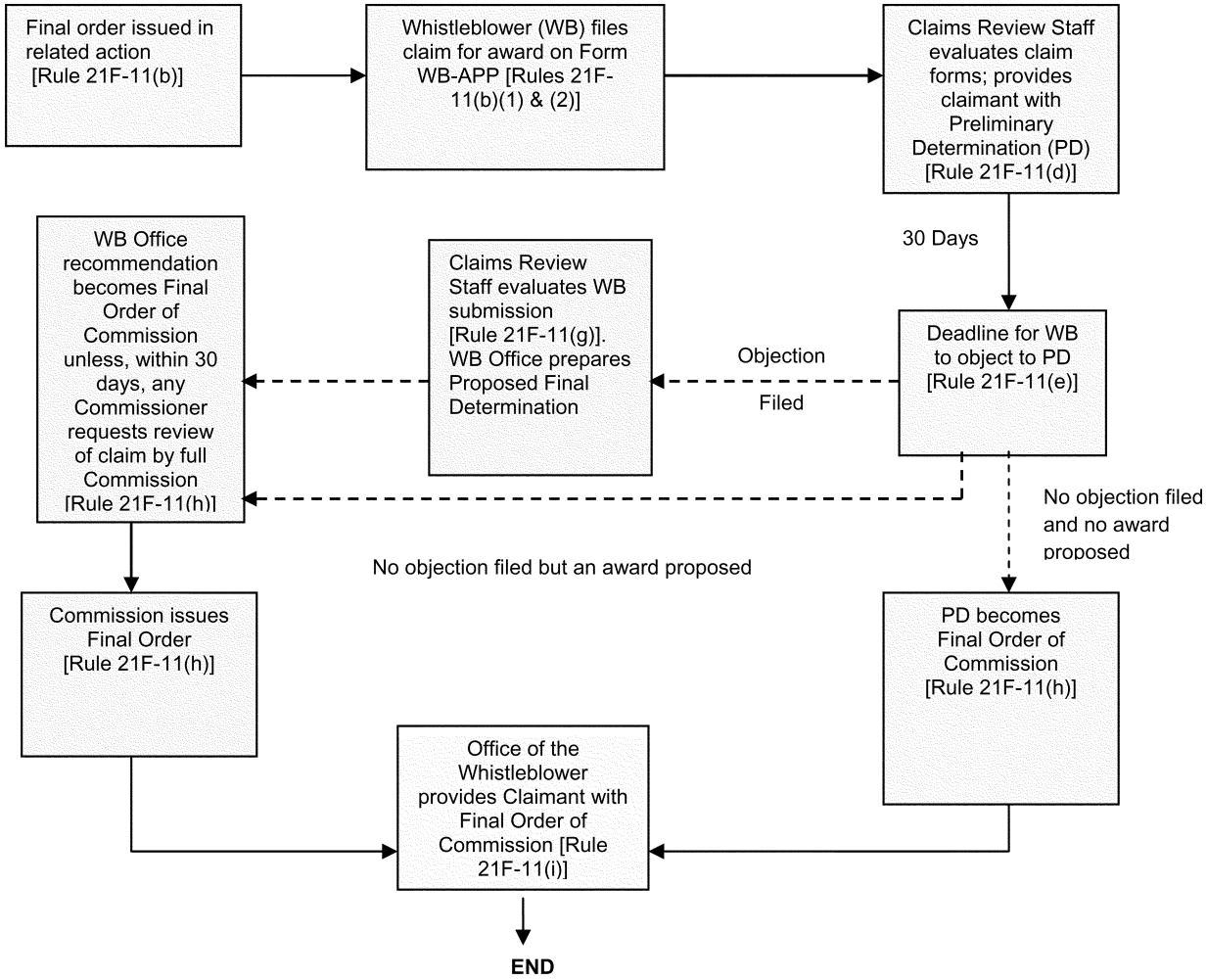
The Commission did not receive any comments directed specifically to this proposed rule. Nonetheless, several of the comments on Rule 21F–10—those recommending that we employ certain additional procedures or guidance to assist whistleblowers with the claims process—are also relevant to Rule 21F–11.

c. Final Rule

We are adopting Rule 21F–11 with several modifications, which parallel certain of the changes we made to Rule 21F–10.

First, in paragraph (b)(2), we have extended to ninety (90) days the period that a whistleblower has to file a claim following the entry of a final order imposing monetary sanctions in a related action where the entry of the final order occurs after the whistleblower has submitted a claim for an award in the Commission's covered action. This gives whistleblowers a longer time in which to file a claim, reducing the likelihood that a meritorious whistleblower would miss the filing deadline. Second, in paragraph (e), we have clarified that any response a claimant files to a Preliminary Determination must be in a form and manner that the Office of the Whistleblower shall require. Third, in paragraph (e)(1)(i), we have added a reference to new Rule 21F–12, clarifying that a claimant can request that the Office of the Whistleblower make available for his or her review the materials from among those set forth in Rule 21F–12 that the Claims Review Staff used as the basis for its Preliminary Determination.

The following chart represents a general overview of the process that we are adopting:



L. Rules 21F–12 & 13—Materials That May Be Used as the Basis for an Award Determination and That May Comprise the Record on Appeal; Right of Appeal

a. Proposed Rule

In Proposed Rule 21F–12, we described claimants' appeal rights and designated the materials that could comprise the record on appeal.

We intended paragraph (a) of the proposed rule to track Section 21F(f) of the Exchange Act, which provides for certain rights of appeal of Commission orders with respect to whistleblower awards. Under Section 21F, a decision of the Commission regarding the amount of an award would not be appealable when the Commission has followed the statutory mandate to award between 10 and 30 percent of the monetary sanctions collected after taking into consideration the criteria established under Section 21F(c)(1)(B) of the Act. A decision regarding whether or to whom to make an award could be appealed to an appropriate court of appeals within 30 days after the Commission issues its final decision. Under Section 25(a)(1) of the Exchange Act, appeals of final orders of the Commission entered pursuant to the Exchange Act could be made to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his principal place of business.

Paragraph (b) of the proposed rule designated the materials that comprise the record on appeal. These included the Claims Review Staff's Preliminary Determination, any materials submitted by the claimant or claimants (including the claimant's Forms TCR, WB–DEC, WB–APP, and materials filed in response to the Preliminary Determination), and any other materials that supported the Final Order of the Commission, with the exception of any internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim, such as the staff's Proposed Final Determination in the event it does not become the Final Order.

Other than the materials identified for inclusion in the record on appeal, the proposed rule provided the Claims Review Staff and the Commission with discretion on a case-by-case basis to determine the materials that could be relied upon to form the award determination.[353]

b. Comments Received

We received only a few comments on this proposal. One commenter stated that the proposed rule unduly restricted the whistleblower's appeals rights by foreclosing judicial review of the Commission's determination of the amount of the award and claims of abuse of discretion in applying the statutory criteria set forth in Dodd-Frank 922(f).[354] Another commenter recommended that the rule should include a provision to permit a whistleblower who is wrongfully denied a reward to obtain, as a matter of course, attorney's fees under the Equal Access to Justice Act if the claimant prevails on

[353] *See, e.g.,* Proposed Rule 21F–10(e)(1)(i); Proposed Rule 21F–11(e)(1)(i).

[354] *See* letter from False Claims Act Legal Center (citing Senate Report No. 111–176, at 112 (April 30, 2010)).

appeal.[355] A third commenter criticized our proposal to the extent that it would not make available internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim.[356]

c. Final Rule

After reviewing the comments, we are adopting a new Rule 21F–12 that specifies the material that may form the record of the Commission's award determination, and rule 21F–13, concerning appeals, which substantially follows proposed rule 21F–12.

Rule 21F–12(a) specifies the materials that we may rely upon to form the basis for an award determination. We believe that specifying the materials that we may rely upon will promote transparency and consistency in the claims review process.

Under Rule 21F–12(a), the Commission and staff may rely on the following items:

- Any publicly available materials from the covered action or related action, including (i) the complaint, notice of hearing, answers and any amendments thereto; (ii) the final judgment, consent order, or final administrative order; (iii) any transcripts of the proceedings, including any exhibits; (iv) any items that appear on the docket; and (v) any appellate decisions or orders.
- The whistleblower's Form TCR, including attachments, and other related materials provided by the whistleblower to assist the Commission with the investigation or examination.
- The whistleblower's Form WB–APP, including attachments, and any other filings or submissions from the whistleblower in support of the award application.
- Sworn declarations (including attachments) from the Commission's staff regarding any matters relevant to the award determination.
- With respect to an award claim involving a related action by another entity, any statements or other information that the entity provides or identifies in connection with an award determination. However, we will not consider any materials if the entity that provided them has not authorized us to share the information with the claimant, because we do not believe it would be fair or appropriate to rely upon information that may not be made available to the claimant.[357]
- Any other documents or materials including sworn declarations from third-parties that are received or obtained by the Office of the Whistleblower to assist us in resolving the claimant's award application, including information related to the claimant's eligibility (provided that we are also permitted to share it with the claimant).[358]

Rule 21F–12(b) provides that a claimant is not entitled to obtain any materials beyond those that form the basis of an award determination, including "pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim." The proposed rules did not provide claimants with an opportunity to review materials that we did not rely upon to form the basis for an award determination, and Rule 21F–12(b) simply clarifies that claimants are not entitled to obtain these materials.[359]

In Proposed Rule 21F–12(b) (which is now Final Rule 21F–13(b)), we provided that a claimant is not entitled to include pre-decisional material in the record on appeal, and we are now further clarifying in Rule 21F–12(b) that a claimant is not entitled to receive those materials from the Commission. We do not agree with the suggestion that internal deliberative process materials that are prepared exclusively to assist the Commission's decisional process should be included within the record on appeal. These materials are by their nature pre-decisional work product that may often contain the staff's "frank discussion of legal and policy making materials,"[360] and the disclosure of these materials would have a chilling effect on our decision-making process.[361]

Rule 21F–12(b) also consolidates provisions from Proposed Rules 21F–10(e)(1)(i) and 21F–11(e)(1)(i) that provide that the Office of the Whistleblower may: (1) make redactions as necessary to comply with any statutory restrictions, to protect the Commission's law enforcement and regulatory functions, and to comply with requests for confidential treatment from other law enforcement and regulatory authorities; and (2) require a claimant to sign a confidentiality agreement before providing these materials.

We are adopting Rule 21F–13(a)—which substantially tracks Proposed Rule 21F–12(a)—to clarify that when the Commission makes an award between 10 and 30 percent, and that determination is based on the factors set forth in Rule 21F–6, our final order regarding the amount of an award (including the award allocation among multiple whistleblowers) is not appealable. The proposing rule had not expressly stated that the award determination must be based on a consideration of the factors in Rule 21F–6, but we believe this clarification ensures that the rule is consistent with Section 21F(f) of the Exchange Act. We have further clarified that, consistent with Section 21F(f), "any factual findings, legal conclusions, policy judgments, or discretionary assessments" that we make in considering the Rule 21F–6 factors are *not* appealable.[362]

We are adopting Rule 21F–13(b)—which substantially tracks Proposed Rule 21F–12(b); however, we have modified the proposed language to clarify that the record on appeal shall consist of the Preliminary Determination, the Final Order of the Commission, and any other items from among those set forth in Rule 21F–12(a)

[355] *See* letter from NWC.

[356] *See* letter from Eric Dixon.

[357] For instance, if a state Attorney General should provide us with information to assist us in processing a whistleblower claim, but should expressly tell us that the information is highly sensitive and may not be shared with the whistleblower because it might jeopardize on-going criminal law enforcement investigations, we will not rely on the particular information in processing the whistleblower's claim because we cannot also share the information with the claimant.

[358] For instance, if a third party should voluntarily provide us with information related to a whistleblower's claim, but expressly request that we not disclose the information to the claimant for fear the claimant would realize the third-party had been the source, we will not rely on the particular information because we cannot also share it with the claimant.

[359] *See, e.g.,* Proposed Rule 21F–10(e)(1)(i); Proposed Rule 21F–11(e)(1)(i). *See also* Proposed Rule 21F–12(b).

[360] *See, e.g., NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 151 (1975); *see also United States* v. *Farley,* 11 F.3d 1385, 1389 (7th Cir. 1993) ("[F]rank discussion of legal and policy matters is essential to the decision-making process of a governmental agency."); *Town of Norfolk* v. *U.S. Army Corps of Eng'rs,* 968 F.2d 1438, 1458 (1st Cir. 1992).

[361] *See generally Dep't of Interior* v. *Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8–9 (2001) (stating that the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news").

[362] Although one commenter cited to legislative history to contend that we are unduly restricting the scope of appeals under Section 21F(f), the legislative history identified in fact refers to an earlier draft of the bill that became the Dodd-Frank Act. That provision was subsequently changed before it was incorporated into the Dodd-Frank Act so that it expressly precluded appeal of an award amount where the Commission considered the relevant factors in assessing the award. *See* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen. Dodd) ("amended to eliminate the right of a whistleblower to appeal the amount of an award.") Indeed, the relevant provision of the earlier draft of the bill did not, unlike Section 21F(f), include language that expressly excluded from the scope of appeal "the determination of the amount of an award if the award was based on a consideration of the" awards factors.

that either the Commission *or the claimant* identifies for inclusion in the record. We believe that this modification is appropriate because it expressly provides the claimant with an opportunity to designate items for the appellate record from among those items set forth in Rule 21F–12(a).

Finally, with respect to the suggestion that we include a provision that would afford attorneys' fees pursuant to the Equal Access to Justice Act to a claimant any time he or she prevails on appeal, we believe that this would be inconsistent with EAJA's substantive terms,[363] which set forth the specific circumstances under which a prevailing party may obtain attorney's fees.

M. Rule 21F–14—Procedures Applicable to Payment of Awards

Proposed Rule 21F–13 addressed the procedures for payment of awards to whistleblowers. After considering the comments on this proposal, we are adopting the rule as proposed, except that we are redesignating the rule as Rule 21F–14.

a. Proposed Rule

Paragraph (a) of the proposed rule provided that any award made pursuant to the rules would be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund") established by Section 21F(g) of the Exchange Act.[364] Paragraph (b) provided that a recipient of a whistleblower award would be entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based. Both of these provisions derive from language in Section 21F(b) of the Exchange Act.[365]

Paragraph (c) addressed the timing for payment. It stated that any payment of an award for a monetary sanction collected in a Commission action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the Notice of Covered Action for that action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a related action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected.

Paragraph (d) of the proposed rule described how the Commission would address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment otherwise should be made. In general, the provision specified the priority among whistleblowers for payment when amounts become available in the Fund to pay awards.

b. Comments Received

We received only a few comments on the payment procedures under proposed rule 21F–13 and our request for comment on the possibility that whistleblowers could be paid with monies that otherwise could be distributed to victims pursuant to a Commission action.[366]

One commenter stated that it was improper to reward whistleblowers at the expense of victims and suggested that the Commission consider the interests of victims first and reward whistleblowers only after victims have been made whole.[367] Another commenter believed that the tension between paying an award to a whistleblower and compensating victims is unlikely to occur given the present balance of the Fund, but suggested that, if the tension did arise, the Commission could defer paying an award to a whistleblower until all victims have been compensated, or alternatively, ask the whistleblower to voluntarily defer payment of an award until all victims have been compensated.[368] A third commenter stated that the Commission should make sure that the IRS is notified of any payments to whistleblowers and that any award recipient receives a Form 1099.[369]

c. Final Rule

After reviewing and considering the comments, we are adopting Rule 21F–13 as proposed, except that we are redesignating the rule as Rule 21F–14.

We are sympathetic to the commenters' concern that in some circumstances whistleblowers might be paid with monies that otherwise could be distributed to victims pursuant to a Commission action. That possibility is a consequence of the whistleblower statute, however, not the rule. Moreover, deferring payment to a whistleblower would not resolve this issue. If there are insufficient amounts in the Fund to pay a whistleblower award, the statute requires that monies needed to satisfy the award be deposited into the Fund from any monies collected in the Commission action on which the award is based. Once deposited into the Fund, these monies can be paid only to a whistleblower (or for specified purposes to the SEC's Inspector General), not to victims. Deferring payment to a whistleblower would not free up these monies to compensate victims first. Accordingly, we are constrained by the funding mechanism established in the whistleblower statute, and do not believe that the issue can be resolved through payment procedures.[370]

As in the proposed rule, paragraph (a) of the rule that we are adopting today provides that any award made pursuant to the rules will be paid from the Fund. This provision derives directly from Section 21F(b)(2) of the Exchange Act, which states that any amount paid to a whistleblower shall be paid from the Fund.[371] Paragraph (b) provides that a recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based. [372] This requirement derives from Section 21F(b)(1) of the Exchange Act, which provides that an award is based upon the monetary sanctions collected in the Commission action or related action.[373]

[363] *See, e.g.,* Equal Access to Justice Act (EAJA) 28 U.S.C. 2412(d)(1)(A) ("[A] court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.").

[364] 15 U.S.C. 78u–6(g).

[365] 15 U.S.C. 78u–6(b).

[366] 15 U.S.C. 78u–6(g)(3)(B). That possibility arises from a provision in the law that requires the Commission to deposit into the Fund an amount equal to the unsatisfied portion of a whistleblower award from any monetary sanction collected by the Commission in the Commission action on which the award is based if the balance of the Fund is not sufficient to satisfy the award.

[367] *See* letter from Americans for Limited Government.

[368] *See* letter from Georg Merkl.

[369] *See* letter from John Wahh.

[370] We agree with the comment that we notify the IRS and issue Form 1099 for any whistleblower payment, but we do not believe that any change to the rule is necessary to accomplish this. We expect to issue Form 1099–MISC to each whistleblower and the IRS upon payment of an award to a whistleblower who is not a foreign national. We will coordinate with the IRS regarding the tax filing requirements that may be applicable to the payment of an award to a whistleblower who is a foreign national.

[371] 15 U.S.C. 78u–6(b)(2).

[372] Where the Commission receives a monetary sanction that is deemed satisfied by payment of a separate money judgment obtained by an entity described in Rule 21F–3(c)(1)—*i.e.,* a payment in a "related action"—the monetary sanction will not be counted as having been collected in both the Commission action and in the related action.

[373] 15 U.S.C. 78u–6(b)(1). We note that, if monetary sanctions are ordered to be paid in a

Paragraph (c) of the final rule, like the proposed rule, provides that any payment of an award for a monetary sanction collected in a Commission action will be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the Notice of Covered Action for that action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a related action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected. This provision is intended to cover situations where a single action results in multiple whistleblower claims. In that circumstance, if one whistleblower appealed a Final Determination of the Commission denying the whistleblower's claim for an award, the Commission would not pay any awards in the action until that whistleblower's appeal has been concluded, because the disposition of that appeal could require the Commission to reconsider its determination and thereby could affect all payments for that action.

Finally, as in the proposed rule, paragraph (d) of the final rule describes how the Commission will address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment should otherwise be made. In this situation, the whistleblower or whistleblowers will be paid when amounts become available in the Fund, subject to the terms set forth in paragraphs (d)(1) and (d)(2). Under paragraph (d)(1), where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action or related action, priority in making payment on these awards will be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments. Under paragraph (d)(2), where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action or related action, they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

N. Rule 21F–15—No Amnesty

a. Proposed Rule

Proposed rule 21F–14 stated that the provisions of Section 21F of the Exchange Act do not provide whistleblowers with amnesty or immunity for their own misconduct. However, the proposed rule noted that the Commission will take whistleblowers' cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in [SEC] Investigations and Related Enforcement Actions (17 CFR 202.12).

b. Comments Received

We received few comments on this proposed rule. All of the commenters urged the Commission to adopt a liberal approach to granting amnesty to whistleblowers.[374] One commenter suggested that there will be a large group of high-quality potential whistleblowers that have concerns about their potential liability and will not come forward to report securities violations without assurances that they will not be civilly or criminally prosecuted.[375] Another commenter stated that there should be no firm rule on amnesty.[376]

c. Final Rule

We are adopting the proposed rule without modification, except that we have redesignated it as Rule 21F–15. The final rule provides notice that whistleblowers will not automatically receive amnesty if they provide information about securities violations to the Commission. Of course, whistleblowers who have not participated in misconduct will not need amnesty.

With respect to the suggestion that we establish a process in which whistleblowers can receive amnesty or other forms of leniency, such policies and procedures have already been publicly promulgated in the "Fostering Cooperation" section of the Enforcement Manual for the Division of Enforcement. This section discusses in detail the wide spectrum of tools available to the Commission and its staff for facilitating and rewarding whistleblowers and other cooperators, ranging from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions.[377]

O. Rule 21F–16—Awards to Whistleblowers who Engage in Culpable Conduct

a. Proposed Rule

Proposed rule 21F–15 stated that, for purposes of determining whether the required $1,000,000 threshold for an award has been satisfied, the Commission would not include any monetary sanctions that the whistleblower is ordered to pay, or that an entity is ordered to pay if the entity's liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The proposed rule also stated that the Commission will not include any such amounts in the total monetary sanctions collected for purposes of calculating the amount of an award payment to a whistleblower.

b. Comments Received

We received many comments on this proposed rule. The comments addressed whether whistleblowers' culpability in the unlawful conduct should be a basis for excluding them from eligibility for an award or reducing the amount of their awards.

Many of the commenters opposed any rule that would exclude culpable whistleblowers from eligibility for awards or would reduce the amount of their awards, reasoning that without sufficient financial incentives potential high-quality whistleblowers would not come forward and fraud schemes would go undetected or be discovered much later than they otherwise might.[378] Some commenters contended that the Commission did not have the statutory authority to exclude culpable whistleblowers from eligibility for awards beyond what is already contained in the statute—that is, whistleblowers who are convicted of a criminal violation related to the covered action.[379] Other commenters argued that culpable whistleblowers are often "insiders" with valuable first-hand knowledge of fraudulent conduct, and as such are frequently the best sources of information about companies and senior level management involved in

Commission or related action, but payment is waived, in whole or in part, for inability to pay or for other reasons, payment to a whistleblower is made only with respect to the amounts actually collected in such action. However, this does not affect whether the $1,000,000 monetary sanctions threshold is satisfied for purposes of qualifying as a covered action.

[374] *See, e.g.,* letters from NWC, John Wahh and Stuart D. Meissner, LLC.

[375] *See* letter from Stuart D. Meissner, LLC.

[376] *See* letter from NWC.

[377] *See http://www.sec.gov/divisions/enforce/enforcementmanual.pdf#6.2.*

[378] *See, e.g.,* letters from Auditing Standards Committee, NWC and Sipio.

[379] *See, e.g.,* letter from NWC.

misconduct.[380] One commenter suggested that allowing culpable whistleblowers to be eligible for awards may also deter future misconduct because securities violators would know that they forever face an increased risk that one of their co-conspirators "might turn state's evidence against them."[381]

Many other commenters advocated that culpable whistleblowers should not be eligible for awards because the failure to exclude such whistleblowers would create significant incentives for individuals to engage in wrongdoing.[382] Some commenters stated that, if the final rule allows for awards to culpable whistleblowers, a whistleblower would have an incentive to conceal or fail to disclose a fraud as it continues to grow in order to satisfy the $1,000,000 threshold for award eligibility or to receive a larger award.[383] Others expressed concern that paying awards to culpable whistleblowers would harm internal compliance programs because it is critical that employees raise ethical and compliance concerns before a violation occurs and the proposed rules would incentivize whistleblowers to bypass or delay reporting violations internally.[384]

Other commenters recommended that the final rule should limit, but not prohibit, awards to culpable whistleblowers.[385] One commenter stated that the rules should allow the Commission to evaluate a person's culpable conduct and use that evaluation as a basis for reducing the amount of an award.[386] Several commenters stated that the role and culpability of the whistleblower in the unlawful conduct should be a required criterion that would result in reducing the amount of an award within the 10 to 30 percent range.[387] Others suggested that a partial exclusion of culpable whistleblowers would be more appropriate. Specifically, these commenters recommended that whistleblowers' unlawful conduct should not be considered for determining the amount of a whistleblower award but should be considered when determining whether the $1,000,000 threshold has been met because the proposed rule disincentivizes individuals even marginally involved in the wrongful conduct from helping the Commission bring a successful enforcement action.[388]

c. Final Rule

We are adopting the proposed rule without modification, except that we are redesignating it as Rule 21F–16. After carefully considering the comments, we believe that the final rule appropriately incentivizes culpable whistleblowers to report securities violations while preventing culpable whistleblowers from financially benefiting from their own misconduct or misconduct for which they are substantially responsible.

As a preliminary matter, we do not believe that a *per se* exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act. As commenters noted, the original Federal whistleblower statute—the False Claims Act—was premised on the notion that one effective way to bring about justice is to use a rogue to catch a rogue.[389] This basic law enforcement principle is especially true for sophisticated securities fraud schemes which can be difficult for law enforcement authorities to detect and prosecute without insider information and assistance from participants in the scheme or their coconspirators. Insiders regularly provide law enforcement authorities with early and invaluable assistance in identifying the scope, participants, victims, and ill-gotten gains from these fraudulent schemes. Accordingly, culpable whistleblowers can enhance the Commission's ability to detect violations of the Federal securities laws, increase the effectiveness and efficiency of the Commission's investigations, and provide important evidence for the Commission's enforcement actions.

Nevertheless, we share commenters' concern that failing to limit culpable whistleblowers' eligibility for awards could create incentives that are contrary to public policy. Accordingly, for purposes of determining whether the $1,000,000 threshold has been satisfied or calculating the amount of an award, the Commission will not count any monetary sanctions that the whistleblower is ordered to pay or that are ordered to be paid against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated.[390] This final rule provides an incentive for less culpable individuals to come forward and disclose illegal conduct involving others. At the same time, the rule limits awards based on the conduct attributable to the culpable whistleblower. The rationale for this limitation is that the common understanding of a whistleblower is one who reports misconduct *by another person* and it would be contrary to public policy for whistleblowers to benefit from their own misconduct. As for the suggestion that a partial exclusion for culpable whistleblowers should be adopted by the Commission, we believe that it would be inappropriate to treat culpable whistleblowers more favorably than other less or non-culpable whistleblowers, even if such differential treatment could result in additional submissions from culpable whistleblowers. Accordingly, we do not believe that the monetary sanctions of an entity associated with misconduct that the whistleblower substantially directed, planned, or initiated the reported misconduct should be considered when determining whether the culpable whistleblower met the $1,000,000 threshold. Finally, to minimize any incentive for whistleblowers to conceal misconduct or to delay reporting it, we have included in Rule 21F–6 a provision that requires the Commission to consider whether it would be appropriate to decrease a whistleblower's award percentage because of the culpability of

[380] *See, e.g.,* letters from Vogel, Slade & Goldstein; Kenney & McCafferty; Georg Merkl; and NWC.

[381] *See* letter from NWC.

[382] *See, e.g.,* letters from SIFMA, Business Roundtable, Washington Legal Foundation, Morgan Lewis, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Trace, Alcoa Group, Oppenheimer Funds, Association of Corporate Counsel, CCMC, Connolly & Finkel, Target, Thompson Hine, Americans for Limited Government, Ryder Systems, Verizon, AT&T, Institute for Corporate Ethics, TRACE International, Inc., and ABA.

[383] *See, e.g.,* letters from AT&T, Davis Polk, and John Wahh.

[384] *See, e.g.,* letters from the Business Roundtable and AT&T.

[385] *See, e.g.,* letters from Chris Barnard and Peter van Schaick.

[386] *See* the letter from ABA.

[387] *See, e.g.,* letters from the Auditing Standards Committee of the Auditing Section of the American Accounting Association, Wells Fargo, Chris Barnard and Peter van Schaick.

[388] *See, e.g.,* letters from DC Bar and Connolly & Finkel.

[389] *See* Cong. Globe, 37th Cong., 3d Sess. 955–56 (1863), *quoted in* Issues and Developments in Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy 119, 121 (1996) (U.S. Senator Jacob M. Howard—"I have based (the provisions of False Claims Act) on the old fashioned idea of holding out a temptation and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way of bringing rogues to justice.").

[390] In addition, as part of a negotiated settlement agreement, deferred prosecution agreement, non-prosecution agreement, immunity agreement, cooperation agreement, or other similar agreement with a highly culpable whistleblower, we have the ability to obtain the whistleblower's agreement to accept less than the statutory minimum or to forgo seeking a whistleblower award. We may exercise this authority in appropriate cases, including cases involving whistleblowers who seek to participate in the Commission's Cooperation Program and who substantially directed, planned, or initiated the violation.

the whistleblower or any substantial and unreasonable reporting delay by the whistleblower.[391]

P. Rule 21F–17—Staff Communications With Individuals Reporting Possible Securities Law Violations

a. Proposed Rule

Proposed Rule 21F–16(a) provided that no person may take any action to impede a whistleblower from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) & (ii) of this chapter related to the legal representation of a client) with respect to such communications. The Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.

Proposed Rule 21F–16(b) clarified the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the Commission related to a possible securities law violation. The proposed rule stated that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel. The objective of paragraph (b) is to implement several important policies inherent in Section 21F in a manner consistent with the state bar ethics rules governing the professional responsibilities of members of the staff who act in the capacity of attorneys.

Every jurisdiction that regulates the professional responsibility of lawyers has adopted some variation of ABA Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[392]

In the context of organizational entities represented by lawyers,[393] a difficulty in applying the various state versions of ABA Model Rule 4.2 is identifying those actors within the entity—such as directors or officers—that are the embodiment of the represented entity such that the proscription against contact applies.[394] This is so in part because the various state bar ethics rules have differing definitions of which organizational constituents are covered by Rule 4.2.[395]

As explained above, however, Section 21F of the Exchange Act evinces a Congressional purpose to facilitate the disclosure of information to the Commission relating to possible securities law violations and to preserve the confidentiality of those who do so.[396] This Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts us and who is a director, officer, member, agent, or employee of the entity. Similarly, whistleblowers falling within these categories could be less inclined to report possible securities law violations if they believed there was a risk that the Commission staff might be required to request consent of the entity's counsel—thus disclosing the whistleblower's identity—before speaking to him or her.

For this reason, Section 21F necessarily authorizes the Commission to communicate directly with these individuals without first obtaining the consent of the entity's counsel. Paragraph (b) of the proposal would clarify this authority by providing that, in the context of whistleblower-initiated contacts with the Commission, all discussions with a director, officer, member, agent, or employee of an entity that has counsel are "authorized by law"[397] and, will therefore not require consent of the entity's counsel as might otherwise be required by rules of professional conduct.[398]

b. Comments Received

The comments that we received on Proposed Rule 21F–16(a) supported it. One commenter noted that the proposed rule is especially important because many firms require employees to sign confidentiality agreements.[399]

With respect to Proposed Rule 21F–16(b), a couple of commenters supported the proposal,[400] but others opposed it.[401] Those commenters

[391] We do not agree with the suggestion of some commenters that the rule will create an incentive for culpable whistleblowers to delay reporting in order to increase the potential for a larger award. Under these rules, a whistleblower has the greatest likelihood of receiving an award if he reports misconduct to us *first*. If a culpable whistleblower delays reporting, he runs the substantial risk that another person will report first, or that the misconduct will otherwise come to light, which will not only make the whistleblower unlikely to obtain an award, but will increase the likelihood that he will be prosecuted for his involvement in the misconduct.

[392] Model Rules of Prof'l Conduct R. 4.2. The primary purpose of ABA Model Rule 4.2 is to protect the attorney-client relationship and to protect represented persons, in the absence of their lawyers, from being taken advantage of by lawyers who are not representing their interests.

[393] *See generally Upjohn Co.* v. *United States,* 449 U.S. 383 (1981).

[394] Comment 7 to ABA Model Rule 4.2 addresses this issue: In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[395] Comment 5 to the ABA Model Rule 4.2 specifically carves out a potential exception for "investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." The commentary, and most state professional responsibility rules, do not specify which governmental investigative activities are exempt.

[396] *See, e.g.,* Exchange Act Section 21F (b) through (d) and (h), 15 U.S.C 78u–6 (b) through (d) and (h).

[397] As noted, ABA Model Rule 4.2 allows for contacts with represented persons without the consent of the person's lawyer if such contacts are "*authorized by law.*" Every state bar ethics rules, in accordance with ABA Model Rule 4.2, has some variation of an authorized by law exception. Thus, in the context of communications initiated by a whistleblower who is also the director, officer, member, agent, or employee of an entity that has counsel, the proposed rule would make clear that contacts and communications between these individuals and the staff are "authorized by law."

[398] The proposed rule is not intended, and will not be used, to obtain otherwise privileged information about the entity. *See* SEC Division of Enforcement Manual § 3.3.1.

[399] *See* letter from POGO. *See also, e.g.,* letters from Kurt Schulzke (stating the proposed rule represents an improvement over the False Claims Act and IRS whistleblower regimes because of "(a) the effective nullification of confidentiality agreements and other actions to 'impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation' and (b) the empowerment of the Commission staff to communicate directly with whistleblowers regardless of state bar ethics rules governing communications with represented parties."); VOICES (stating that a whistleblower should not be prevented from communicating directly with the Commission staff by actions such as enforcing, or threatening to enforce, a confidentiality agreement because such actions would "conflict with the purpose of the statute").

[400] *See, e.g.,* letters from NWC; Kurt Schulzke. *See also* Letter from Society of Corporate Secretaries (stating the Commission "does not 'need permission' to speak directly with a whistleblower," but should "be required to give the company notice that it intends to do so[.]").

[401] *See, e.g.,* letters from Business Roundtable; Financial Services Roundtable; GE Group; Alcoa

Continued

opposing the proposal generally expressed concern that it could significantly erode the protections of the attorney-client privilege because the staff could seek to obtain attorney-client privileged information during the communications, or treat any attorney-client information that the whistleblower conveys as a waiver of the privilege. Several of these commenters recommended that the final rule should contain express language stating that the staff is not permitted to obtain attorney-client information during any communications authorized by the rule.[402]

Finally, a few comment letters asserted that the Commission lacks authority to establish an "authorized by law"[403] exception to state attorney ethics rule that would permit the staff to engage in these types of communications without the consent of the entity's counsel.[404] One of these commenters argued that nothing in Section 21F of the Exchange Act indicates that Congress intended to undermine the so-called McDade-Murtha Amendment, which requires attorneys at the Department of Justice to comply with the state bar disciplinary rules of the state in which they are licensed.[405]

c. Final Rule

After reviewing the comments, we are adopting Rule 21F–16 as proposed, except that we have redesignated it as Rule 21F–17.[406]

Rule 21F–17(a) is necessary and appropriate because, as we noted in the proposing release, efforts to impede an individual's direct communications with Commission staff about a possible securities law violation would conflict with the statutory purpose of encouraging individuals to report to the Commission.[407] Thus, an attempt to enforce a confidentiality agreement against an individual to prevent his or her communications with Commission staff about a possible securities law violation could inhibit those communications even when such an agreement would be legally unenforceable,[408] and would undermine the effectiveness of the countervailing incentives that Congress established to encourage individuals to disclose possible violations to the Commission.[409]

With respect to Rule 21F–17(b), we believe that this rule is a necessary and appropriate means to implement Section 21F's purposes of facilitating the disclosure of information to the Commission relating to possible securities law violations and preserving the confidentiality of those who do so.[410] As a result, our rulemaking authority under Section 21F(j) permits us to authorize our staff to communicate directly with directors, officers, members, agents, or employees of an entity that has counsel where the individual first initiates communication with the Commission as a whistleblower. Moreover, because Rule 21F–17(b) fits within the "authorized to do so by law" exception of ABA Model Rule 4.2 and the state bar rules modeled after it, Rule 21F–17(b) is fully consistent with state bar rules.[411]

Although a number of commenters expressed concern that this rule will undermine the attorney-client privilege, we emphasize that nothing about this rule authorizes the staff to depart from the Commission's existing procedures and practices when dealing with potential attorney-client privileged information.[412] As stated above,[413] compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult about possible violations, and the attorney-client privilege furthers such consultation. None of the rules that we are promulgating under Section 21F, *including* Rule 21F–17(b), is intended to undermine this benefit by having individuals disclose to us information about possible securities laws violations that they learned of through privileged communications. Thus, to the extent that the staff may be engaged in a communication authorized under Rule 21F–17(b) and issues relating to attorney-client privilege should develop, the staff will proceed in accordance with established Commission practices.[414]

III. Paperwork Reduction Act

Certain provisions of the Proposed Rules contained "collection of information" requirements within the meaning of the Paperwork Reduction Act ("PRA") of 1995.[415] An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid Office of Management and Budget ("OMB") control number is displayed. The Commission submitted proposed collections of information to OMB for review in accordance with the PRA.[416] The titles for the collections of information were: (1) Form TCR (Tip, Complaint or Referral), (2) Form WB–DEC (Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934), and (3) Form WB–APP (Application for Award for Original Information Provided Pursuant to § 21F of the

Group; Association of Corporate Counsel; GE Group; Auditing Standards Committee.

[402] *See, e.g.,* letters from GE Group; Auditing Standards Committee; Business Roundtable.

[403] Model Rules of Professional Conduct, Rule 4.2.

[404] *See, e.g.,* letters from GE Group; Financial Services Roundtable; Association of Corporate Counsel.

[405] 28 U.S.C. 530B.

[406] We have modified the rule text to make clear that it applies to any individual seeking to report possible securities law violations to the Commission, and not just those who provide information to us pursuant to the procedures set forth in Rule 21F–9(a).

[407] Based on the suggestion of a commenter, we wish to clarify that confidentiality agreements or protective orders entered in SRO arbitration or adjudicatory proceedings may *not* be used to prevent a party from reporting to us possible securities law violations that he or she discovers during the proceedings. *See* letter from Stuart D. Meissner, LLC. Indeed, given that the SRO's are charged with helping us enforce the Federal securities laws, it would be an odd result if one party in an SRO proceeding could use a protective order to prevent another party from reporting a possible securities law violation to us.

[408] *See, e.g., In re JDS Uniphase Corp. Sec. Litig.,* 238 F.Supp.2d 1127, 1137 (N.D.Cal.2002) ("To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations."); *Chambers* v. *Capital Cities/ABC,* 159 F.R.D. 441, 444 (S.D.N.Y.1995) (holding that "it is against public policy for parties to agree not to reveal * * * facts relating to alleged or potential violations of [Federal] law").

[409] The proposed rule would not, however, address the effectiveness or enforceability of confidentiality agreements in situations other than communications with the Commission about potential securities law violations. Paragraph (a) of the proposal is not intended to prevent professional or religious organizations from responding to a breach of a recognized common-law or statutory privilege (*e.g.,* psychiatrist-patient, priest-penitent) by one its members.

[410] We have made one non-substantive clarifying change to the final rule text, replacing the term "subject of your communication" with "possible securities law violation." The final rule provides that "the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel."

[411] We disagree with the comment that Rule 21F–17(b) is inconsistent with the McDade-Murtha Amendment, 28 U.S.C. 530B. First, as we discussed above, Rule 21F–17(b) does not preempt state bar ethics rules, but instead is simply an application of the "authorized by law" exception. Second, McDade-Murtha does not apply to Commission attorneys.

[412] *See generally* SEC Division of Enforcement Manual § 4.

[413] *See supra* discussion of Rule 21F–4(b)(4)(i).

[414] One commenter recommended that we should establish operating procedures to deal with potentially privileged material. *See* letter from Standards Committee of the Auditing Section of the American Accounting Association. The staff is in the process of developing internal operating protocols for dealing with attorney-client information that whistleblowers may provide us.

[415] 44 U.S.C. 3501 *et seq.*

[416] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Securities Exchange Act of 1934). These three forms were proposed to implement Section 21F of the Exchange Act. The proposed forms allowed a whistleblower to provide information to the Commission and its staff regarding (i) potential violations of the securities laws and (ii) the whistleblower's eligibility for and entitlement to an award.

The Commission did not receive any comments that directly addressed its Paperwork Reduction Act analysis or its burden estimates.[417] In comments on the rule proposals, a number of commenters suggested that the three-form process proposed for obtaining information from whistleblowers was burdensome.[418] As we discuss in connection with Rule 21F–9, our final Rules require largely the same information to be collected, but in response to comments we have combined the information collection into only two forms—Form TCR, which incorporates several questions previously posed on Proposed Form WB–DEC, and Form WB–APP—to simplify the process for whistleblowers.

A. Summary of Collection of Information

Form TCR, submitted pursuant to Rule 21F–9, requests the following information:

1. Background information regarding each complainant submitting the TCR, including the person's name and contact information. We have added a section for the identification of additional complainants.

2. If the complainant is represented by an attorney, the name and contact information for the complainant's attorney (in cases of anonymous submissions the person must be represented by an attorney);

3. Information regarding the person or entity that is the subject of the tip or complaint, including contact information;

4. Information regarding the tip or complaint, including the date of the alleged violation; the nature of the complaint; the type of security or investment, ticker symbol or CUSIP number and name of the issuer or security, if relevant; whether the complainant or counsel has had prior contact with Commission staff and with whom; whether information has been communicated to another agency and, if so, details about that communication, including the name and contact information for the point of contact at the agency, if available; whether the complaint relates to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor; whether the complainant has taken any prior actions regarding the complaint including reporting the violation to a supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations; and the date of such action was taken;

5. A description of the facts pertinent to the alleged violation, including an explanation of why the complainant believes the acts described constitute a violation of the Federal securities laws;

6. A description of all supporting materials in the complainant's possession and the availability and location of any additional supporting materials not in the complainant's possession;

7. An explanation of how the person submitting the complaint obtained the information and, if any information was obtained form an attorney or in a communication where an attorney was present, the identification of any such information;

8. A description of any information obtained from a public source and a description of such source;

9. A description of any documents or other information in the complainant's submission that the complainant believes could reasonably be expected to reveal his or her identity, including an explanation of the basis for the complainant's belief that his or her identity would be revealed if the documents were disclosed to a third party; and

10. Any additional information the complainant believes may be relevant.

Also included in Form TCR are several items previously included in proposed Form WB–DEC, which was required to be submitted pursuant to Proposed Rule 21F–9. First, there are several questions that require a complainant to provide eligibility-related information, by checking a series of "yes/no" answers.[419] Second, the form contains a declaration, signed under penalty of perjury, that the information provided to the Commission pursuant to Proposed Rule 21F–9 is true, correct and complete to the best of the person's knowledge, information and belief. Third, there is a counsel certification, which is required to be executed in instances where a complainant makes an anonymous submission pursuant to the whistleblower program and thus must be represented by an attorney. This statement certifies that the attorney has verified the complainant's identity, and has reviewed the complainant's completed and signed Form TCR for completeness and accuracy, and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief. The certification also contains new statements, which were not included in proposed Form WB–DEC, that: (i) The attorney has obtained the complainant's non-waivable consent to provide the Commission with the original completed and signed Form TCR in the event that the Commission requests it due to concerns that the form may contain false, fictitious or fraudulent statements or representations that were knowingly or willfully made by the complainant; and (ii) the attorney consents to be legally obligated to provide the signed Form TCR within seven (7) calendar days of receiving such request from the Commission.

Form WB–APP, submitted pursuant to Rules 21F–10 and F–11, requires the following information:

(1) The applicant's name, address and contact information;

(2) The applicant's social security number, if any;

(3) If the person is represented by an attorney, the name and contact information for the attorney (in cases of anonymous submissions the person must be represented by an attorney);

(4) Details concerning the tip or complaint, including (a) the manner in which the information was submitted to the SEC, (b) the subject of the tip, complaint or referral (TCR), (c) the TCR number, and (d) the date the TCR was submitted to the SEC;

(5) Information concerning the Notice of Covered Action to which the claim relates, including (i) the date of the Notice, (ii) the Notice number, and (iii) the case name and number;

(6) For related actions, (i) the name and contact information for the agency or organization to which the person provided the original information; (ii) the date the person provided this information, (ii) the date the agency or organization filed the related action, (iv) the case name and number of the related action, and (v) the name and contact information for the point of contact at the agency or organization, if known;

(7) A series of questions concerning the person's eligibility to receive an

[417] We received one comment generally opining that our proposed rules failed to adequately account for the time expended by counsel in representing whistleblowers that extends beyond the completion of our proposed forms. *See* letter from Stuart D. Meissner, LLC at n. 3.

[418] *See. e.g.,* letters from Jane Liu; NWC; Patrick Burns.

[419] *See supra* note 342 for a more detailed description of these questions.

award as described in the discussion Form TCR above;[420]

(8) An optional explanation of the reasons that the person believes he is entitled to an award in connection with his submission of information to the Commission, or to another agency in a related action, including any additional information and supporting documents that may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F–6, and any supporting documents; and

(9) A declaration, signed under penalty of perjury, that the information provided in Form WB–APP is true, correct and complete to the best of the person's knowledge, information and belief.

B. Use of Information

The collection of information on Forms TCR and WB–APP will be used to permit the Commission and its staff to collect information from whistleblowers regarding alleged violations of the Federal securities laws and to determine claims for whistleblower awards.

C. Respondents

The likely respondents to Form TCR will be individuals who wish to provide information relating to possible violations of the Federal securities laws and who wish to be eligible for whistleblower awards. The likely respondents to Form WB–APP will be individuals who have provided the Commission or to another agency in a related action with information relating to a possible violation of the Federal securities laws and who believe they are entitled to an award.

D. Total Annual Reporting and Recordkeeping Burden

i. Form TCR

The Commission estimates that it will receive approximately 30,000 tips, complaints and referrals submissions each year through its Electronic Data Collection System or completed forms TCR.[421] Of those 30,000 submissions, the Commission estimates that it will receive approximately 3,000 Forms TCR each year.[422] Each respondent would submit only one Form TCR and would not have a recurring obligation. In the proposing release, we proposed that a whistleblower would have to complete two forms, proposed Form TCR and proposed Form WB–DEC, to be eligible for an award. In the Final Rules, we have eliminated Form WB–DEC and added the eligibility questions from that proposed form to Form TCR.

The Commission estimates that it will take a whistleblower, on average, one hour to complete the portion of Form TCR that does not include the questions that had previously been included in proposed Form WB–DEC. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. As a result, the Commission estimates that the annual PRA burden of Form TCR is 3,000 hours.

A person who submits information through a Form TCR or the Electronic Data Submission System and who wishes to be eligible for an award under the program must complete the remainder of Form TCR (the additional questions related to eligibility that had been included in Proposed Form WB–DEC). The Commission estimates that it will receive this additional information in roughly 50 percent of the cases in which the Commission receives a Form TCR or an electronic submission of information.[423] As noted above, the Commission estimates that it will receive approximately 30,000 combined electronic submissions and submission on Form TCR each year. Thus, the Commission estimates that it will receive responses to these additional questions in approximately 15,000 instances. We estimate that it will take a whistleblower, on average, 0.5 hours to complete the remainder of Form TCR.[424] Accordingly, we estimate that the annual PRA burden of the remainder of Form TCR is 7,500 hours.

ii. Form WB–APP

Each whistleblower who believes that he is entitled to an award because he provided original information to the Commission that led to successful enforcement of a covered judicial or administrative action, or a related action, is required to submit a Form WB–APP to be considered for an award. A whistleblower can only submit a Form WB–APP after there has been a "Notice of Covered Action" published on the Commission's Web site pursuant to Proposed Rule 21F–10. We originally estimated that we would post approximately 130 such Notices each year. Because the final rules allow for the aggregation of proceedings in certain circumstances, as described in Rule 21F–4(d), we have increased that estimate to 143 Notices per year.[425] In addition, we estimate that we will receive approximately 129 Forms WB–APP each year.[426] Finally, we estimate that it will take a whistleblower, on average, two hours to complete Form WB–APP. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his application for an award. As a result, the Commission estimates that the annual PRA burden of Form WB–APP is 258 hours.

iii. Involvement and Cost of Attorneys

Under the Proposed Rules, an anonymous whistleblower is required, and a whistleblower whose identity is known may elect, to retain counsel to represent the whistleblower in the whistleblower program. The Commission expects that, in most of those instances, the whistleblower's counsel will complete, or assist in the completion, of some or all of the required forms on behalf of the whistleblower. The Commission also

[420] *See supra* at 211 and note 342.

[421] This number is a staff estimate based upon the volume of tips, complaints or referrals received by the Commission on a monthly basis during the past year. The staff believes that the volume of tips, complaints and referrals the Commission has received more recently, and particularly in the months since the passage of Dodd-Frank, provides a more accurate basis for estimating future volumes.

[422] This number is a staff estimate based upon the expectation that roughly 10 percent of all tips received by the Commission will be submitted in hard copy on Form TCR. The staff anticipates that most whistleblowers will elect to submit their information electronically. The electronic submission of information will provide whistleblowers with increased ease of use and will allow whistleblowers to submit more detailed information in roughly the same amount of time it would take them to complete a hard copy Form TCR. Moreover, the Commission should be able to use the information submitted electronically more effectively and efficiently. For example, the Commission will be able to conduct electronic searches of information without first having to convert the data into an electronic format.

[423] This number is a staff estimate. Because this is a new program, the staff does not have prior relevant data on which it can base its estimate.

[424] This is consistent with our estimate of the time it would take a whistleblower, on average, to complete proposed Form WB–DEC.

[425] This number is a staff estimate based upon (i) the average number of actions during the past five years in which the Commission recovered monetary amounts, including penalties, disgorgement or prejudgment interest, in excess of $1,000,000; (ii) the assumption that there should be an increase (roughly 10 percent) in the number of such actions as a result of the aggregation of proceedings permitted under Rule 21F–4(d); and (iii) the assumption that there should be an additional increase (roughly 30 percent) in the number of such actions as a result of the whistleblower program.

[426] This number is a staff estimate based upon two expectations: first, that the Commission will receive Forms WB–APP in approximately 30 percent of cases in which it posts a Notice of Covered Action because we expect that we will continue to bring a substantial number of enforcement cases that are not based on whistleblower information; and second, that we will receive approximately 3 Forms WB–APP in each of those cases. Because this is a new program, the staff does not have prior relevant data on which it can base these estimates.

expects that in the vast majority of cases in which a whistleblower is represented by counsel, the whistleblower will enter into a contingency fee arrangement with counsel, providing that counsel will be paid for the representation through a fixed percentage of any recovery by the whistleblower under the program. Thus, most whistleblowers will not incur any direct, quantifiable expenses for attorneys' fees for the completion of the required forms.

The Commission anticipates that a small number of whistleblowers (no more than five percent) will enter into hourly fee arrangements with counsel.[427] In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses, the Commission makes the following assumptions:

(i) The Commission will receive approximately 3,000 Forms TCR, 1,500 of which contain eligibility-related information previously contained in Proposed Form WB–DEC, and 129 Forms WB–APP annually;[428]

(ii) Whistleblowers will pay hourly fees to counsel for the submission of approximately 75 Forms TCR and 6 Forms WB–APP annually;[429]

(iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average $400 per hour;[430] and

(iv) Counsel will bill on average: (i) 2.5 hours to complete a Form TCR,[431] (ii), and (iii) 10 hours to complete a Form WB–APP.[432]

Based on those assumptions, the Commission estimates that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the whistleblower program forms: (i) $75,000 for the completion of Form TCR; (ii) $24,000 for the completion of Form WB–APP.

E. Mandatory Collection of Information

A whistleblower would be required to complete either a Form TCR or submit his or her information electronically and to complete Form WB–APP or submit his or her information electronically to qualify for a whistleblower award.

F. Confidentiality

As explained above, the statute provides that the Commission must maintain the confidentiality of the identity of each whistleblower, subject to certain exceptions. Section 21F(h)(2) states that, except as expressly provided:

• [T]he Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission [or certain specific entities listed in paragraph (C) of Section 21F(h)(2)].

Section 21F(h)(2) also allows the Commission to share information received from whistleblowers with certain domestic and foreign regulatory and law enforcement agencies. However, the statute requires the domestic entities to maintain such information as confidential, and requires foreign entities to maintain such information in accordance with such assurances of confidentiality as the Commission deems appropriate.

In addition, Section 21F(d)(2) provides that a whistleblower may submit information to the Commission anonymously, so long as the whistleblower is represented by counsel. However, the statute also provides that a whistleblower must disclose his or her identity prior to receiving payment of an award.

IV. Economic Analysis

As discussed above, Section 21F of the Exchange Act (added by Section 922 of the Dodd-Frank Act) establishes substantial new incentives and protections for whistleblowers.[433] First, eligible whistleblowers are entitled to an award equal to 10 to 30 percent of the money recovered when they voluntarily provide us with original information that leads to a monetary sanction greater than $1 million in a Commission enforcement action. Second, Section 21F prohibits employment retaliation against individuals for making submissions to us and it provides that whistleblowers may make these submissions anonymously.

Although many of the requirements of the whistleblower award program are established by Section 21F, Congress authorized the Commission to issue rules and regulations as necessary or appropriate to implement the program. In doing so, we faced a number of policy issues on which we solicited public comment, including:

• Whether the whistleblower program should provide financial incentives for attorneys and others to breach the attorney-client privilege in order to seek an award?

• To what extent should the program provide awards to individuals who have violated the Federal securities laws?

• Whether the program should require employees to first report possible violations through their employer's internal compliance procedures before coming to the Commission? If not, should the program provide other incentives to encourage

[427] This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel to assist them in preparing the forms.

[428] The bases for these assumed amounts are explained in Sections V.D.i., V.D.ii. and V.D.iii. above.

[429] These amounts are based on the assumption, as noted above, that no more than 5 percent of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement. The estimate of the number of Forms TCR submitted by attorneys on behalf of whistleblowers may turn out to be high because it is likely that most attorneys will submit tips electronically, rather than use the hard-copy Form TCR. However, in the absence of any historical data to rely upon, the Commission assumes that attorneys will submit hard-copy Forms TCR in the same percentages as all whistleblowers.

[430] The Commission uses this hourly rate for estimating the billing rates of securities lawyers for purposes of other rules. Absent historical data for the Commission to rely upon in connection with the whistleblower program, the Commission believes that this billing rate estimate is appropriate, recognizing that some attorneys representing whistleblowers may not be securities lawyers and may charge different average hourly rates.

[431] In the proposing release, we estimated that it would take an attorney, on average, 2 hours to complete proposed Form TCR. As noted above, in the Final Rules, we have added to Form TCR questions regarding eligibility that had been in proposed Form WB–DEC. As a result, we estimate that it will take an attorney, on average, 2.5 hours to complete Form TCR.

[432] The Commission expects that counsel will likely charge a whistleblower for additional time required to gather from the whistleblower or other sources relevant information needed to complete Forms TCR and WB–APP. Accordingly, the Commission estimates that on average counsel will bill a whistleblower 2.5 hours for the completion of Form TCR and 10 hours for completion of Form WB–APP (even though the Commission estimates that a whistleblower will be able to complete the entire Form TCR (including the eligibility questions that had been found in Form WB–DEC) in 1.5 hours and Form WB–APP in two hours).

[433] Whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements (*e.g.,* fear of job loss) and non-pecuniary elements (*e.g.,* sense of "doing the right thing," fear of social ostracism). *See* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 Boston Univ. L. Rev. 91, 112–13 (2007) (citing sources); *id.* ("Assuming rational decision making, an employee will blow the whistle when the marginal private benefits exceed the marginal private costs."). The whistleblower award program established by Section 21F seeks to shift the balance of these factors in favor of timely blowing the whistle over silence for individuals who may have useful, quality information about possible securities law violations.

employees to report internally in appropriate circumstances?

In order to implement the program effectively, we addressed these and other issues in our proposed rules, which defined and interpreted various statutory provisions, and established procedures that whistleblowers must follow both when submitting information to us and when applying for awards.

We requested comments and empirical data on all aspects of the economic analysis of the proposed rules, and received only a few comments specifically directed to that analysis. Two commenters recommended that we should consider the costs to companies and other entities that would result if employees are not required to report internally before coming to us.[434] Likewise, two commenters recommended that we should revise the rules to reduce the costs on companies and the Commission that may result from "false or spurious claims" or "meritless complaints" of possible securities law violations.[435] Although the commenter did not quantify these costs, it noted these costs would include companies' legal and accounting fees, and the Commission's costs to review and evaluate these frivolous submissions.

Below we consider the costs and benefits of the final rules, and their effects on efficiency, competition, and capital formation. We limit our analysis to those rules on which we exercised discretion.

A. Analysis of Benefits, Costs, and Economic Effects of the Rules

In promulgating these rules, we have sought to strike the right balance in defining terms and otherwise implementing the whistleblower program so as not to be overly restrictive or overly broad. Overly restrictive definitions or requirements could render the program ineffective if this meant that only a small fraction of whistleblowers who provide us with significant information would qualify for monetary rewards. This could discourage potential whistleblowers from coming forward with information about possible securities law violations, thereby depriving us of meritorious tips. This could in turn mean that some securities law violations would continue unreported for longer periods of time, with the result that overall enforcement and deterrence of violations would be less effective.

By contrast, overly broad definitions and unduly permissive provisions could result in inefficient use of the Investor Protection Fund—especially in situations where the Commission is already well into the process of obtaining sufficient information to bring a successful enforcement action. An important effect of the whistleblower program is reduced economic cost of collecting necessary information about possible securities law violations. To achieve this, the rules should incentivize the prompt and early submission of high-quality, credible tips. From a cost-benefit perspective, doing so leverages the Investor Protection Fund to obtain the maximum benefit from the whistleblower program with respect to the twin goals of protecting investors and increasing public confidence in the markets.

In addition to these considerations, we also assessed the economic impact of our final rules on investors, companies, and other corporate entities. We particularly focused on how the whistleblower program could effectively and efficiently use internal compliance programs in appropriate circumstances to best achieve the statutory objectives, without imposing undue costs on whistleblowers, investors, our enforcement efforts, or companies. We recognized that various policy options presented different trade-offs with respect to the costs and benefits imposed on these various interests.

With these considerations in mind, and after reviewing the public comments we received, we have structured the definitions, interpretations, and other rule provisions to seek to (i) encourage high-quality submissions and discourage frivolous submissions, (ii) encourage whistleblowers to provide information early, rather than waiting to receive a request or inquiry from a relevant authority; (iii) minimize unnecessary burdens on whistleblowers and establish fair, transparent procedures; and (iv) promote the use of effective internal compliance programs in appropriate circumstances.

1. Eligibility for Anti-Retaliation Protection

Rule 21F–2(b) states that anti-retaliation employment protection will be provided to whistleblowers who have a "reasonable belief" that the information they provide reveals a possible securities law violation. The "reasonable belief" standard provides a familiar legal framework that puts potential whistleblowers on notice that meritless submissions cannot be the basis for anti-retaliation protection.

Reducing frivolous submissions in this way should provide benefits. First, Commission resources will be freed up to focus on more meritorious submissions. Second, the costs that employers can be forced to incur when employees abuse the anti-retaliation protections should be lower. These costs can include not only litigation costs resulting from bad faith claims of anti-retaliation, but also inefficiencies stemming from some employers' decisions not to take legitimate disciplinary action due to the threat of bad faith anti-retaliation litigation.

2. The Penalty of Perjury

Rule 21F–9(b)—which requires whistleblowers who wish to participate in the whistleblower program to declare, under penalty of perjury, that their submission is truthful to the best of their knowledge—should similarly discourage frivolous submissions. This should reduce the costs incurred by the Commission from devoting resources to review and evaluate frivolous submissions, and also create efficiency gains by permitting the Commission to place greater reliance on the accuracy of information that is received.[436] By reducing false and frivolous submissions, Rule 21F–9(b) should also reduce the costs to companies and other persons that might otherwise result from the Commission opening investigations based on false or spurious allegations of wrongdoing.

3. Monetary Award Eligibility

Rule 21F–4 provides definitions for "voluntary" (*e.g.,* before the Commission issues a subpoena or makes a request)[437] and "information that leads

[434] *See* letters from the Association of Corporate Counsel and Edison Electric Institute. A number of other commenters also generally raised the concern that companies would be burdened if we did not require employees to report possible violations of the securities laws internally either before or simultaneously with the submission of information to the Commission. In our discussion of Rule 21F–4(c)(3) above, we discuss our views on this issue and our decision not to require whistleblowers to report internally.

[435] *See* letters from the ABA and Edison Electric Institute.

[436] *See, e.g.,* Alexander Dyck *et al., Who Blows the Whistle on Corporate Fraud?,* J. Fin. (2011), *available at http://www.afajof.org/afa/forthcoming/4820p.pdf.* The staff will review and evaluate all TCRs, regardless of whether the whistleblower has completed the declaration portion. However, because the declaration would aid in assessing reliability, the staff may consider whether a whistleblower has executed a declaration in prioritizing the investigation of TCRs and the allocation of the Division of Enforcement's limited resources. As Rule 21F–9 provides, a whistleblower will not be eligible for an award if he fails to complete the declaration at the time he submitted his TCR form.

[437] Rule 21F–4(a) defines "Voluntary Submission of Information" to require that the whistleblower make his or her submission before a request, inquiry, or demand that relates to the subject matter

to successful enforcement."[438] These definitions are designed to ensure that the Commission receives actionable whistleblower information—tips indicating a high likelihood of a substantial securities violation—in a timely manner. More specifically, the definitions seek to incentivize submissions involving information that is unobservable to the Commission, that is not likely to be uncovered as part of any on-going investigations or examinations, that increases the probability of a successful enforcement action, and that reduces our enforcement costs in terms of time, effort, and resources. We believe that paying awards for whistleblower information that satisfies these criteria helps leverage the Investor Protection Fund to provide the maximum law enforcement benefit. By contrast, however, we do not believe that information provided by a whistleblower in instances where the Commission is about to obtain the same information in the ordinary course of an ongoing investigation would justify the expenditure of funds from the Investor Protection Fund, thus warranting the exclusion of such submissions from the definition of "voluntary" (so as to not qualify for an award). This will provide the additional benefit of incentivizing whistleblowers to report possible violations early—before they receive a subpoena or are otherwise requested to provide information by the Commission or other regulatory authority.[439]

The eligibility exclusions outlined in Rule 21F–4(b) under the definitions of "independent knowledge" and "independent analysis" are similarly sensitive to cost-benefit considerations. Rule 21F–4(b) excludes individuals in particular relations of trust from receiving awards in certain limited situations where, in our view, doing so on balance better promotes the overall enforcement of the Federal securities laws. For example, we believe that we can achieve more efficient enforcement of the securities laws by not creating incentives for attorneys or others to breach the attorney-client privilege by submitting tips disclosing privileged communications. Attorneys are uniquely positioned to advise clients when conduct may violate the Federal securities laws, and therefore they can plan a critical role in preventing or stopping such conduct. Accordingly, we believe that overall compliance with the Federal securities laws is better promoted by generally excluding information that is shared in confidence with attorneys by their clients so as to promote open attorney-client consultations.

For similar reasons, we have placed certain limitations on the ability of particular categories of individuals to receive awards based on information that they learn in their professional capacity because of the positions that they occupy—*e.g.,* officers, directors, trustees, or partners of an entity; employees with internal audit or compliance responsibilities; and employees or associates of either firms that are retained to investigate possible securities law violations, or independent public accountants that are retained to conduct engagements required by the securities laws. As a general matter, these individuals occupy sensitive roles that can enable them to identify and stop possible violations of the securities law, and their diligence in doing so can be an important factor that companies or other entities achieve compliance. Thus, we believe it is a more efficient and cost-effective use of the Investor Protection Fund to provide further incentive to these individuals to fulfill those responsibilities rather than allowing them to use knowledge of possible wrongdoing to obtain an award by reporting to the Commission. That said, we have recognized certain exceptions to the exclusions that, in our view, reflect situations where the benefit of paying an award—in terms of reducing the harm to the entity and investors, and in preserving our enforcement capacity—justifies the cost associated with a claim on the Investor Protection Fund.[440]

Additionally, with respect to employees with internal audit or compliance responsibilities, we believe the exclusion is appropriate because to do otherwise would undermine the incentives for companies and other entities to establish and maintain effective internal compliance programs. As we discussed in more detail below in Part (A)(7), effective internal compliance programs can in appropriate circumstances provide significant benefits both in terms of reducing the harm that entities and investors experience from securities law violations, and in terms of efficiently assisting our own enforcement efforts.

Finally, Rule 21F–4(d) interprets the statutory term "action" to allow the Commission to aggregate the monetary sanction from two or more closely

of the submission is directed to the whistleblower or anyone representing the whistleblower (i) by the Commission; (ii) in connection with an investigation, inspection, or examination by the PCAOB or any self-regulatory organization; or (iii) in connection with an investigation by the Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority. The rule further provides that a whistleblower's submission will be deemed voluntary if it was provided after a Commission request, inquiry, or demand directed to the whistleblower, *provided* that the whistleblower had previously disclosed the information voluntarily to one of the other authorities identified in the rule. Finally, the rule provides that a submission is not voluntary if the whistleblower was required to report the information to the Commission as a result of a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth in the rule, or a duty that arises out of a judicial or administrative order.

[438] Rule 21F–4(c) defines "Information that Leads to Successful Enforcement" such that a whistleblower is only entitled to an award if one of three general standards is satisfied. The first standard is met if a whistleblower gave the Commission original information that was sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the whistleblower's original information. The second standard is met if the whistleblower gave the Commission original information about conduct that was already under examination or investigation by the Commission, or certain other specified law enforcement or regulatory entities, and the whistleblower's submission significantly contributed to the success of the action. Finally, the third standard permits a whistleblower to report original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time he reports the information to the Commission (but no later than 120 days after the internal submission); this standard under the led-to definition will be satisfied if the entity thereafter provided the whistleblower's information to us, or provided results of an audit or investigation initiated in response to the whistleblower's report, and the information the entity provided to us satisfies either (1) or (2) above.

[439] We note that there may be an adverse incentive for would-be whistleblowers to delay blowing the whistle on a violation in progress in order to allow the magnitude of the harm to increase and thus qualify the potential whistleblower for a larger amount. *See, e.g.,* Robert Howse & Ronald J. Daniels, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy,* UNIV. PENN. SCHOLARLY COMMONS, Departmental Paper (1995) 527 ("[I]t is often suggested that the calibration of the amount of the reward from whistleblowing directly to the amount of the penalty * * * provides whistleblowers with an incentive to report wrongdoing later rather than earlier, and to do so only after the corruption has produced much more serious consequences, rather than disclosing evidence of corruption in the corporation immediately."). However, we believe that other elements of the whistleblower program provide additional incentives for whistleblowers to report information early. For example, a potential whistleblower who does not report information early runs the risk that another person may provide the same information to the Commission thereby possibly denying the dilatory whistleblower from receiving an award.

[440] These exceptions, which are set forth in Rule 21F–4(b)(4)(v), permit a submission where: (i) a report to the Commission is necessary to prevent substantial harm to the entity or investors; (ii) the entity is engaging in conduct that will impede our investigation; or (iii) 120 days have elapsed.

associated judicial or administrative proceedings.[441] From a cost perspective, this will result in more awards, as well as larger awards, being paid from the Securities Investor Protection Fund. However, we believe the benefits of these additional award expenditures justify those costs. The ability to aggregate the monetary sanctions from two or more closely associated Commission proceedings should enhance the incentive for whistleblowers to come forward in a timely manner where there is the potential for multiple closely-associated Commission proceedings that collectively may reflect more than a million dollars in monetary sanctions, but none of which would likely do so individually. Without the ability to aggregate Commission proceedings in these instances, a potential whistleblower might prefer to delay reporting possible violations until he is sufficiently confident that the Commission can bring at least one single proceeding that satisfies the covered action threshold; this could lead to unnecessary additional costs for entities and investors due to the delay in reporting on-going violations.

4. Eligibility for Culpable Whistleblowers

Rule 21F–16 is designed to minimize the potential costs and enhance the benefits of paying a culpable whistleblower an award.[442] On the one hand, we do not believe the Investor Protection Fund should pay culpable whistleblowers for their own misconduct or with respect to highly culpable whistleblowers, to also pay for the misconduct of entities that they directly cause. On the other hand, we also recognize that culpable whistleblowers can be a valuable source of information about undetected securities law violations. Thus, we believe the Investor Protection Fund should pay culpable whistleblowers for information that leads to monetary sanctions against other participants in the violation; indeed, to do otherwise could unduly reduce the amount of useful information the Commission receives, thereby resulting in some on-going violations remaining undetected to the detriment of investors.

5. Award Amount Factor

The revisions to final Rule 21F–6, governing the criteria used in determining the amount of an award, are designed to provide strong incentives for the whistleblower to report violations with increasing levels of quality, timeliness, and validity.[443] Rule 21F–6 allows the Commission to set the award percentage based, among other things, on the significance of the information provided by the whistleblower and any unreasonable delay by the whistleblower in making the submission.[444] Taken together, these rules provide for greater awards for more timely and more useful information, and reduced awards for whistleblowers whose dilatory or uncooperative conduct may impair our enforcement efforts.

The rules also encourage whistleblowers to work with the Commission as we investigate and litigate enforcement actions, which should provide the benefit of enhanced Commission enforcement of the Federal securities. For example, Rule 21F–6(a)(2) provides that, in setting the award percentage, we will consider the assistance the whistleblower provided us. To complement this, Rule 21F–17(a) makes it unlawful for another person to take action that impedes a whistleblower's efforts to communicate with the Commission. Likewise, Rule 21F–17(b), by authorizing communications between the Commission staff and a whistleblower without seeking consent of the counsel of an entity with whom the whistleblower is employed, has the benefit of encouraging whistleblowers to communicate with us without the fear that their communications will lead to disclosure of their identity to their employer.[445] We believe that these rules provide benefits by ensuring that whistleblowers are able to work with the Commission as it takes actions in response to possible securities law violations, and thus justify any costs on companies.

6. Procedures Required for a Whistleblower to Qualify for an Award

The procedural rules adopted also further the effective implementation of the program.[446] Form WB–APP requires the submission of information that is necessary for the Commission to determine award eligibility. The Commission recognizes that it will take time and effort on the part of whistleblowers to complete and submit the forms. While requiring an additional form imposes a cost on potential whistleblowers, determining the appropriate level of award for each instance of qualified whistleblower is

[441] Rule 21F4(d) defines a Commission "action" generally as a single captioned judicial or administrative proceeding brought by the Commission. However, the rule identifies two exceptions to this general definition to allow payment of an award in cases where we may have chosen for various reasons to bring separate proceedings against respondents or defendants involved in the same or closely related conduct. The first exception to the general definition provides that an action will constitute two or more Commission proceedings arising from the same nucleus of operative facts for purposes of making an award under Rule 21F–10; this will permit, for example, considering two or more proceedings together to determine that there are monetary sanctions in excess of $1,000,000 and that an award may be paid. The second exception provides that, for purposes of making payments under Rule 21F–14 on a Commission action for which we have already made an award, we will treat as part of the same action any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.

[442] Rule 21F–16 provides that, in determining whether the required $1 million threshold for an award has been satisfied, the Commission will not include any monetary sanctions (i) that the whistleblower is ordered to pay, or (ii) that an entity is ordered to pay if the entity's liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The rule also provides that the Commission will not include any such amounts in the total monetary sanctions collected for purposes of calculating the amount of an award payment to a whistleblower.

[443] Rule 21F–6 sets forth the factors for determining the award percentage. Four general factors may lead to an increase in the award percentage: the significance of the information provided by the whistleblower; the assistance provided by the whistleblower; the law enforcement and programmatic interests; and the whistleblower's voluntary participation in internal compliance systems. In addition, three general factors may lead to a decrease in the award percentage: the whistleblower's culpability or involvement in the matters associated with the Commission or related action; a substantial and unreasonable reporting delay; or, in cases where the whistleblower, while interacting with his entity's internal compliance or reporting system, interferes with or otherwise undermines the system's integrity.

[444] *See* Ben Depoorter & Jef De Mot, *Whistleblowing: An Economic Analysis of the False Claims Act,* 14 Sup. Ct. Econ. Rev. 135, 158 2006 (awards should be structured to align whistleblowers private incentives with the public interest in timely reporting).

[445] Rule 21F–17(b) states that if a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel has initiated communications with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with the whistleblower regarding the subject of the communication without seeking the consent of the entity's counsel.

[446] Rules 21F–9, 10 and 11 set forth the procedures for submitting information and making a claim for an award. First, Rule 21F–9(a) provides that an individual qualifies as a whistleblower if he submits a Form TCR electronically through the Commission's web page or provides the Commission with a completed copy by mail or facsimile. Second, Rule 21F–9(b) provides that, to qualify for an award, the whistleblower must declare under penalty of perjury that the information in the Form TCR is true, correct, and complete to the best of his knowledge, information, and belief. The rules also require potential whistleblowers to complete a second form in the claims phase to establish potential eligibility for an award under the program. Pursuant to Rules 21F–10 and 21F–11, a whistleblower must complete Form WB–APP to apply for an award for a covered judicial or administrative action by the Commission or a related action.

critical to successful implementation of the whistleblower rule. The Commission needs to collect pertinent information from the whistleblower to determine whether he or she should receive an award and, if so, in what amount. This information will need to be evaluated in conjunction with the Commission's enforcement action to determine the significance of the whistleblower's contribution. While we have simplified the procedures in the final rules, it is still possible that some prospective whistleblowers could find the procedures burdensome, and as a result, be deterred from coming forward to provide information to the Commission.

The procedural elements in the rules are structured to provide a fair, transparent process for consideration of whistleblower award claims. We believe that this should help incentivize individuals to participate in the whistleblower award program by coming forward with high-quality, timely information about possible securities law violations.

There is also an additional cost on whistleblowers who wish to participate anonymously in the whistleblower program—Rule 21F–9(c) requires that these whistleblowers locate and retain counsel to make a submission on their behalf.[447] We recognize that this requirement may, in some instances, discourage potential whistleblowers from making submissions of valuable information. Nonetheless, we believe that on balance this requirement is appropriate. For example, the attorney is needed to serve as the point-of-contact for us when we need to elicit additional information, while at the same time continuing to preserve the confidentiality of the whistleblower. The involvement of an attorney can also help to protect against the possibility that anonymous whistleblowers are making frivolous or false submissions, can help the whistleblower develop and draft his submission to maximize its informational value to the Commission (and thus the whistleblower's chance of an eventual award), and can assist in verifying the whistleblower's eligibility for participation in the program early in the process.

The 120-day "look back" period for whistleblowers who make submissions internally may also impose costs on whistleblowers in that it requires them to act within a certain period of time to ensure that their eligibility for an award under the program is not compromised. The Commission has set the 120-day period based on a consideration of those costs against the concern that a longer grace period could serve to delay the Commission's receipt of valuable information that could be used to protect investors.[448]

7. Incentives for Internal Reporting

As discussed above, we have built significant incentives into the whistleblower award program that we believe will encourage whistleblowers to report internally in appropriate circumstances. We believe that this approach effectuates the general statutory purpose of Section 21F of the Exchange Act—which is to enhance the enforcement of the Federal securities laws by encouraging whistleblowers to come forward to the Commission[449] with quality tips regarding possible securities law violations—in a manner that is consistent with, and reflective of, cost-benefit considerations.

Our proposed rules solicited comment on the question of how, if at all, to incorporate internal compliance reporting into the whistleblower award program. The focus of the proposed rules was on the principal purpose of the statute, which is ensuring that the Commission receives quality tips as a result of the financial incentive created by Section 21F of the Exchange Act.[450]

In response to the proposed rules, many commenters from the corporate community argued that whistleblowers would divert from internal reporting in response to the financial incentive of a potential whistleblower award from the Commission.[451] These commenters further argued that companies and other entities would experience significant costs as a result. Among the costs that they identified are the following: (i) Increased harm to entities and investors due to the delay in entities learning about on-going violations from the Commission rather than from internal whistleblowing; (ii) increased defense and litigation costs in responding to Commission enforcement proceedings from, among other things, non-meritorious whistleblower complaints that could have been resolved internally; (iii) increased harm to entities and investors when *non*-securities law violations go unreported to the entity. These commenters did not provide us with projections or estimations regarding either the degree to which whistleblowers would likely be diverted from internal reporting under our proposed rule, or the resulting costs to companies or other entities.[452]

Analysis of the academic literature, although not wholly conclusive, provides reason to believe that a sizable percentage of whistleblowers who currently report internally are motivated

[447] The statute requires that a whistleblower who makes an anonymous claim for an award must be represented by counsel. Section 21F(d)(2)(A) of the Exchange Act.

[448] As stated in the release discussion of Rule 21F–4(b)(7), this 120-day period applies only to whistleblowers and does not prescribe for companies the appropriate time limits for reporting violations to the Commission, nor does it impose an obligation to report.

[449] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *.").

[450] Our proposing release did explain, however that whistleblower reporting through internal compliance procedures can complement or otherwise appreciably enhance our enforcement efforts in appropriate circumstances. For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims, and may make such findings available for the Commission. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning internal compliance program in place. Screening allegations through internal compliance programs may limit false and frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.

[451] *See, e.g.,* letters from CAQ, Edison and GE Group. *See also* letter from the CCMC ("In the absence of an affirmative restriction on external reporting when effective internal compliance channels are available, or provision of significant incentive for using those internal channels, employees will face an irresistible temptation to go to the SEC with their report.").

[452] We do note, however, that other commenters provided some evidence to counter the assertion that whistleblowers would be diverted from reporting internally in significant numbers. For example, one commenter cited an empirical study of the False Claims Act (FCA)—which requires no mandatory internal reporting—stating that "the overwhelming majority of employees voluntarily utilize internal reporting processes, despite the fact that they were potentially eligible for a large reward under the FCA." Letter from NWC at 4. This study claims that "89.7 percent of employees who eventually filed False Claims Act cases had made an internal report, despite the absence of a legal requirement that they do so." *See supra* discussion in footnote 232. *See also* letter from TAF at 22 ("[I]t is our membership's experience that the vast majority of whistleblowers *do,* in fact, report their concerns first to either their superiors or compliance officers, and only avail themselves of statutory whistleblower programs when their concerns have been dismissed or unaddressed, or when they suffer retaliation.") (emphasis in original). *See generally* Aaron S. Kesselheim *et al., Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies,* 362 New England J. Med. 1832, 1834 & 1836 (2010) (a study of *qui tam* cases involving pharmaceutical companies that showed "[n]early all (18 of 22) insiders first tried to fix matters internally by talking to their superiors, filing an internal complaint, or both" despite the fact that the ultimate monetary awards from external reporting were large, ranging from $100,000 to $42 million, with a median of $3 million."); *id.* at 1839 (discussing possible limitations with the study).

by non-monetary reasons.[453] Thus, we anticipate that many whistleblowers would continue to report internally.

Nonetheless, we recognize that there could be a sizeable percentage of whistleblowers who, under our rules, could now be more motivated to report to the Commission in lieu of reporting internally because of the financial incentives created by the whistleblower program. In response to this possibility, we have tailored the final rules to provide whistleblowers who are otherwise pre-disposed to report internally, but who may also be affected by financial incentives, with additional economic incentives to continue to report internally. The final rules provide that a whistleblower who reports internally can collect a whistleblower award from the Commission if his internal report to the company or entity results in a successful covered action. In addition, the final rules provide that when determining the amount of an award, the Commission will consider as a plus-factor the whistleblower's participation in an entity's internal compliance procedures.

We believe these provisions should substantially reduce the degree of diversion of whistleblower reporting from companies. Assuming that some significant percentage of whistleblowers who were pre-disposed to report internally prior to the whistleblower program are inclined to change their behavior in response to financial incentives, these provisions should mitigate any diversion effect. These provisions do so by providing that an internal report can be an additional path to a whistleblower award. Indeed, to the extent that this sub-set of potential whistleblowers is responsive to economic incentives, they should be motivated to report internally by the final rules because by doing so they can increase both the probability and the magnitude of a potential recovery. Specifically, if they submit their tip internally, and either simultaneously or within 120 days make the same submission to the Commission, it is conceivable that they can increase the probability of an award because they now have two paths to a recovery—a Commission investigation, or an internal corporate investigation. They can increase the magnitude of a potential award because of the award criteria that provides a plus-factor for participation in an entity's internal compliance procedures.[454]

These additional financial incentives for whistleblowers to report internally should make it less likely that significant numbers of tips will be diverted from internal reporting.[455] This in turn should mitigate companies' costs from lost internal whistleblower reports. Moreover, while some whistleblower tips may nonetheless be diverted to the Commission,[456] any decrease in internal reporting should be offset at least in part by the fact that our final rules will incentivize other individuals who might not have reported internally prior to the whistleblower program to do so now. The financial incentives offered by the final rules to report internally should induce individuals to report who, absent any financial incentive, would never have reported either internally or to the Commission.[457] As a result, companies and other entities should now receive some information related to possible violations that they would not have otherwise received, which in turn may allow these entities to stop on-going violations, thereby limiting the harm to the entities and investors sooner than might otherwise have been the case.

In addition to considering the benefits and costs of the final rules on companies and other entities, we considered the benefits and costs of the final rules on our own enforcement program. As we stated in our proposing release, internal reporting to effective compliance programs can provide valuable assistance to our own enforcement efforts. By providing a strong financial incentive for whistleblower to report internally when appropriate, we are leveraging the Investor Protection Fund established by Section 21F of the Exchange Act to obtain the benefit of effective internal compliance programs that can respond to whistleblower tips by, among other

[453] Whistleblowers are often willing to report notwithstanding the absence of financial incentives and the potential for costs to them in terms of time, money, social stigma, and a possible job loss. Non-monetary incentives that often motivate individuals to whistleblow include: (i) Cleansing the conscience, (ii) punishing wrongdoers (in some cases out of spite), (iii) simply "doing the right thing" for the sake of a general increase in social welfare, or (iv) motive for self-preservation. *See* Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistleblower Policy,* 25 J. L. Econ. & Org. 157, 159 (2009) (providing a short review of academic literature on sociology and psychology and listing non-monetary motives for whistleblowing); *see also* Aaron S. Kesselheim *et al., Whistle-Blower's Experience in Fraud Litigation Against Pharmaceutical Companies,* 362 New England J. Med. 1832, 1834 (2010) (listing as primary motivations for *qui tam* lawsuit self-preservation, justice, integrity, altruism or public safety) (cited by letter from NWC). Research has also shown that the likelihood of internal whistleblowing increases when ethical and legal compliance policies exist in an organization, particularly if specific whistleblowing procedures are in place. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers,* 2006 B.Y.U. L. Rev. 1107, 1142–43 (2006) ("A disclosure channel also harmonizes with a whistleblower's tendency to report misconduct internally—by this sense of loyalty. * * * [Internal reporting] fits well with the psyche of the American employee, whose sense of loyalty to the organization keeps her from reporting misconduct externally, but who may report internally if encouraged by the organization.") (cited in letter from CCMC).

[454] We believe that the final rules' financial incentives to report internally should be particularly attractive to whistleblowers who may be uncertain that their information is sufficiently compelling to cause the Commission staff to open an investigation. Where this is the case, whistleblowers may reasonably view internal compliance as the more likely path for an eventual award on the belief that an effective internal compliance process will investigate the information.

[455] A commenter suggested that some whistleblowers could still decline to report a violation internally based on the strategic calculation that the company could reduce the monetary sanctions through remediation, self-reporting, cooperation, etc., which in turn might reduce the whistleblower's award. *See* letter from CCMC. Although the commenter provided neither anecdotal nor empirical evidence to support this proposition, we think the incidence of this (if it should occur) would be relatively small for several reasons. *Cf.* letter from NWC at 7. First, no whistleblower can safely assume that his decision to bypass internal compliance will in fact lead to larger monetary sanctions. We will make our own assessment of the circumstances—indeed, as noted at pp. 92, sometimes our first step will be to contact the company—and good cooperation by the company overall, even in response to contact from the Commission staff, might mean that the monetary sanctions will not be any greater than if the whistleblower had simultaneously reported internally. Second, various factors in Rule 21F–6 allow us to account for a reduced monetary sanction by providing for an upward adjustment in the award determination where the internal reporting potentially resulted in a lower monetary sanction. Finally, to the extent there is any impact on whistleblower behavior, we believe it will generally mean that whistleblowers decide to report simultaneously, rather than availing themselves of the 120-day look-back period, out of concern that the latter course might afford companies an increased opportunity to take actions that could possibly result in a reduced monetary sanction.

[456] For example, we recognize that, notwithstanding the strong financial incentives to report internally, whistleblowers may bypass internal compliance procedures in cases involving clear fraud or other instances of serious securities law violations by senior management. In these cases, however, we believe the benefits of coming to the Commission, both in terms of our enforcement efforts and in terms of investors' interests, will often be quite significant, so as to justify any potential costs to the entity.

[457] *See* Elletta Sanrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act,* 37 Vill. L. Rev. 273, 284 (finding that "money rewards for whistleblowing may produce the desired result of increasing the number of individuals willing to report activity" and stating that "financial incentives should encourage a new type of whistleblower to step forward"). *See generally* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 Boston Univ. L. Rev. 91, 118–26 (2007) (discussing reasons that insiders may not report information about ongoing corporate and financial fraud in the absence of significant financial incentives to do so).

things, undertaking prompt investigations that can lead to timely, well-documented reports of violations to the Commission.

As alternatives to the significant incentives approach that we have adopted, we considered the suggestions from commenters that we adopt some form of a mandatory internal reporting requirement as a condition on whistleblowers for award eligibility. Such an approach could take the following forms: (1) Mandatory internal pre-reporting, where the whistleblower's eligibility would be conditioned on his first making a report internally and providing the company's internal compliance function a meaningful period of time to respond; or (2) mandatory simultaneous reporting, under which the whistleblower's eligibility is conditioned upon a simultaneous report to internal compliance and the Commission. We evaluated these alternatives by analyzing how whistleblowers' expected behavior might change relative to the significant incentives approach adopted in the final rules, and what those changes might mean for the resulting costs and benefits to companies as well as the Commission's enforcement efforts.

We believe that either a mandatory pre-reporting or a simultaneous reporting requirement would not achieve an appreciable cost-benefit advantage over the approach we are adopting, and indeed a mandatory internal reporting requirement could be less advantageous because it could result in less overall whistleblowing. With respect to those whistleblowers who are already pre-disposed to report internally, a mandatory internal reporting requirement should have little or no net difference from the significant financial incentives approach that we are adopting.[458] To the extent that these whistleblowers respond to the financial incentives of a potential whistleblower award, we would expect them to report internally under a mandatory internal reporting requirement to be eligible for a whistleblower award from us, or to report internally under our final rules so as to seek to increase the probability and magnitude of any potential award.

The most likely difference between a mandatory regime and the significant financial incentives approach is with respect to the category of whistleblowers who, prior to the whistleblower award program, were not predisposed to report either internally or to the Commission, but who are now willing to come forward in response to a financial inducement. Within this category of whistleblowers, we believe there is some subset who would respond to the financial incentive offered by our final rules by reporting *only* to us, but who would not come forward either to us or to the entity if the financial incentive were coupled with a mandatory internal reporting requirement.[459] Requiring internal reporting would have several adverse consequences: The Commission would lose critical information about some possible securities law violations, and companies and investors in turn would suffer as on-going violations remained undetected and unremedied.[460]

Finally, we have considered the alternative of mandating that a whistleblower report internally within a specified period of time *after* reporting to us, *unless* upon reviewing the submission we direct the whistleblower not to report internally. Conceptually, this approach could allow the Commission an opportunity to review a whistleblower's submission and direct him not to report internally in situations where, among other things, (i) we identify a basis to believe that he might in fact suffer retaliation, or (ii) there would be no benefit to reporting internally either because the entity might engage in a cover-up or the internal compliance program is ineffective. This approach could encourage *some* whistleblowers who might otherwise be discouraged from reporting to us under a pure mandatory reporting regime because these whistleblowers could perceive an opportunity to persuade the Commission that they should be excused from making the mandatory internal report.[461]

Notwithstanding this potential benefit, however, we do not believe that this approach would have any significant cost-benefit advantage over the approach that we have adopted. In fact, this alternative approach would have significant disadvantages over the adopted rules. Simply put, for this approach to operate effectively and efficiently, the Commission would need to be in a position to meaningfully assess within a very short time—likely a few weeks—whether a whistleblower should be excused from reporting internally. However, the Commission is not in a position to make the necessary fact-intensive assessments identified above in a considered and reliable manner, especially within this short time frame.[462] Moreover, this could

[458] Some commenters suggested that a mandatory internal pre-reporting requirement could reduce the Commission's cost of information processing by filtering out frivolous or low quality tips from being submitted to us. *See* Americans for Limited Government. However, we believe other mechanisms in the final rules are reasonably designed to discourage frivolous submissions and thus reduce the attendant costs. *See supra* discussion in Parts IV.A (1)–(2).

[459] We believe that the fear of retaliation and other forms of harassment, as well as other social and psychological factors, can have a chilling effect on certain whistleblowers who, absent a mandatory internal reporting requirement, would respond to the financial incentive offered by the whistleblower program by providing the Commission with information about possible securities law violations. A number of commenters who have experience dealing with whistleblowers support this assessment. *See, e.g.,* letters from TAF at 21–23 (Dec. 17, 2010); POGO at 4–5 (Dec. 17, 2010); Grohovsky Group at 4 (Dec. 16, 2010). Our review of the academic literature further supports this assessment. *See generally* Luigi Zingales, *Want to Stop Corporate Fraud? Pay Off Those Whistle-Blowers,* AEI-Brookings Joint Center Policy Matters (January 18, 2004); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 Boston Univ. L. Rev. 91; Pamela H. Bucy, *Information as a Commodity in the Regulatory World,* 39 Hous. L. Rev. 905, 948–959; Aaron S. Kesselheim *et al., Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies,* 362 New England J. Med. 1832, 1834 (2010); *see also* Letter from Eric Dixon LLC (Dec. 19, 2010) ("[W]histleblowers expose them[selves] to serious risk, including harm to them and their families, professional or career reprisals and community ostracization. Whistleblowers may also face retaliation from alleged wrongdoers or their associates, including civil suits").

[460] There are additional costs that could follow from a mandatory internal pre-reporting requirement where the company or entity's internal compliance process is ineffective and thus unlikely to respond properly to the violation. In these situations, the mandatory internal pre-reporting requirement would result in delays before the violation can be addressed by the Commission, resulting in potentially increased injuries to the company and investors. *See* letter from CCMC at 6 ("Of course, when internal reporting systems are nonexistent or illusory, it is appropriate and beneficial for employees to report information of wrongdoing directly to the SEC."). In other cases, mandatory internal reporting could result in spoliation or other interference with our ability to investigate.

[461] We believe that many whistleblowers would still elect not to participate in the whistleblower program because of the uncertainty ahead of time regarding whether we would tell them not to report internally. As a result, we believe that it remains the case even under this approach that many whistleblowers would not report possible securities law violations to us due to the internal reporting requirement, and thus on-going violations would continue undetected resulting in further harms to entities and investors.

[462] In contrast to any of the alternative mandatory reporting regimes, we believe that the financial incentives approach has the additional advantage that it allows whistleblowers to select the proper reporting procedures under the specific circumstances. Whistleblowers can balance the potential increase in the probability and magnitude of an award by participating in an effective internal compliance mechanism, against the particular risks that may result from doing so, which could include retaliation, loss of anonymity (for those companies that may not have effective anonymous reporting procedures), delay due to an ineffective or questionable internal compliance mechanism, and destruction of evidence based on the nature of the allegations or the corporate environment. On

Continued

divert limited resources from the primary objective of investigating allegations of wrongdoing.

As stated earlier, Congress did not include an internal reporting requirement in the statute, which is modeled upon the DOJ and IRS whistleblower program.[463] Instead, Congress enacted a requirement that provides financial incentives and employment retaliation protections for reporting directly to the Commission. Internal compliance programs are valuable, and under appropriate circumstances, these rules provide financial encouragement for whistleblowers to utilize those programs. At the same time, however, internal compliance programs cannot serve as adequate substitutes for our obligation to identify and remedy violations of the Federal securities laws. In addition, there are circumstances where whistleblowers may have legitimate reasons for not wanting to report information internally, even if the company provides an avenue for anonymous reporting. For these reasons, the adopted approach encourages the whistleblower to report allegations internally, yet ultimately and appropriately leaves that decision to the whistleblower.

B. Additional Considerations of Competition, Efficiency, and Capital Formation

Section 23(a)(2)[464] of the Securities Exchange Act of 1934 requires the Commission, in promulgating rules under the Exchange Act, to consider the impact that any rule may have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Further, Section 3(f) of the Exchange Act[465] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We expect that the impact of the final rules on capital formation and efficiency will be generally positive. As discussed above, the final rules are structured to encourage the submission of more actionable information both to the Commission and to internal compliance programs regarding possible securities law violations. This will have several positive effects on capital formation. First, to the extent that more effective enforcement leads to earlier detection of violations and increased deterrence of potential future violations, this should assist in a more efficient allocation of investment funds. Serious securities frauds, for example, can cause inefficiencies in the economy by diverting investment funds from more legitimate, productive uses. Second, the deterrent effect of our rules should result in a higher level of investors' trust in the securities markets. We believe that this increased investor trust in the fairness of the market will promote lower capital costs as more investment funds enter the market, and as investors generally demand a lower risk premium due to a reduced likelihood of securities fraud.[466] This, too, should promote the efficient allocation of capital formation.

In addition, there will be certain gains and losses in efficiency due to our rules, most of which were discussed in our cost-benefit analysis. As stated above, we believe that the final rules, by encouraging internal reporting without mandating it, allow whistleblowers to balance the potential increase in the probability and magnitude of an award by participating in an effective internal compliance mechanism against the particular risks that may result from doing so. By allowing potential whistleblowers to make this assessment and encouraging them to report internally in situations where their tips will be appropriately addressed, the final rules should promote efficiency in how violations are reported and resolved. Furthermore, issuers who previously may have underinvested in internal compliance programs may respond to our rules by making improvements in corporate governance generally,[467] and strengthening their internal compliance programs in particular. While these improvements will involve costs on companies, there should be an overall increased efficiency from the perspective of investors to the extent that these companies achieve a more optimal investment in these programs.

We do not believe the final rules will impose undue burdens on competition and, indeed, we believe the rules may have a potential pro-competitive effect. Specifically, by increasing the likelihood that misconduct will be detected, of securities law violations, the rules should reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.

We are aware of the possible concern that smaller companies may bear a disproportionately greater cost under the final rules than larger companies. We do not believe this is likely for several reasons, however. First, we believe that the relative likelihood that any particular employee will blow the whistle on a possible violation should not significantly vary between smaller and larger companies, and thus we believe that the incidence of whistleblowing and the resulting costs borne by companies should be relatively consistent on a per-employee basis irrespective of a company's size. Second, because the final rules do not dictate the structure of effective compliance processes for internal reporting by employees under Rule 21F–4(c)(iii), including allowing companies to utilize upward reporting practices, we believe that companies of all sizes should be able to design cost-effective processes that meet their particular needs based on company size and structure. Overall, we do not believe these effects will result in undue burdens on competition.

V. Regulatory Flexibility Act Certification

In our proposing release, we certified that a regulatory flexibility analysis is not required because the persons that would be subject to the rules—individuals—are not "small entities" for purposes of the Regulatory Flexibility Act and the rules therefore would not have a significant economic impact on a substantial number of small entities. One commenter disagreed with this conclusion, contending that our proposal not to require mandatory internal reporting will cause small businesses to experience significant costs and disruptions.[468] Notwithstanding the possibility of such indirect impacts, we disagree with the comment's conclusion that this means a

balance, we believe that, from a law-enforcement perspective, overall efficiency is better promoted by allowing whistleblowers to make this assessment on a case-by-case basis.

[463] *See* S. Rep. No. 111–176 at 111 (2010).

[464] 15 U.S.C. 78w(a)(2).

[465] 15 U.S.C. 78c(f).

[466] If investors fear theft, fraud, manipulation, insider trading, or conflicted investment advice, their trust in the markets will be low, both in the primary market for issuance or in the secondary market for trading. This would increase the cost of raising capital, which would impair capital formation—in the sense that it will be less than it would or should be if rules against such abuses were in effect and properly enforced and obeyed.

[467] *See* Robert M. Bowen *et al.,* "Whistle-Blowing: Target Firm Characteristics and Economic Consequences," working paper (2009) at 29, *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890750* (cited in letter from CCMC) (documenting that firms respond to external whistleblowing with subsequent governance changes).

[468] *See* letter from Association for Corporate Counsel.

Regulatory Flexibility Act analysis is required. These rules do not directly affect or impose responsibilities on small entities.[469]

VI. Statutory Authority

The Commission is adopting rules and forms contained in this document under the authority set forth in Sections 3(b), 21F and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249

Securities.

Text of the Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78-i, 78j, 78j-1, 78k, 78k-1, 78*l,* 78m, 78n, 78n-1, 78*o,* 78*o*-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78*ll,* 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.;* 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.21F is also issued under Pub. L. 111–203, § 922(a), 124 Stat. 1841 (2010).

* * * * *

■ 2. Add an undesignated center heading and §§ 240.21F–1 through § 240.21F–17 to read as follows:

Securities Whistleblower Incentives and Protections

Sec.

240.21F–1 General.
240.21F–2 Whistleblower status and retaliation protections.
240.21F–3 Payment of award.
240.21F–4 Other definitions.
240.21F–5 Amount of award.
240.21F–6 Criteria for determining amount of award.
240.21F–7 Confidentiality of submissions.
240.21F–8 Eligibility.
240.21F–9 Procedures for submitting original information.
240.21F–10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000
240.21F–11 Procedures for determining awards based upon a related action.
240.21F–12 Materials that may be used as the basis for an award determination and that may comprise the record on appeal.
240.21F–13 Appeals.
240.21F–14 Procedures applicable to the payment of awards.
240.21F–15 No amnesty.
240.21F–16 Awards to whistleblowers who engage in culpable conduct.
240.21F–17 Staff communications with individuals reporting possible securities law violations.

* * * * *

§ 240.21F–1 General.

Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78u-6), entitled "Securities Whistleblower Incentives and Protection," requires the Securities and Exchange Commission ("Commission") to pay awards, subject to certain limitations and conditions, to whistleblowers who provide the Commission with original information about violations of the Federal securities laws. These rules describe the whistleblower program that the Commission has established to implement the provisions of Section 21F, and explain the procedures you will need to follow in order to be eligible for an award. You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible. Unless expressly provided for in these rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof. The Securities and Exchange Commission's Office of the Whistleblower administers our whistleblower program. Questions about the program or these rules should be directed to the SEC Office of the Whistleblower, 100 F Street, NE., Washington, DC 20549–5631.

§ 240.21F–2 Whistleblower status and retaliation protection.

(a) *Definition of a whistleblower.* (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F–9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F–4, 240.21F–8, and 240.21F–9 of this chapter.

(b) Prohibition against retaliation: (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

(2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

§ 240.21F–3 Payment of awards.

(a) *Commission actions:* Subject to the eligibility requirements described in §§ 240.21F–2, 240.21F–8, and 240.21F–16 of this chapter, the Commission will pay an award or awards to one or more whistleblowers who:

(1) Voluntarily provide the Commission

(2) With original information

(3) That leads to the successful enforcement by the Commission of a Federal court or administrative action

(4) In which the Commission obtains monetary sanctions totaling more than $1,000,000.

Note to paragraph (a): The terms *voluntarily, original information, leads to successful enforcement, action,* and *monetary sanctions* are defined in § 240.21F–4 of this chapter.

(b) *Related actions:* The Commission will also pay an award based on amounts collected in certain related actions.

(1) A *related action* is a judicial or administrative action that is brought by:

(i) The Attorney General of the United States;

[469] In advancing the argument, the commenter relies on *Aeronautical Repair Station Association* v. *Federal Aviation Administration,* 494 F.3d 161 (DC Cir. 2007). This case is inapposite, however, because there the agency's own rulemaking release expressly stated that the rule *imposed responsibilities directly* on certain small business contractors. The court reaffirmed its prior holdings that the Regulatory Flexibility Act limits its application to small entities "which will be subject to the proposed regulation—that is, those small entities to which the proposed rule will apply." *Id.* at 176 (emphasis and internal quotations omitted). *See also Cement Kiln Recycling Coal* v. *EPA,* 255 F. 3d 855, 869 (DC Cir. 2001).

(ii) An appropriate regulatory authority;

(iii) A self-regulatory organization; or

(iv) A state attorney general in a criminal case, and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than $1,000,000.

Note to paragraph (b)(1): The terms *appropriate regulatory authority* and *self-regulatory organization* are defined in § 240.21F–4 of this chapter.

(2) In order for the Commission to make an award in connection with a related action, the Commission must determine that the same original information that the whistleblower gave to the Commission also led to the successful enforcement of the related action under the same criteria described in these rules for awards made in connection with Commission actions. The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. The Commission will deny an award in connection with the related action if:

(i) The Commission determines that the criteria for an award are not satisfied; or

(ii) The Commission is unable to make a determination because the Office of the Whistleblower could not obtain sufficient and reliable information that could be used as the basis for an award determination pursuant to § 240.21F–12(a) of this chapter. Additional procedures apply to the payment of awards in related actions. These procedures are described in §§ 240.21F–11 and 240.21F–14 of this chapter.

(3) The Commission will not make an award to you for a related action if you have already been granted an award by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under Section 23 of the Commodity Exchange Act (7 U.S.C. 26). Similarly, if the CFTC has previously denied an award to you in a related action, you will be precluded from relitigating any issues before the Commission that the CFTC resolved against you as part of the award denial.

§ 240.21F–4 Other definitions.

(a) *Voluntary submission of information.* (1) Your submission of information is made *voluntarily* within the meaning of §§ 240.21F–1 through 240.21F–17 of this chapter if you provide your submission before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney):

(i) By the Commission;

(ii) In connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or

(iii) In connection with an investigation by Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority.

(2) If the Commission or any of these other authorities direct a request, inquiry, or demand as described in paragraph (a)(1) of this section to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law. However, your submission of information to the Commission will be considered voluntary if you voluntarily provided the same information to one of the other authorities identified above prior to receiving a request, inquiry, or demand from the Commission.

(3) In addition, your submission will not be considered voluntary if you are required to report your original information to the Commission as a result of a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (a)(1) of this section, or a duty that arises out of a judicial or administrative order.

(b) *Original information.* (1) In order for your whistleblower submission to be considered *original information,* it must be:

(i) Derived from your independent knowledge or independent analysis;

(ii) Not already known to the Commission from any other source, unless you are the original source of the information;

(iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless you are a source of the information; and

(iv) Provided to the Commission for the first time after July 21, 2010 (the date of enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*).

(2) *Independent knowledge* means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.

(3) *Independent analysis* means your own analysis, whether done alone or in combination with others. *Analysis* means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.

(4) The Commission will not consider information to be derived from your independent knowledge or independent analysis in any of the following circumstances:

(i) If you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(ii) If you obtained the information in connection with the legal representation of a client on whose behalf you or your employer or firm are providing services, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; or

(iii) In circumstances not covered by paragraphs (b)(4)(i) or (b)(4)(ii) of this section, if you obtained the information because you were:

(A) An officer, director, trustee, or partner of an entity and another person informed you of allegations of misconduct, or you learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law;

(B) An employee whose principal duties involve compliance or internal audit responsibilities, or you were employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity;

(C) Employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law; or

(D) An employee of, or other person associated with, a public accounting firm, if you obtained the information through the performance of an engagement required of an independent public accountant under the Federal securities laws (other than an audit subject to § 240.21F–8(c)(4) of this chapter), and that information related to a violation by the engagement client or the client's directors, officers or other employees.

(iv) If you obtained the information by a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law; or

(v) Exceptions. Paragraph (b)(4)(iii) of this section shall not apply if:

(A) You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;

(B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or

(C) At least 120 days have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.

(vi) If you obtained the information from a person who is subject to this section, unless the information is not excluded from that person's use pursuant to this section, or you are providing the Commission with information about possible violations involving that person.

(5) The Commission will consider you to be an *original source* of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative. In order to be considered an original source of information that the Commission receives from Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, you must have voluntarily given such authorities the information within the meaning of these rules. You must establish your status as the original source of information to the Commission's satisfaction. In determining whether you are the original source of information, the Commission may seek assistance and confirmation from one of the other authorities described above, or from another entity (including your employer), in the event that you claim to be the original source of information that an authority or another entity provided to the Commission.

(6) If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an original source of that information under paragraph (b)(5) of this section, the Commission will consider you an original source of any information you provide that is derived from your independent knowledge or analysis and that materially adds to the information that the Commission already possesses.

(7) If you provide information to the Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, or to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, and you, within 120 days, submit the same information to the Commission pursuant to § 240.21F–9 of this chapter, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under §§ 240.21F–10 and 240.21F–11 of this chapter, the Commission will consider that you provided information as of the date of your original disclosure, report or submission to one of these other authorities or persons. You must establish the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(c) *Information that leads to successful enforcement.* The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in any of the following circumstances:

(1) You gave the Commission original information that was sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of your original information; or

(2) You gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the PCAOB (except in cases where you were an original source of this information as defined in paragraph (b)(4) of this section), and your submission significantly contributed to the success of the action.

(3) You reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time you reported them to the Commission; the entity later provided your information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information you reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (c)(1) or (c)(2) of this section. Under this paragraph (c)(3), you must also submit the same information to the Commission in accordance with the procedures set forth in § 240.21F–9 within 120 days of providing it to the entity.

(d) An *action* generally means a single captioned judicial or administrative proceeding brought by the Commission. Notwithstanding the foregoing:

(1) For purposes of making an award under § 240.21F–10 of this chapter, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or

(2) For purposes of determining the payment on an award under § 240.21F–14 of this chapter, the Commission will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.

(e) *Monetary sanctions* means any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of a Commission action or a related action.

(f) *Appropriate regulatory agency* means the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and any other agencies that may be defined as appropriate regulatory agencies under

Section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)).

(g) *Appropriate regulatory authority* means an appropriate regulatory agency other than the Commission.

(h) *Self-regulatory organization* means any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26)).

§ 240.21F–5 Amount of award.

(a) The determination of the amount of an award is in the discretion of the Commission.

(b) If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the percentage amount of the award applying the criteria set forth in § 240.21F–6 of this chapter and pursuant to the procedures set forth in §§ 240.21F–10 and 240.21F–11 of this chapter. The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect. The percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.

(c) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 240.21F–6 Criteria for determining amount of award.

In exercising its discretion to determine the appropriate award percentage, the Commission may consider the following factors in relation to the unique facts and circumstances of each case, and may increase or decrease the award percentage based on its analysis of these factors. In the event that awards are determined for multiple whistleblowers in connection an action, these factors will be used to determine the relative allocation of awards among the whistleblowers.

(a) *Factors that may increase the amount of a whistleblower's award.* In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Significance of the information provided by the whistleblower.* The Commission will assess the significance of the information provided by a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources;

(ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission or related action.

(2) *Assistance provided by the whistleblower.* The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;

(ii) The timeliness of the whistleblower's initial report to the Commission or to an internal compliance or reporting system of business organizations committing, or impacted by, the securities violations, where appropriate;

(iii) The resources conserved as a result of the whistleblower's assistance;

(iv) Whether the whistleblower appropriately encouraged or authorized others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;

(v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and

(vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.

(3) *Law enforcement interest.* The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:

(i) The degree to which an award enhances the Commission's ability to enforce the Federal securities laws and protect investors; and

(ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers' submission of significant information and assistance, even in cases where the monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a securities violation following the whistleblower's related internal disclosure, report, or submission.

(iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the securities violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations; and

(iv) The dangers to investors or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed.

(4) *Participation in internal compliance systems.* The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:

(i) Whether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and

(ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations.

(b) *Factors that may decrease the amount of a whistleblower's award.* In determining whether to decrease the amount of an award, the Commission

will consider the following factors, which are not listed in order of importance.

(1) *Culpability.* The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions. In considering this factor, the Commission may take into account, among other things:

(i) The whistleblower's role in the securities violations;

(ii) The whistleblower's education, training, experience, and position of responsibility at the time the violations occurred;

(iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;

(iv) Whether the whistleblower financially benefitted from the violations;

(v) Whether the whistleblower is a recidivist;

(vi) The egregiousness of the underlying fraud committed by the whistleblower; and

(vii) Whether the whistleblower knowingly interfered with the Commission's investigation of the violations or related enforcement actions.

(2) *Unreasonable reporting delay.* The Commission will assess whether the whistleblower unreasonably delayed reporting the securities violations. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;

(ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and

(iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

(3) *Interference with internal compliance and reporting systems.* The Commission will assess, in cases where the whistleblower interacted with his or her entity's internal compliance or reporting system, whether the whistleblower undermined the integrity of such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:

(i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported securities violation;

(ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations; and

(iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations.

§ 240.21F–7 Confidentiality of submissions.

(a) Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2)) requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a Federal court or administrative action that the Commission files or in another public action or proceeding that is filed by an authority to which we provide the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Exchange Act (15 U.S.C. 78a) and to protect investors, it may provide your information to the Department of Justice, an appropriate regulatory authority, a self regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities. Each of these entities other than foreign securities and law enforcement authorities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act (15 U.S.C. 78u–6(h)). The Commission will determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities.

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) You may submit information to the Commission anonymously. If you do so, however, you must also do the following:

(1) You must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information;

(2) You and your attorney must follow the procedures set forth in § 240.21F–9 of this chapter for submitting original information anonymously; and

(3) Before the Commission will pay any award to you, you must disclose your identity to the Commission and your identity must be verified by the Commission as set forth in § 240.21F–10 of this chapter.

§ 240.21F–8 Eligibility.

(a) To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires. The procedures for submitting information and making a claim for an award are described in § 240.21F–9 through § 240.21F–11 of this chapter. You should read these procedures carefully because you need to follow them in order to be eligible for an award, except that the Commission may, in its sole discretion, waive any of these procedures based upon a showing of extraordinary circumstances.

(b) In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. You may be required to:

(1) Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted;

(2) Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to;

(3) Provide testimony or other evidence acceptable to the staff relating to whether you are eligible, or otherwise satisfy any of the conditions, for an award; and

(4) Enter into a confidentiality agreement in a form acceptable to the Office of the Whistleblower, covering any non-public information that the Commission provides to you, and including a provision that a violation of the agreement may lead to your ineligibility to receive an award.

(c) You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if:

(1) You are, or were at the time you acquired the original information provided to the Commission, a member, officer, or employee of the Commission, the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public

Company Accounting Oversight Board, or any law enforcement organization;

(2) You are, or were at the time you acquired the original information provided to the Commission, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 U.S.C. 78c(a)(52));

(3) You are convicted of a criminal violation that is related to the Commission action or to a related action (as defined in § 240.21F–4 of this chapter) for which you otherwise could receive an award;

(4) You obtained the original information that you gave the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to requirements of Section 10A of the Exchange Act (15 U.S.C. 78j–a).

(5) You are the spouse, parent, child, or sibling of a member or employee of the Commission, or you reside in the same household as a member or employee of the Commission;

(6) You acquired the original information you gave the Commission from a person:

(i) Who is subject to paragraph (c)(4) of this section, unless the information is not excluded from that person's use, or you are providing the Commission with information about possible violations involving that person; or

(ii) With the intent to evade any provision of these rules; or

(7) In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictitious, or fraudulent statement or representation, or use any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the Commission or another authority.

§ 240.21F–9 Procedures for submitting original information.

(a) To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u–6(h)), you must submit your information about a possible securities law violation by either of these methods:

(1) Online, through the Commission's Web site located at *http://www.sec.gov;* or

(2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in § 249.1800 of this chapter) to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549–5631, Fax (703) 813–9322.

(b) Further, to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1) or (2) of this section that your information is true and correct to the best of your knowledge and belief.

(c) Notwithstanding paragraphs (a) and (b) of this section, if you are providing your original information to the Commission anonymously, then your attorney must submit your information on your behalf pursuant to the procedures specified in paragraph (a) of this section. Prior to your attorney's submission, you must provide your attorney with a completed Form TCR (referenced in § 249.1800 of this chapter) that you have signed under penalty of perjury. When your attorney makes her submission on your behalf, your attorney will be required to certify that he or she:

(1) Has verified your identity;

(2) Has reviewed your completed and signed Form TCR (referenced in § 249.1800 of this chapter) for completeness and accuracy and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief;

(3) Has obtained your non-waivable consent to provide the Commission with your original completed and signed Form TCR (referenced in § 249.1800 of this chapter) in the event that the Commission requests it due to concerns that you may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and

(4) Consents to be legally obligated to provide the signed Form TCR (referenced in § 249.1800 of this chapter) within seven (7) calendar days of receiving such request from the Commission.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date of these rules, your submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section. If you were an anonymous whistleblower, however, you must provide your attorney with a completed and signed copy of Form TCR (referenced in § 249.1800 of this chapter) within 60 days of the effective date of these rules, your attorney must retain the signed form in his or her records, and you must provide of copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to you in connection with your submission. Notwithstanding the foregoing, you must follow the procedures and conditions for making a claim for a whistleblower award described in §§ 240.21F–10 and 240.21F–11 of this chapter.

§ 240.21F–10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.

(a) Whenever a Commission action results in monetary sanctions totaling more than $1,000,000, the Office of the Whistleblower will cause to be published on the Commission's Web site a "Notice of Covered Action." Such Notice will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission action, exceeds $1,000,000; or, in the absence of such judgment or order subsequent to the deposit of monetary sanctions exceeding $1,000,000 into a disgorgement or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002. A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, you must file Form WB–APP, *Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934* (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award.

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB–APP (referenced in § 249.1801 of this chapter), and your identity must be verified in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the staff designated by the Director of the Division of Enforcement ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1801 of this chapter) in accordance with the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F–(8)(b) of this chapter. Following that evaluation, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in § 240.21F–12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to § 240.21F–13 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Office of the Whistleblower will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

§ 240.21F–11 Procedures for determining awards based upon a related action.

(a) If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in § 240.21F–3 of this chapter).

(b) You must also use Form WB–APP (referenced in § 249.1801 of this chapter) to submit a claim for an award in a related action. You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax as follows:

(1) If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB–APP (referenced in § 249.1801 of this chapter) that you use for the Commission action.

(2) If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, you must submit your claim on Form WB–APP (referenced in § 249.1801 of this chapter) within ninety (90) days of the issuance of a final order imposing sanctions in the related action.

(c) The Office of the Whistleblower may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. The Office of the Whistleblower may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(d) Once the time for filing any appeals of the final judgment or order in a related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1801 of this chapter) in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F–(8)(b) of this chapter. Following this evaluation, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of

an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in § 240.21F–12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1)(i) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to § 240.21F–13 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds that you advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Office of the Whistleblower will notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

§ 240.21F–12 Materials that may form the basis of an award determination and that may comprise the record on appeal.

(a) The following items constitute the materials that the Commission and the Claims Review Staff may rely upon to make an award determination pursuant to §§ 240.21F–10 and 240.21F–11 of this chapter:

(1) Any publicly available materials from the covered action or related action, including:

(i) The complaint, notice of hearing, answers and any amendments thereto;

(ii) The final judgment, consent order, or final administrative order;

(iii) Any transcripts of the proceedings, including any exhibits;

(iv) Any items that appear on the docket; and

(v) Any appellate decisions or orders.

(2) The whistleblower's Form TCR (referenced in § 249.1800 of this chapter), including attachments, and other related materials provided by the whistleblower to assist the Commission with the investigation or examination;

(3) The whistleblower's Form WB–APP (referenced in § 249.1800 of this chapter), including attachments, and any other filings or submissions from the whistleblower in support of the award application;

(4) Sworn declarations (including attachments) from the Commission staff regarding any matters relevant to the award determination;

(5) With respect to an award claim involving a related action, any statements or other information that the entity provides or identifies in connection with an award determination, provided the entity has authorized the Commission to share the information with the claimant. (Neither the Commission nor the Claims Review Staff may rely upon information that the entity has not authorized the Commission to share with the claimant); and

(6) Any other documents or materials including sworn declarations from third-parties that are received or obtained by the Office of the Whistleblower to assist the Commission resolve the claimant's award application, including information related to the claimant's eligibility. (Neither the Commission nor the Claims Review Staff may rely upon information that the entity has not authorized the Commission to share with the claimant).

(b) These rules do not entitle claimants to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim) other than those listed in paragraph (a) of this section. Moreover, the Office of the Whistleblower may make redactions as necessary to comply with any statutory restrictions, to protect the Commission's law enforcement and regulatory functions, and to comply with requests for confidential treatment from other law enforcement and regulatory authorities. The Office of the Whistleblower may also require you to sign a confidentiality agreement, as set forth in § 240.21F–(8)(b)(4) of this chapter, before providing these materials.

§ 240.21F–13 Appeals.

(a) Section 21F of the Exchange Act (15 U.S.C. 78u–6) commits determinations of whether, to whom, and in what amount to make awards to the Commission's discretion. A determination of whether or to whom to make an award may be appealed within 30 days after the Commission issues its final decision to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his principal place of business. Where the Commission makes an award based on the factors set forth in § 240.21F–6 of this chapter of not less than 10 percent and not more than 30 percent of the monetary sanctions collected in the Commission or related action, the Commission's determination regarding the amount of an award (including the allocation of an award as between multiple whistleblowers, and any factual findings, legal conclusions, policy judgments, or discretionary assessments involving the Commission's consideration of the factors in § 240.21F–6 of this chapter) is not appealable.

(b) The record on appeal shall consist of the Preliminary Determination, the Final Order of the Commission, and any other items from those set forth in § 240.21F–12(a) of this chapter that either the claimant or the Commission identifies for inclusion in the record.

The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim (including the staff's Draft Final Determination in the event that the Commissioners reviewed the claim and issued the Final Order).

§ 240.21F–14 Procedures applicable to the payment of awards.

(a) Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund").

(b) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.

(c) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a Commission action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(d) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (c) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 240.21F–15 No amnesty.

The Securities Whistleblower Incentives and Protection provisions do not provide amnesty to individuals who provide information to the Commission. The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the Federal securities laws. If such an action is determined to be appropriate, however, the Commission will take your cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in Investigations and Related Enforcement Actions (17 CFR 202.12).

§ 240.21F–16 Awards to whistleblowers who engage in culpable conduct.

In determining whether the required $1,000,000 threshold has been satisfied (this threshold is further explained in § 240.21F–10 of this chapter) for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments.

§ 240.21F–17 Staff communications with individuals reporting possible securities law violations.

(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) and § 240.21F–4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

(b) If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for Part 249 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 78a, *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.1800 is also issued under Public Law 111.203, § 922(a), 124 Stat 1841 (2010).

Section 249.1801 is also issued under Public Law 111.203, § 922(a), 124 Stat 1841 (2010).

* * * * *

■ 4. Add Subpart S to read as follows:

Subpart S—Whistleblower Forms

Sec.

249.1800 Form TCR, tip, complaint or referral.

249.1801 Form WB–APP, Application for award for original information submitted pursuant to Section 21F of the Securities Exchange Act of 1934.

§ 249.1800 Form TCR, tip, complaint or referral.

This form may be used by anyone wishing to provide the SEC with information concerning a violation of the Federal securities laws. The information provided may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2)) and § 240.21F–7 of this chapter.

§ 249.1801 Form WB–APP, Application for award for original information submitted pursuant to Section 21F of the Securities Exchange Act of 1934.

This form must be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934 (15 U.S.C. 78u–6). This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or

implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2)) and § 240.21F–7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Note: The following Forms will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM TCR
TIP, COMPLAINT OR REFERRAL

A. INFORMATION ABOUT YOU			
COMPLAINANT 1: 1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred method of communication
4. Occupation			
COMPLAINANT 2: 1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred method of communication
4. Occupation			

B. ATTORNEY'S INFORMATION (If Applicable - See Instructions)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP/ Postal Code	Country
4. Telephone	Fax	E-mail Address	

C. TELL US ABOUT THE INDIVIDUAL OR ENTITY YOU HAVE A COMPLAINT AGAINST

INDIVIDUAL/ENTITY 1: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet address	
INDIVIDUAL/ENTITY 2: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet Address	

D. TELL US ABOUT YOUR COMPLAINT

1. Occurrence Date (mm/dd/yyyy): / /	2. Nature of complaint:

3a. Has the complainant or counsel had any prior communication(s) with the SEC concerning this matter? YES ☐ NO ☐

3b. If the answer to 3a is "Yes," name of SEC staff member with whom the complainant or counsel communicated

4a. Has the complainant or counsel provided the information to any other agency or organization, or has any other agency or organization requested the information or related information from you?

YES ☐ NO ☐

4b. If the answer to 4a is "Yes," please provide details. Use additional sheets if necessary.

4c. Name and contact information for point of contact at agency or organization, if known

5a. Does this complaint relate to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor?
YES ☐ NO ☐

5b. If the answer to question 5a is "yes," has the complainant reported this violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations? YES ☐ NO ☐

5c. If the answer to question 5b is "yes," please provide details. Use additional sheets if necessary.

5d. Date on which the complainant took the action(s) described in question 5b (mm/dd/yyyy): / /

6a. Has the complainant taken any other action regarding your complaint? YES ☐ NO ☐

6b. If the answer to question 6a is "yes," please provide details. Use additional sheets if necessary.

7a. Type of security or investment, if relevant

7b. Name of issuer or security, if relevant	7c. Security/ Ticker Symbol or CUSIP no.

8. State in detail all facts pertinent to the alleged violation. Explain why the complainant believes the acts described constitute a violation of the federal securities laws. Use additional sheets if necessary.

9. Describe all supporting materials in the complainant's possession and the availability and location of any additional supporting materials not in complainant's possession. Use additional sheets, if necessary.

10. Describe how and from whom the complainant obtained the information that supports this claim. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

11. Identify with particularity any documents or other information in your submission that you believe could reasonably be expected to reveal your identity and explain the basis for your belief that your identity would be revealed if the documents were disclosed to a third party.

12. Provide any additional information you think may be relevant.

E. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Are you, or were you at the time you acquired the original information you are submitting to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board?

YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you are submitting to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))?

YES ☐ NO ☐

3. Did you acquire the information being provided to us through the performance of an engagement required under the federal securities laws by an independent public accountant?

YES ☐ NO ☐

4. Are you providing this information pursuant to a cooperation agreement with the SEC or another agency or organization?

YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the SEC, or do you reside in the same household as a member or employee of the SEC?

YES ☐ NO ☐

6. Are you providing this information before you (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of your submission (i) from the SEC, (ii) in connection with an investigation, inspection or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or (iii) in connection with an investigation by the Congress, any other authority of the federal government, or a state Attorney General or securities regulatory authority?

YES ☐ NO ☐

7. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information you are submitting to the SEC?

YES ☐ NO ☐

8. Did you acquire the information being provided to us from any person described in questions E1 through E7?

YES ☐ NO ☐

9. Use this space to provide additional details relating to your responses to questions 1 through 8. Use additional sheets if necessary.

F. WHISTLEBLOWER'S DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Print name	
Signature	Date

G. COUNSEL CERTIFICATION

I certify that I have reviewed this form for completeness and accuracy and that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I further certify that I have verified the identity of the whistleblower on whose behalf this form is being submitted by viewing the whistleblower's valid, unexpired government issued identification (*e.g.*, driver's license, passport) and will retain an original, signed copy of this form, with Section F signed by the whistleblower, in my records. I further certify that I have obtained the whistleblower's non-waiveable consent to provide the Commission with his or her original signed Form TCR upon request in the event that the Commission requests it due to concerns that the whistleblower may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and that I consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commission.

Signature	Date

BILLING CODE 8011–01–C

Privacy Act Statement

This notice is given under the Privacy Act of 1974. This form may be used by anyone wishing to provide the SEC with information concerning a possible violation of the federal securities laws. We are authorized to request information from you by various laws: Sections 19 and 20 of the Securities Act of 1933, Sections 21 and 21F of the Securities Exchange Act of 1934, Section 321 of the Trust Indenture Act of 1939, Section 42 of the Investment Company Act of 1940, Section 209 of the Investment Advisers Act of 1940 and Title 17 of the Code of Federal Regulations, Section 202.5.

Our principal purpose in requesting information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which we have enforcement authority. Facts developed may, however, constitute violations of other laws or rules. Further, if you are submitting information for the SEC's whistleblower award program pursuant to Section 21F of the Securities Exchange Act of 1934 (Exchange Act), the information provided will be used in connection with our evaluation of your or your client's eligibility and other factors relevant to our determination of whether to pay an award to you or your client.

The information provided may be used by SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities law; in proceedings in which the federal securities laws are in issue or the SEC is a party; to coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self regulatory organizations, and foreign securities authorities; and pursuant to other routine uses as described in SEC–42 "Enforcement Files."

Furnishing the information requested herein is voluntary. However, a decision not provide any of the requested information, or failure to provide complete information, may affect our evaluation of your submission. Further, if you are submitting this information for the SEC whistleblower program and you do not execute the Whistleblower Declaration or, if you are submitting information anonymously, identify the attorney representing you in this matter, you may not be considered for an award.

Questions concerning this form maybe directed to the SEC Office of the Whistleblower, 100 F Street, NE, Washington, DC 20549, Tel. (202) 551–4790, Fax (703) 813–9322.

Submission Procedures

- After manually completing this Form TCR, please send it by mail or delivery to the SEC Office of the Whistleblower, 100 F. Street, NE, Washington, DC 20549, or by facsimile to (703) 813–9322.
- You have the right to submit information anonymously. If you are submitting anonymously and you want to be considered for a whistleblower award, however, you must be represented by an attorney in this matter and Section B of this form must be completed. Otherwise, you may, but are not required, to have an attorney. If you are not represented by an attorney in this matter, you may leave Section B blank.
- **If you are submitting information for the SEC's whistleblower award program, you must submit your information either using this Form TCR or electronically through the SEC's Electronic Data Collection System, available on the SEC web site at *www.sec.gov*.**

Instructions for Completing Form TCR:

Section A: Information about You

Questions 1–3: Please provide the following information about yourself:

- Last name, first name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- Your e-mail address (to facilitate communications, we strongly encourage you to provide your email address),
- Your preferred method of communication; and
- Your occupation

Section B: Information about Your Attorney. Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be completed, if you are submitting your information anonymously and you want to be considered for the SEC's whistleblower award program.

Questions 1–4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address

Section C: Tell Us about the Individual and/or Entity You Have a Complaint Against. If your complaint relates to more than two individuals and/or entities, you may attach additional sheets.

Question 1: Choose one of the following that best describes the individual or entity to which your complaint relates:

- **For Individuals:** accountant, analyst, attorney, auditor, broker, compliance officer, employee, executive officer or director, financial planner, fund manager, investment advisor representative, stock promoter, trustee, unknown, or other (specify).
- **For Entity:** bank, broker-dealer, clearing agency, day trading firm, exchange, Financial Industry Regulatory Authority, insurance company, investment advisor, investment advisor representative, investment company, Individual Retirement Account or 401(k) custodian/administrator, market maker, municipal securities dealers, mutual fund, newsletter company/investment publication company, on-line trading firm, private fund company (including hedge fund, private equity fund, venture capital fund, or real estate fund), private/closely held company, publicly held company, transfer agent/paying agent/registrar, underwriter, unknown, or other (specify).

Questions 2–4: For each subject, provide the following information, if known:

- Full name
- Complete address, including city, state and zip code
- Telephone number,
- E-mail address, and
- Internet address, if applicable

Section D: Tell Us about Your Complaint

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that you believe best describes the nature of your complaint. If you are alleging more than one violation, please list all that you believe may apply. Use additional sheets if necessary.

- Theft/misappropriation (advance fee fraud; lost or stolen securities; hacking of account)
- Misrepresentation/omission (false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by Broker-Dealer, Investment Adviser and Associated Person; false/material misstatements in firm research that were basis of transaction)
- Offering fraud (Ponzi/pyramid scheme; other offering fraud)
- Registration violations (unregistered securities offering)
- Trading (after hours trading; algorithmic trading; front-running; insider trading, manipulation of securities/prices; market timing; inaccurate quotes/pricing information; program trading; short selling; trading suspensions; volatility)
- Fees/mark-ups/commissions (excessive or unnecessary administrative fees; excessive commissions or sales fees; failure to disclose fees; insufficient notice of change in fees; negotiated fee problems; excessive mark-ups/markdowns; excessive or otherwise improper spreads)
- Corporate disclosure/reporting/other issuer matter (audit; corporate governance; conflicts of interest by management; executive compensation; failure to notify shareholders of corporate events; false/misleading financial statements, offering documents, press releases, proxy materials; failure to file reports; financial fraud; Foreign Corrupt Practices Act violations; going private transactions; mergers and acquisitions; restrictive legends, including 144 issues; reverse stock splits; selective disclosure—Regulation FD, 17 CFR 243; shareholder proposals; stock options for employees; stock splits; tender offers)
- Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility (IA); failure to disclose breakpoints; churning/excessive trading; cold calling; conflict of interest; abuse of authority in discretionary trading; failure to respond to investor; guarantee against loss/promise to buy back shares; high pressure sales techniques; instructions by client not followed; investment objectives not followed; margin; poor investment advice; Regulation E (Electronic Transfer Act); Regulation S–P, 17 CFR 248, (privacy issues); solicitation methods (non-cold calling; seminars); suitability; unauthorized transactions)
- Operational (bond call; bond default; difficulty buying/selling securities; confirmations/statements; proxy materials/prospectus; delivery of funds/proceeds; dividend and interest problems; exchanges/switches of mutual funds with fund family; margin (illegal extension of margin credit, Regulation T restrictions, unauthorized margin transactions); online issues (trading system operation); settlement (including T+1 or T=3 concerns); stock certificates; spam; tax reporting problems; titling securities (difficulty titling ownership); trade execution.
- Customer accounts (abandoned or inactive accounts; account administration and processing; identity theft affecting account; IPOs: problems with IPO allocation or eligibility; inaccurate valuation of Net Asset Value; transfer of account)
- Comments/complaints about SEC, Self-Regulatory Organization, and Securities Investor Protection Corporation processes & programs (arbitration: bias by arbitrators/forum, failure to pay/comply with award, mandatory arbitration requirements, procedural problems or delays; SEC: complaints about enforcement actions, complaints about rulemaking, failure to act; Self-Regulatory Organization: failure to act; Investor Protection: inadequacy of laws or rules; SIPC: customer protection, proceedings and Broker-Dealer liquidations;
- Other (analyst complaints; market maker activities; employer/employee disputes; specify other).

Question 3a: State whether you or your counsel have had any prior communications with the SEC concerning this matter.

Question 3b: If the answer to question 3a is yes, provide the name of the SEC staff member with whom you or your counsel communicated.

Question 4a: Indicate whether you or your counsel have provided the information you are providing to the SEC to any other agency or organization.

Question 4b: If the answer to question 4a is yes, provide details.

Question 4c: Provide the name and contact information of the point of contact at the other agency or organization, if known.

Question 5a: Indicate whether your complaint relates to an entity of which you are, or were in the past, an officer, director, counsel, employee, consultant, or contractor.

Question 5b: If the answer to question 5a is yes, state whether you have reported this violation to your

supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.

Question 5c: If the answer to question 5b is yes, provide details.

Question 5d: Provide the date on which you took the actions described in questions 5a and 5b.

Question 6a: Indicate whether you have taken any other action regarding your complaint, including whether you complained to the SEC, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 6b: If you answered yes to question 6a, provide details, including the date on which you took the action(s) described, the name of the person or entity to whom you directed any report or complaint and contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action you have taken. Use additional sheets if necessary.

Question 7a: Choose from the following the option that you believe best describes the type of security or investment at issue, if applicable:

- 1031 exchanges
- 529 plans
- American Depositary Receipts
- Annuities (equity-indexed annuities, fixed annuities, variable annuities)
- Asset-backed securities
- Auction rate securities
- Banking products (including credit cards)
- Certificates of deposit (CDs)
- Closed-end funds
- Coins and precious metals (gold, silver, etc.)
- Collateralized mortgage obligations (CMOs)
- Commercial paper
- Commodities (currency transactions, futures, stock index options)
- Convertible securities
- Debt (corporate, lower-rated or "junk", municipal)
- Equities (exchange-traded, foreign, Over-the-Counter, unregistered, linked notes)
- Exchange Traded Funds
- Franchises or business ventures
- Hedge funds
- Insurance contracts (not annuities)
- Money-market funds
- Mortgage-backed securities (mortgages, reverse mortgages)
- Mutual funds
- Options (commodity options, index options)
- Partnerships
- Preferred shares
- Prime bank securities/high yield programs
- Promissory notes
- Real estate (real estate investment trusts (REITs))
- Retirement plans (401(k), IRAs)
- Rights and warrants
- Structured note products
- Subprime issues
- Treasury securities
- U.S. government agency securities
- Unit investment trusts (UIT)
- Viaticals and life settlements
- Wrap accounts
- Separately Managed Accounts (SMAs)
- Unknown
- Other (specify)

Question 7b: Provide the name of the issuer or security, if applicable.

Question 7c: Provide the ticker symbol or CUSIP number of the security, if applicable.

Question 8: State in detail all the facts pertinent to the alleged violation. Explain why you believe the facts described constitute a violation of the federal securities laws. Attach additional sheets if necessary.

Question 9: Describe all supporting materials in your possession and the availability and location of additional supporting materials not in your possession. Attach additional sheets if necessary.

Question 10: Describe how you obtained the information that supports your allegation. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

Question 11: You may use this space to identify any documents or other information in your submission that you believe could reasonably be expected to reveal your identity. Explain the basis for your belief that your identity would be revealed if the documents or information were disclosed to a third party.

Question 12: Provide any additional information you think may be relevant.

Section E: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you are submitting to the SEC, a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you are submitting to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.

- Section 3(a)(52) of the Exchange Act (15 U.S.C. § 78c(a)(52)) currently defines "foreign financial regulatory authority" as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: State whether you acquired the information you are providing to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you are providing the information pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the SEC, or whether you reside in the same household as a member or employee of the SEC.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you are providing the information you are submitting to the SEC before you (or anyone representing you) received any request, inquiry or demand that relates

to the subject matter of your submission in connection with: (i) an investigation, inspection or examination by the SEC, the Public Company Accounting Oversight Board, or any self-regulatory organization; or (ii) an investigation by Congress, or any other authority of the federal government, or a state Attorney General or securities regulatory authority?

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information you are submitting to the SEC.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary.

SECTION F: Whistleblower's Declaration.

You must sign this Declaration if you are submitting this information pursuant to the SEC whistleblower program and wish to be considered for an award. If you are submitting your information anonymously, you must still sign this Declaration, and you must provide your attorney with the original of this signed form.

If you are *not* submitting your information pursuant to the SEC whistleblower program, you do not need to sign this Declaration.

SECTION G: COUNSEL CERTIFICATION

If you are submitting this information pursuant to the SEC whistleblower program and are doing so anonymously, your attorney *must* sign the Counsel Certification section.

If you are represented in this matter but you are *not* submitting your information pursuant to the SEC whistleblower program, your attorney does not need to sign the Counsel Certification Section.

BILLING CODE 8011–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM WB-APP

APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)

1. Last Name	First	M.I.	Social Security No.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP Code	Country
3. Telephone	Alt. Phone	E-mail Address	

B. ATTORNEY'S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)

1. Attorney's name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP Code	Country
4. Telephone	Fax	E-mail Address	

C. TIP/COMPLAINT DETAILS

1. Manner in which original information was submitted to SEC: SEC website ☐ Mail ☐ Fax ☐ Other ☐ _____

2a. Tip, Complaint or Referral number	2b. Date TCR referred to in 2a submitted to SEC / /

2c. Subject(s) of the Tip, Complaint or Referral:

D. NOTICE OF COVERED ACTION

1. Date of Notice of Covered Action to which claim relates: / /	2. Notice Number:
3a. Case Name	3b. Case Number

E. CLAIMS PERTAINING TO RELATED ACTIONS

1. Name of agency or organization to which you provided your information

2. Name and contact information for point of contact at agency or organization, if known.

3a. Date you provided your information / /	3b. Date action filed by agency/organization / /
4a. Case Name	4b. Case number

F. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board? YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))? YES ☐ NO ☐

3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant? YES ☐ NO ☐

4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization? YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐ NO ☐

6. Did you acquire the information you are providing to us from any person described in questions F1 through F5? YES ☐ NO ☐

7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.

8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of your submission (i) from the SEC, (ii) in connection with an investigation, inspection or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or (iii) in connection with an investigation by the Congress, any other authority of the federal government, or a state Attorney General or securities regulatory authority? YES ☐ NO ☐

8b. If you answered "yes" to question 8a, please provide details. Use additional sheets if necessary.

9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐ NO ☐

9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.

G. ENTITLEMENT TO AWARD

Explain the basis for your belief that you are entitled to an award in connection with your submission of information to us, or to another agency in a related action. Provide any additional information you think may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F-6 under the Securities Exchange Act of 1934. Include any supporting documents in your possession or control, and attach additional sheets, if necessary.

H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature	Date

BILLING CODE 8011–01–C

Privacy Act Statement

This notice is given under the Privacy Act of 1974. We are authorized to request information from you by Section 21F of the Securities Exchange Act of 1934. Our principal purpose in requesting this information is to assist in our evaluation of your eligibility and other factors relevant to our determination of whether to pay a whistleblower award to you under Section 21F of the Exchange Act.

However, the information provided may be used by SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities law; in proceedings in which the federal securities laws are in issue or the SEC is a party; to coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self regulatory organizations, and foreign securities authorities; and pursuant to other routine uses as described in SEC–42 "Enforcement Files."

Furnishing this information is voluntary, but a decision not do so, or failure to provide complete information, may result in our denying a whistleblower award to you, or may affect our evaluation of the appropriate amount of an award. Further, if you are submitting this information for the SEC whistleblower program and you do not execute the Declaration, you may not be considered for an award.

Questions concerning this form may be directed to the SEC Office of the Whistleblower, 100 F Street, NE, Washington, DC 20549–5631, Tel. (202) 551–4790, Fax (703) 813–9322.

General

• This form should be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. In order to be deemed eligible for an award, you must meet all the requirements set forth in Section 21F of the Securities Exchange Act of 1934 and the rules thereunder.

• You must sign the Form WB–APP as the claimant. If you provided your information to the SEC anonymously, you must now disclose your identity on this form and your identity must be verified in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of any award.

○ If you are filing your claim in connection with information that you provided to the SEC, then your Form WB–APP, and any attachments thereto, **must be received by the SEC Office of the Whistleblower within sixty (60) days of the date of the Notice of Covered Action to which the claim relates.**

○ If you are filing your claim in connection with information you provided to another agency in a related action, then your Form WB–APP, and any attachments thereto, must be received by the SEC Office of the Whistleblower as follows:

• If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim for an award in that related action on the same Form WB–APP that you use for the Commission action.**

• If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim on Form WB–APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.**

• You must submit your Form WB–APP to us in one of the following two ways:

○ By mailing or delivering the signed form to the SEC Office of the Whistleblower, 100 F Street NE, Washington, DC 20549–5631; or

○ By faxing the signed form to (703) 813–9322.

Instructions for Completing Form WB–APP

Section A: Applicant's Information

Questions 1–3: Provide the following information about yourself:

• First and last name, and middle initial

• Complete address, including city, state and zip code

• Telephone number and, if available, an alternate number where you can be reached

• E-mail address

Section B: Attorney's Information. If you are represented by an attorney in this matter, provide the information requested. If you are not representing an attorney in this matter, leave this Section blank.

Questions 1–4: Provide the following information about the attorney representing you in this matter:

• Attorney's name

• Firm name

• Complete address, including city, state and zip code

• Telephone number and fax number, and

• E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which your original information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which you submitted your information to the SEC.

Question 2c: Provide the name of the individual(s) or entity(s) to which your complaint related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a "Notice of a Covered Action" on the Commission's Web site. This notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000. The Notice is published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

Section E: Claims Pertaining to Related Actions

Question 1: Provide the name of the agency or organization to which you provided your information.

Question 2: Provide the name and contact information for your point of contact at the agency or organization, if known.

Question 3a: Provide the date on which that you provided your information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information you provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.

• Section 3(a)(52) of the Exchange Act (15 U.S.C. § 78c(a)(52)) currently defines

"foreign financial regulatory authority" as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you provided the information identified submitted to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary. If you previously provided this information on Form WB-DEC, you may leave this question blank, unless your response has changed since the time you submitted your Form WB–DEC.

Section G: Entitlement to Award

This section is optional. Use this section to explain the basis for your belief that you are entitled to an award in connection with your submission of information to us or to another agency in connection with a related action. Specifically address how you believe you voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to Rules 21F–3 and 21F–4 under the Exchange Act for further information concerning the relevant award criteria. You may attach additional sheets, if necessary.

Rule 21F–6 under the Exchange Act provides that in determining the amount of an award, the Commission will evaluate the following factors: (a) the significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers. Address these factors in your response as well.

Additional information about the criteria the Commission may consider in determining the amount of an award is available on the Commission's Web site at *www.sec.gov/complaint/info_whistleblowers.shtml.*

Section H: Declaration

This section must be signed by the claimant.

Dated: May 25, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–13382 Filed 6–10–11; 8:45 am]

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Part III

Department of Education

34 CFR Part 668

Program Integrity: Gainful Employment—Debt Measures; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

RIN 1840–AD06

[Docket ID ED–2010–OPE–0012]

Program Integrity: Gainful Employment—Debt Measures

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Student Assistance General Provisions regulations to improve disclosure of relevant information and to establish minimal measures for determining whether certain postsecondary educational programs lead to gainful employment in recognized occupations, and the conditions under which these educational programs remain eligible for the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA).

DATES: These regulations are effective July 1, 2012.

FOR FURTHER INFORMATION CONTACT: John Kolotos or Fred Sellers for general information only. *Telephone:* (202) 502–7805. Any other questions or requests for information regarding these final regulations must be submitted to: *GE-Questions@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Executive Summary

Institutions providing gainful employment programs offer important opportunities to Americans seeking to expand their skills and earn postsecondary degrees and certificates. For-profit institutions offer many quality programs, but in some instances, these programs leave large numbers of students with unaffordable debts and poor employment prospects.

The Department of Education has a particularly strong interest in ensuring that institutions that are heavily reliant on Federal funding promote student academic and career opportunities. These final gainful employment regulations are designed to (1) provide institutions with better metrics and more time to assess their program outcomes and thereby a greater opportunity to improve the performance of their gainful employment programs before those programs lose eligibility for Federal student aid funds, and (2) identify accurately the worst performing gainful employment programs. At the same time, the final regulations require that these federally funded programs meet minimal standards because students and taxpayers have too much at stake to allow otherwise.

The Higher Education Act of 1965, as amended (HEA), has long provided for the extension of financial aid to students attending postsecondary programs that "lead to gainful employment in a recognized occupation," including nearly all programs at for-profit institutions and certificate programs at public and non-profit institutions. For-profit institutions, in particular, are a diverse, innovative, and fast-growing group of institutions. By pioneering creative course schedules and online programs and serving nontraditional students, many of these institutions have developed impressive, beneficial practices that both public and non-profit institutions might emulate. In recent months, a number of institutions have taken promising steps to improve the value of the programs they offer to students by offering free trial and orientation periods, closing underperforming programs, and investing more in their faculty and curricula. These reforms may serve students well and improve performance as measured under these final regulations.

At the same time, for-profit institutions typically charge higher tuitions for their programs than do their public and non-profit counterparts. They also have higher net prices, a measure of how much students pay after receiving grant aid, such as Federal Pell Grants. As a result, students on average assume more debt to enroll in a program than do their peers who attend public or private, nonprofit institutions.

We also have concerns about recruitment practices and completion rates for particular programs offered by for-profit institutions. The Government Accountability Office (GAO) and other investigators have found evidence of high-pressure and deceptive recruiting practices at for-profit institutions. These recruiting practices may contribute to low graduation rates. First-time students enrolling in four-year institutions in 2004 were only about half as likely to earn any kind of degree or certificate by 2009 if they began their postsecondary education at a for-profit institution than if they began their postsecondary education at a public institution. National Center for Education Statistics, 2004/2009 Beginning Postsecondary Students Longitudinal Study.

Proprietary institutions market their programs to students by emphasizing the value of the program against the cost to the student. This approach is often called the value proposition of the program and is meant to portray to students the value of the specific program offerings to that student's career goals. It is this posture that distinguishes programs "that lead to gainful employment in a recognized occupation" as set forth in the HEA.

These final regulations reflect the Department's policy determination that students are not adequately protected by the Department's current regulatory framework, which focuses on institutional level information. By defining what it means to provide training leading to gainful employment for each program that is eligible to receive title IV, HEA funds, the Department believes that students will be better served and the Department will have improved how it carries out its obligation to ensure program integrity.

Some have argued that cohort default rates, measured at the institutional level, already provide a measure of whether student debt is at appropriate levels. The Department believes that those measures are properly supplemented and complemented by those outlined here. The Department's experience with the CDR is that it operates for particular purposes and that, among other things, it does not identify the harm to students that can come from enrolling in a specific program that leaves them with high education debts and limited job opportunities. An institution's average default rate does not measure the effect of any individual program, and that information alone does not provide a student with a measure of whether he or she will be able to achieve a career goal and pay off loan debt. Moreover, the default rate does not take account of the possibility that many students are struggling to repay their loans, such as those receiving economic hardship deferments or who are in income-based repayment. These are students who are seeing their loans grow, rather than shrink, because their incomes are low and their debts are high. As a result the default rate is a better measurement of the potential loss to taxpayers than of the repayment burden on borrowers.

The Department is adopting in these final regulations a definition of programs that provide training leading

to gainful employment in a recognized occupation in order to provide students with a measure of the particular program they are considering taking. This program-level assessment is further reflected in the way in which we have required disclosures of information and in the care we have taken with regulating the development of new programs once a program has failed to meet the measures in the regulation. The regulations we are adopting will help to protect students by removing eligibility from the worst performing programs that fail the minimum requirements, while providing institutions with incentives to improve the performance of their programs under the measures and create better outcomes for the students enrolled in those programs.

Institutional measures of eligibility often fail to reveal the effects of providing bad outcomes to students in the particular programs that they offer. Most of the revenues of for-profit institutions come from Pell Grants and Federal student loans. The revenues of these institutions are dependent on the number of students they enroll in their programs; they are not otherwise dependent on whether their students graduate, find jobs, and ultimately repay their loans. Thus, if one of these students defaults on her or his loan, the institution's revenues are unlikely to be affected and the blended cohort default rates calculated for an institution tend to mask the harms to students that are coming from only a few bad programs offered at an institution. For students, however, the consequences of an unaffordable loan are severe. For the 2008 cohort year, 46 percent of student loans (weighted by dollars) borrowed by students at two-year for-profit institutions are expected to go into default over the life of the loans, compared to 16 percent of loans borrowed by students across all types of institutions.

Former students who are not gainfully employed and cannot afford to repay their loans face very serious challenges. Discharging Federal student loans in bankruptcy is very rare. The common consequences of default include large fees—collection costs that can add 25 percent to the outstanding loan balance—and interest charges; struggles to rent or buy a home, buy a car, or get a job; collection agency actions, including lawsuits and garnishment of wages; and the loss of tax refunds and even Social Security benefits. Moreover, borrowers in default are no longer entitled to any deferments or forbearances and may be ineligible for any additional student aid until they have reestablished a good repayment history.

Consistent with the HEA's requirements, to be eligible to participate in the title IV, HEA programs, certain institutions must provide an eligible program leading to gainful employment in a recognized occupation. The Department's goals in promulgating these regulations are to ensure that (1) students who enroll in these programs do not have to face these difficult challenges, because they are equipped to secure gainful employment rather than being left with unaffordable debts and poor employment prospects, and (2) the Federal investment of title IV, HEA student aid dollars is well spent.

The Department began its efforts in this area with regulations designed to help students make informed choices about postsecondary education programs in 2009 by conducting a series of public hearings and negotiated rulemaking sessions. It published two notices of proposed rulemaking (NPRMs) in 2010. The Department's proposed regulations emphasized the use of disclosure mechanisms to provide students and the public with critical information about the performance of gainful employment programs. On October 29, 2010, the Department published regulations (75 FR 66832) (Program Integrity Issues final regulations) requiring institutions with programs that prepare students for gainful employment in a recognized occupation to disclose key performance information about each program on their Web site and in promotional materials to prospective students. The required elements include the program cost, on-time completion rate, placement rate, median loan debt, and other information for programs that prepare students for gainful employment in recognized occupations.

Since publishing the final regulations, the Department has published in the **Federal Register** on April 13, 2011, a draft disclosure template for public comment (76 FR 20635). The Department intends to finalize this disclosure template by the fall of 2011 so that it is available for use by institutions by July 1, 2012. The disclosure template will automate the process by which institutions can prepare the required disclosures and will include links to provide the appropriate Web sites of other institutions offering the same program that participate in the title IV, HEA student aid programs, thus allowing students to compare similar programs. With this template, and consistent with section 4 of Executive Order 13563, the Department is thus attempting to foster informed decisions and to improve the operation of the market through "disclosure requirements as well as provision of information to the public in a form that is clear and intelligible."

The Program Integrity Issues final regulations also included significant new regulations that we designed to protect consumers from misleading or overly aggressive recruiting practices, and to clarify State oversight responsibilities. These regulations took significant steps to curbing fraud and abuse in the Federal student aid programs by strengthening existing requirements that are designed to protect students and taxpayers. Among these changes were the strengthening of our misrepresentation regulations to provide the Department greater authority to take action against institutions engaging in deceptive advertising, marketing, and sales practices. The regulations also eliminate "safe harbors" that allowed questionable recruitment practices that often included institutions paying incentive compensation to recruiters. Too often this type of compensation leads to overly aggressive recruiting practices that encouraged students to take out loans they could not afford or enroll in programs for which they were unqualified or in which it was unlikely they could succeed. Additionally, the Program Integrity Issues final regulations took a needed step toward ensuring that States are taking necessary steps to ensure the appropriate oversight of the postsecondary education being provided by institutions by establishing minimum steps that States must take to meet their important responsibility under the HEA to protect students, including for institutions that offer distance or correspondence education.

These final regulations, Gainful Employment—Debt Measures, reflect a number of significant changes and improvements from the July 26, 2010 NPRM in response to public comments. The changes and improvements are designed to provide a better measure of whether a program provides training that will lead to gainful employment in a recognized occupation. They reflect alterations from the proposed regulations designed to (1) Provide better program information to students, (2) identify the worst performing programs, and (3) create appropriate flexibility and provide institutions the opportunity to improve their programs before losing title IV, HEA program eligibility. These changes are also designed to minimize the costs for regulated institutions, while providing

considerable benefits both to students at regulated institutions and to taxpayers.

The regulations emphasize the importance of disclosing program information and take several further steps to promote informed decisions. Thus, under the final regulations, institutions must disclose to the public, and the Secretary may also disseminate to the public, information about how each of an institution's programs are performing under the debt measures that we are establishing in these final regulations. The Department is considering additional steps to promote the comparison of programs and to facilitate access to this information. In keeping with the emphasis on disclosure, the regulations also provide that during the first two years that a program fails the debt measures, the institution must provide warnings to students. To promote informed student choice, these warnings must be provided to students sufficiently in advance of enrolling to permit the student time to consider whether to enroll in the program.

While increasing the level of disclosure is critical, the Department recognizes that information alone is unlikely fully to promote the goals of the HEA and to ensure that programs provide training that leads to gainful employment in a recognized occupation. Students enrolling in a postsecondary program often have limited background information about a program and little or no experience choosing among postsecondary programs. High-pressure sales tactics by institutions may also make it difficult for individuals to choose carefully among programs. Therefore, the Department is setting minimum standards to measure whether programs are providing training that leads to gainful employment in a recognized occupation.

To provide an additional layer of protection for students and taxpayers, the Department is defining a set of measures that identifies the lowest performing programs by focusing on the ability of students to repay their student loans. Under these measures, a program is now considered to lead to gainful employment if it has a repayment rate of at least 35 percent or its annual loan payment under the debt-to-earnings ratios is 12 percent or less of annual earnings or 30 percent or less of discretionary income. Under the regulations, only after failing both debt measures for three out of four fiscal years does a program lose eligibility. These regulations set minimum standards and are designed to provide flexibility, specifically allowing programs an opportunity to improve their performance before losing title IV, HEA program eligibility. The Department believes that these measures will improve the operation of free markets by identifying the poorest performing programs and strengthening institutions' incentive to provide an affordable quality education.

Background of Rulemaking Proceedings

On September 9, 2009, the Secretary announced the Department's intent to establish two negotiated rulemaking committees to develop proposed regulations under title IV of the HEA through a notice in the **Federal Register** (74 FR 46399). The Secretary established one committee to develop proposed regulations governing foreign schools and another committee to develop proposed regulations to improve integrity in the title IV, HEA programs. Team I—Program Integrity Issues (Team I) met to develop proposed regulations during the months of November 2009 through January 2010; however, no consensus on the proposed regulations was reached during the negotiations. After Team I's negotiations concluded, the Department published two NPRMs.

On June 18, 2010, the Secretary published the first NPRM in the **Federal Register** (75 FR 34806) (June 18, 2010 NPRM) proposing to strengthen and improve the administration of programs authorized under title IV of the HEA. With regard to gainful employment, the June 18, 2010 NPRM included proposals covering several technical, reporting, and disclosure issues. The June 18, 2010 NPRM reserved for a second NPRM the remaining gainful employment issues, which addressed the extent to which certain educational programs lead to gainful employment and the conditions under which those programs remain eligible for title IV, HEA program funds.

On July 26, 2010, the Secretary published a second NPRM for gainful employment issues in the **Federal Register** (75 FR 43616) (July 26, 2010 NPRM). In the July 26, 2010 NPRM, the Secretary proposed to—

- Establish debt thresholds based on debt-to-income and repayment rate measures that a program at an institution would need to meet in order to demonstrate that it provides training that leads to gainful employment in a recognized occupation and consequently to remain eligible for title IV, HEA funds;
- Establish a tiered eligibility system under which a program may have unrestricted eligibility, may have restricted eligibility, or may become ineligible to participate in the title IV, HEA programs;
- Establish consequences for a program with a restricted eligibility status, including requirements to provide debt warning disclosures to current and prospective students that they may have difficulty repaying loans obtained for attending the program; employer affirmations that the program curriculum is appropriately aligned with recognized occupations at the employers' businesses and that there is a demand for those occupations; and limits on enrollment of title IV, HEA program recipients in that program;
- Provide that a program becomes ineligible if it does not meet at least one of the debt thresholds for one award year;
- Specify that the institution may not disburse any title IV, HEA program funds to students who subsequently begin attending a program determined to be ineligible, but may disburse title IV, HEA program funds to students who began attending the program before it became ineligible for the remainder of the award year and for the award year following the date of the Secretary's notice that the program is ineligible;
- Establish a transition year in which the Secretary would cap the number of programs that would be classified as ineligible for the first year after the regulations take effect;
- Add a definition of *The Classification of Instructional Programs (CIP);*
- Permit the Secretary to place on provisional certification an institution that has one or more of its programs determined to be subject to the eligibility limitations or determined ineligible under the gainful employment provisions; and
- Establish that in a termination action against a program for not meeting the gainful employment standards, the hearing official would accept, as accurate, earnings information for students that was obtained by the Department from another Federal agency, but would consider alternate earnings data as long as that data was reliable for the same students.

The Department reviewed the comments from both the June 18, 2010 NPRM and the July 26, 2010 NPRM and divided the final regulations into three separate documents. On October 29, 2010, the Secretary published both the first and second sets of final regulations in the **Federal Register** (75 FR 66832 and 75 FR 66665) (Program Integrity Issues and Gainful Employment/New Programs final regulations, respectively) with effective dates, generally, of July 1, 2011.

The Program Integrity Issues final regulations (75 FR 66832)—

• Clarified that only certificate or credentialed nondegree programs of at least one academic year that are offered by a public or nonprofit institution of higher education are gainful employment programs;

• Updated the definition of the term *recognized occupation* to reflect current usage;

• Established requirements for institutions to submit information on students who attend or complete programs that prepare students for gainful employment in recognized occupations; and

• Established requirements for institutions to submit information on students who attend or complete programs that prepare students for gainful employment in recognized occupations; and

• Established requirements for institutions to disclose on their Web site and in promotional materials to prospective students, the on-time graduation rate for students completing a program, placement rate, median loan debt, program costs, and any other information the Secretary provided to the institution about the program.

The Gainful Employment/New Programs final regulations (75 FR 66665)—

• Established a process under which an institution applies to the Secretary for approval to offer additional educational programs that lead to gainful employment in a recognized occupation.

These final regulations, Gainful Employment—Debt Measures, comprise the third set of regulations and reflect a number of significant changes from the proposed regulations in response to public comments. We received over 90,000 comments in response to the July 26, 2010 NPRM. These included tens of thousands of comments supporting our proposals and tens of thousands opposing them. Subsequent to our issuance of the Gainful Employment/New Programs final regulations, we also met with more than 100 individuals and organizations to permit these individuals and entities to clarify their comments in person. The Department extended its work on the regulations by six additional months to consider fully these comments. Consistent with Executive Order 13563, the result of this unprecedented public engagement is stronger regulations that (1) Are based on careful consideration of both the costs and benefits (both quantitative and qualitative) of the regulations; (2) incorporate many suggestions to allow flexible approaches for the regulated entities; and (3) balance the concerns of those on both sides of the "gainful employment" issue.

The final regulations will:

• Give all programs *three years to improve* their performance. The Department will begin by giving institutions data to help them identify and improve their failing programs and to help current and prospective students make informed choices. The first programs could lose eligibility based upon their performance under the debt measures calculated for fiscal year (FY) 2014 and released in 2015, rather than FY 2012 as proposed.

• Target only the worst performing failing programs by:

(1) Permitting an institution to maintain a program's title IV, HEA program eligibility until the program fails both the debt-to-earnings ratios and repayment rate measures for *three out of four FYs,* similar to the multi-year measures used to assess cohort default rates (CDRs) at an institution;

(2) Limiting the number of programs that will lose eligibility based on the debt measures calculated for only FY 2014 under § 668.7(k) to the *worst performing 5 percent of programs* (weighted by enrollment); and

(3) Eliminating enrollment restrictions that the Department had proposed in the July 26, 2010 NPRM to apply to all programs with repayment rates below 45 percent and an annual loan payment that is more than 20 percent of discretionary income or 8 percent of annual earnings.

• Improve the repayment rate and debt-to-earnings ratios measures based on extensive public comment by:

(1) Revising the measures such that a program is now considered to lead to gainful employment if it has a repayment rate of at least 35 percent or its annual loan payment under the debt-to-earnings ratios is 12 percent or less of annual earnings or 30 percent or less of discretionary income;

(2) Allowing institutions to demonstrate that their programs meet the debt-to-earnings ratios with alternative reliable earnings information, including use of State data, survey data, or Bureau of Labor Statistics (BLS) data during a transitional period;

(3) Measuring performance in years three and four of repayment, rather than years one through four, to examine more typical years in the life cycle of a loan (with a provision to use years three through six where necessary to ensure that more than 30 borrowers or completers are included in the measurement and additional adjustments to address the needs of programs that are improving their performance, graduate programs, and medical and dental programs);

(4) Measuring debt burdens based on an assumption that loans are repaid over 10 to 20 years depending on the level of degree, rather than 10 years for all programs as was originally proposed. Loan debt will be amortized over 10 years for undergraduate or post-baccalaureate certificate and associate's degree programs, 15 years for bachelor's and master's degree programs, and 20 years for programs that lead to a doctoral or first-professional degree;

(5) Limiting debt in the debt-to-earnings ratio calculation to tuition and fee charges for a specific educational program, if this information is provided by the institution, thereby providing programs relief for loans taken for indirect educational costs, including living expenses;

(6) Providing that borrowers who meet their obligations under income-sensitive repayment plans are considered to be successfully repaying their loans even if their payments are smaller than accrued interest, so long as the program at issue does not have unusually large numbers of students in those categories; and

(7) Providing that a program is considered to satisfy the debt measures if the number of students who completed the program or the number of borrowers whose loans entered repayment during the relevant four-year period is 30 or fewer.

• Improve the disclosure of information about programs by:

(1) Providing in § 668.7(g)(6) that the Secretary may disseminate the final debt measures and information about, or related to, the debt measures to the public in any time, manner, and form, including publishing information that will allow the public to ascertain how well programs perform under the debt measures and other appropriate objective metrics. The Department is considering appropriate ways to provide these metrics and other key indicators to facilitate access to the information and the comparison of programs;

(2) Requiring that an institution with a failing program that does not meet the minimum standards specified in the regulations must provide warnings to enrolled and prospective students;

(3) Requiring that the debt warnings for prospective students must be provided at the time the student first contacts the institution to request information about the program. The institution may not enroll the student until three days after the debt warnings are first provided to the student. If more than 30 days pass from the date the debt

warnings are first provided to the student and the date the student seeks to enroll in the program, the institution must provide the debt warnings again and may not enroll the student until three days after the debt warnings are most recently provided to the student; and

(4) Requiring an institution to disclose the repayment rate and the debt-to-earnings ratio (based on total earnings) of its gainful employment programs.

• Establish restrictions on reestablishing eligibility of ineligible programs, new programs that are substantially similar to an ineligible program, and failing programs that are voluntarily discontinued by the institution.

In sum, the Department has revised these regulations to promote disclosure, to encourage institutions to improve their occupational programs, and to provide more time for this improvement before revoking eligibility. The Department believes that institutions will strengthen their educational programs to meet these higher standards, and relatively few programs will fail. Programs that offer a rewarding education at an affordable price will prosper, and institutions will continue to innovate to serve students and taxpayers.

Implementation Date of These Regulations

Section 482(c) of the HEA requires that regulations affecting programs under title IV of the HEA be published in final form by November 1 prior to the start of the award year (July 1) to which they apply. However, that section also permits the Secretary to designate any regulation as one that an entity subject to the regulation may choose to implement earlier and to specify the conditions under which the entity may implement the provisions early.

The Secretary has not designated any of the provisions in these final regulations for early implementation. Therefore these final regulations are effective July 1, 2012.

Commitment to Continuing Retrospective Review

As discussed further under the heading *Executive Orders 12866 and 13563,* consistent with Executive Order 13563's emphasis on measuring "actual results" and on retrospective review of regulations, the Department intends to monitor the implementation of these regulations carefully, consider new data as they become available to ensure against unintended adverse consequences, and reconsider relevant issues if the evidence warrants. We recognize that, despite the Department's diligent efforts and extensive public input, there are limitations in the best available data and there remains some uncertainty about the impact of these final regulations, such as the number of programs that will be identified as ineligible.

In early 2012, the Department will calculate and share with institutions, for informational purposes only, performance data for programs subject to these regulations. Thus, institutions and the Department will have preliminary information about the performance of particular programs a full year before any programs could be labeled failing and three years before any programs could lose eligibility. This implementation schedule will allow the Department ample time to consider relevant evidence and data and to examine the performance of programs under the regulations. This collection of data, in conjunction with the agency's intention to evaluate the outcomes of these regulations, is consistent both with Executive Order 13563 and the Office of Information and Regulatory Affairs' February 2, 2011 memorandum (OMB M–11–19) on Executive Order 13563, which emphasizes the importance of "empirical testing of the effects of rules both in advance and retrospectively," and which encourages future regulations to be "designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses." The Department will continue to explore the effects of the regulations. Among other things, the Department will examine the type and number of programs determined to be failing and ineligible, and it will consider whether these final regulations should be reconsidered or amended in furtherance of its goals of protecting students and taxpayers against educational programs that leave students with unaffordable debts and poor employment prospects.

Analysis of Comments and Changes

As indicated earlier, over 90,000 parties submitted comments on the July 26, 2010 NPRM. Many of these comments were substantially similar. We have reviewed all of the comments. Generally, we do not address minor, nonsubstantive changes, recommended changes that the law does not authorize the Secretary to make, or comments pertaining to operational processes.

General

Comment Process

Comment: The Department received over 90,000 comments on the July 26, 2010 NPRM. Of those comments, approximately 25 percent were in support of our proposed regulations and approximately 75 percent were opposed. We received comments from numerous categories of individuals, including students, families, employees of institutions of higher education, school presidents, congressional and other governmental leaders, advocacy groups, State and local associations, trade associations, and businesses. The comments received varied in content and length from extremely short responses to complex and lengthy economic and legal analyses. The vast majority of the comments, however, were similar, largely duplicative, and apparently generated through petition drives and letter-writing campaigns. Generally, these commenters did not provide any specific recommendations beyond general support of or opposition to the proposed regulations. Many of the commenters—both those in support of, and in opposition to, specific provisions—indicated that they supported the goals and intent behind the proposed regulations. Specifically, commenters across all sectors of higher education as well as the student and consumer advocacy groups believed that the goal of ensuring student loan debt is affordable is an admirable one.

Some of the commenters did not express substantive comments on the proposed regulations or their effects. For instance, a number of the commenters, particularly those from students, simply said "No," or asked that the Department not "take away my student loans."

Supporters of the proposed regulations praised the Department's transparency and commitment to improving the integrity of the title IV, HEA student aid programs. Some commenters praised the amount of information and data that the Department released with the NPRM and subsequently on the Department's Web site. Other commenters believed that the Department had taken appropriate steps to gather public input and to craft regulations that protect students by regulating programs that claim to prepare students for gainful employment, yet leave students with large amounts of debt and unprepared for employment in recognized occupations. These commenters suggested that the proposed regulations would help to ensure that employers can hire well-qualified employees and that taxpayer dollars are spent wisely and effectively. Some of the commenters believed that the proposed regulations provide for much-needed enforcement authority.

Commenters who opposed the proposed regulations believed that the proposed regulations would have a number of unintended effects and suggested that the regulations would produce results counter to the President's economic and educational goals. These commenters also stated that the proposed regulations would be overly burdensome and discriminatory; represent an overreaching of the Department's authority; unfairly punish institutions for students' choices after graduating; disproportionately affect at-risk and underserved populations of students; and limit the growth of, and innovation in, new programs. The commenters recommended that the Department address these concerns by delaying the implementation of the regulations, considering alternatives to the debt-to-earnings and repayment rate metrics, and exempting certain types of institutions or programs from compliance with the regulations. While making a number of suggestions and recommendations, the commenters generally expressed a desire to work with the Department to provide additional information and insight to craft metrics that they believed would achieve the intended result of reducing student loan debt and helping students to obtain gainful employment.

Discussion: The Department appreciates the numerous comments we received in support of the proposed regulations as well as those we received that expressed concerns about them. Specific issues raised by the commenters are addressed in the relevant topical discussions. These comments were instrumental in identifying ways the Department could design final regulations that provide benefits to students, minimize costs to regulated institutions, and provide institutions with greater flexibility to achieve regulatory compliance.

Changes: Changes made in response to the commenters' specific concerns are addressed in the relevant topical discussions.

Timing of Implementation

Comment: Some commenters urged the Department to implement these regulations as early as possible, arguing that students, consumers, and taxpayers need protection now and cannot afford to wait for these regulations to go into effect a few years in the future. Some of these commenters noted that putting provisions into effect, perhaps in a transitional form, would spur institutions with poorly performing programs to invest in program improvements and student services, such as career counseling and job placement assistance, to improve student outcomes.

Some commenters asked the Department to delay the implementation of the regulations for a number of reasons. Some asked for the Department to delay implementation until the results of a forthcoming GAO study on proprietary schools are available. Other commenters requested a delay to allow Congress time to debate and pass a law on the definition of "gainful employment." These commenters argued that Congress, not the Department, appropriately has this authority. Some of the commenters also suggested a delay to allow time to see the effect of the additional disclosures and reporting requirements under the final regulations that will take effect July 1, 2011 (75 FR 66833–66975). Some commenters requested a delay until Congress acts to provide authority to institutions to limit loan funds to institutional charges.

Commenters requested that the Department apply the metrics only to students who enroll after the final regulations are published. These commenters argued that schools should not be held accountable for an outcome that was not defined at the time the students attended the program and that it would be unfair to judge schools on metrics that they could have influenced at the time, when the quality of the programs and the outcomes for the students may be improving. Commenters noted that the Department should delay enforcing the regulations so programs have an opportunity to improve, and that programs that are improving may not be able to satisfy the metrics immediately given that the metrics measure outcomes from students who graduated in past years.

A few commenters asked the Department to provide draft metrics to institutions before their programs would be subject to sanctions. The commenters encouraged the Department to use the new, three-year CDR as a model for how any new metrics on gainful employment could be phased in over time. They further stated that delayed implementation would give schools time to improve their programs and debt counseling advice to meet the metrics as well as time to discontinue programs that are not meeting the metrics.

Some commenters requested further actions within the negotiated rulemaking process. Commenters requested that the Department issue these regulations as an interim final rule so that the public would have an opportunity to submit additional comments and, perhaps, to permit further modifications to the regulations based on those comments. Other commenters recommended that the Department extend the 45-day public comment period to allow a full analysis of the breadth and complexity of the proposed regulations. They further suggested that the Department would benefit from further information from institutions on the details involved with compliance before implementation. A few commenters requested that the Department engage in another round of negotiated rulemaking so that participants could focus solely on an appropriate definition of gainful employment. These commenters believed that more analysis and discussion of the proposed regulations are needed before they become final.

Some commenters suggested that the gainful employment metrics should apply no earlier than July 1, 2014, and sanctions for ineligible programs should apply on or after July 1, 2016, arguing that these timeframes would give institutions an adequate opportunity to comply with the new requirements.

Discussion: We appreciate the concerns of the commenters who urged the Department to implement these regulations as early as possible. However, based on the concerns of other commenters, we believe it is desirable to extend the implementation schedule of these final regulations. In that regard, we agree that institutions should have the opportunity to improve program performance against the metrics before being subject to significant sanctions. The adjustments to the regulations reflecting these changes are discussed more fully under the relevant topical discussions.

We do not agree with commenters that we should delay implementing the final regulations until a third party takes some action such as waiting for a GAO study to be available. We have already undertaken extensive efforts to analyze the impact of these regulations and gather public comments. We also believe the need to remove poorly performing programs is too great to wait for third-party actions.

We do not agree that further actions need to be taken within the rulemaking process such as issuing interim final regulations, providing an additional comment period, or renegotiating the proposed regulations. Given the Department's extensive efforts to solicit and respond to comments from the public, including public hearings, three sessions of negotiations, additional meetings with interested parties, and the over 90,000 comments received, we do not believe it is necessary to reopen the rulemaking process and delay publishing these final regulations.

Changes: Changes made in response to the commenters' specific concerns are addressed in the relevant topical discussions.

Legal Authority

Comments: A number of commenters objected to the proposed regulations in whole or in part, claiming that no changes to the HEA require the Secretary to define the term "gainful employment," and that the term cannot now be defined since Congress left it undisturbed during its periodic reauthorizations of the HEA. Some commenters expressed the view that the framework of detailed requirements under the HEA programs that includes institutional measures using cohort default rates, disclosure requirements for institutions, restrictions on student loan borrowing, and other financial aid requirements prevents the Department from adopting debt measures to determine the eligibility for these programs. Other commenters noted that it was unfair for the Department to propose these requirements for some programs and not others. Some commenters suggested that the phrase "to prepare students for gainful employment" is unambiguous and therefore not subject to further definition. Some commenters claimed that the Department has previously defined the term "gainful employment in a recognized occupation" in the context of conducting administrative hearings and argued that the Department did not adequately explain in the July 26, 2010 NPRM why it was departing from its prior use of that term.

Discussion: The Department has broad authority to promulgate regulations to implement programs established by statute. Under section 414 of the Department of Education Organization Act, 20 U.S.C. 3474, "[t]he Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department." Similarly, section 410 of the General Education Provisions Act, 20 U.S.C. 1221e–3, provides that the Secretary may "make, promulgate, issue, rescind, and amend rules and regulations" for Department programs, including the Federal student aid programs.

The eligibility of programs leading to gainful employment in a recognized occupation is addressed in sections 101, 102 and 481(b) of the HEA. Section 481(b) of the HEA defines "eligible program" to include a program that offers at least a defined minimum quantity of instruction that "provides a program of training to prepare students for gainful employment in a recognized profession." The HEA in section 102(a) defines an "institution of higher education for purposes of the student assistance programs" and provides further in section 102(b), that proprietary institutions of higher education, with limited exception, "provide[] an eligible program of training to prepare students for gainful employment in a recognized occupation." Similar requirements exist in section 101(b)(1) for public and private non-profit institutions of higher education providing programs at least one year in length, and section 102(c) provides similar requirements for public and private non-profit postsecondary vocational institutions.

Under section 102(b) of the HEA, programs offered at for-profit institutions are only eligible for title IV, HEA funds if they offer programs that "prepare students for gainful employment in a recognized occupation." Such an institution is required to offer at least one eligible program leading to gainful employment in a recognized occupation in order for the institution to be eligible.

This structure for eligibility at the program level and the institutional level is longstanding and has been retained through many amendments to the HEA. Indeed, as recently as the enactment of the Higher Education Opportunity Act of 2008 (HEOA) (Pub. L. 110–315), Congress retained this distinct treatment of programs by exempting liberal arts baccalaureate programs offered at some for-profit institutions from the requirement to provide gainful employment in a recognized occupation.

The HEA establishes eligibility requirements for certain programs based upon the program length and the type of institution offering the program, including such programs that lead to gainful employment in a recognized occupation. Other requirements apply to certain types of institutions offering eligible programs, such as providing disclosures about revenue, and limiting the percentage of revenue that can be received from title IV, HEA programs. Other requirements apply to all eligible institutions, such as submitting annual financial statements and compliance audits, and meeting eligibility requirements based upon the loan cohort default rate calculated for an institution. None of these requirements, viewed alone or together, constitutes a framework that prohibits the Department from establishing the debt measures in these regulations to determine eligibility for programs required to provide training leading to gainful employment in a recognized occupation.

The legislative history of the gainful employment requirement bears directly on the issues now emerging in the data. Congress was concerned that the availability of Federal student aid, particularly in the form of loans for some types of programs and institutions might lead to students taking on more debt than is reasonable given the earnings that could be expected. Congress extended loan eligibility beyond traditional degrees at traditional institutions after considering testimony regarding the connection between the expected earnings of the graduates and the debt burden they would incur from this training. A Senate Report quotes extensively from testimony provided by University of Iowa professor Dr. Kenneth B. Hoyt, who testified on behalf of the American Personnel and Guidance Association:

> It seems evident that, in terms of this sample of students, sufficient numbers were working for sufficient wages so as to make the concept of student loans to be [repaid] following graduation a reasonable approach to take. * * * I have found no reason to believe that such funds are not needed, that their availability would be unjustified in terms of benefits accruing to both these students and to society in general, nor that they would represent a poor financial risk. Sen. Rep. No. 758, 89th Cong., First Sess. (1965) at 3745, 3748.

Congress cited the same affirmation from an industry spokesman, Lattie Upchurch, Jr., of Capitol Radio Engineering Institution, Washington, DC, who testified that "the purely material rewards of continued education are such that the students receiving loans will, in almost every case, be enabled to repay them out of the added income resulting from their better educational status." Id. at 3752.

These final regulations address harms to students that have been identified by the GAO, and were identified in the public hearings and in comments submitted in response to the proposed regulations, namely that program completers are unable to obtain jobs for which they received training. The regulations are also designed to address concerns about high levels of loan debt for students enrolled in postsecondary educational programs that, to qualify for participation in the title IV, HEA programs, must provide training that leads to gainful employment in a recognized occupation. These regulations are of particular importance because significant advances in electronic reporting and analysis now allow the Department to collect accurate and timely data that could not have

been utilized in the past. These analyses will provide the Department, students, and the institutions offering these programs with information about how well the programs are performing under the measures.

With respect to the general claims from some commenters that the terms "gainful employment" and "gainful employment in a recognized occupation" are unambiguous and cannot be defined in regulation, it is clear from the thousands of comments we received that the terms "gainful employment" and "gainful employment in a recognized occupation" are subject to many different views and interpretations. Thus, these regulations represent a reasonable interpretation of those terms and do so in a way that responds to many of the concerns raised in the comments. Adopting a definition now gives meaning to an undefined statutory term, thereby fulfilling the Department's duty to enforce the provisions of the HEA in a clear and meaningful way. And, although the term has been used to refer to applicable programs in the context of administrative hearings at the Department, that use does not limit the Department's use of its statutory authority to create a regulatory definition through the negotiated rulemaking procedures established under the HEA.

With respect to claims that the Department should wait for Congress to legislate before regulating, it is important to note that the original efforts by the Department to address concerns about defaults in the Federal student loan programs were realized using the Secretary's general authority to regulate under section 414 of the Department of Education Organization Act. While Congress ultimately enacted the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508), which provides statutory authority for much of the cohort default rate provisions in effect today, the Secretary's authority was nonetheless appropriately used to issue regulations in this area to require, for example, teach-out arrangements for private institutions.

Changes: None.

Comment: Some commenters suggested that the proposed definition of gainful employment would be unlawful because it would constitute placing price controls on offering gainful employment programs.

Discussion: We disagree that these regulations would constitute price controls for gainful employment programs. The debt measures and eligibility thresholds provide institutions with multiple ways to manage their programs to improve performance.

Changes: None.

Thresholds for the Debt Measures (§ 668.7(a)(1))

General

Comment: Commenters expressed concerned that low-income and minority students, many of whom are Federal Pell Grant recipients, could be harmed by the proposed loan repayment rate and debt-to-income thresholds. These commenters noted that Federal Pell Grant recipients are likely to need to borrow the maximum amount of title IV, HEA loan funds and may have more difficulty repaying their loans than students who incur smaller levels of debt. As a result, according to the commenters, the schools these students attend may not be able to meet the debt measures and could be forced to close or limit their enrollment to exclude these students.

Some of the commenters cited research by Mark Kantrowitz of FinAid.org and FastWeb.com that they believed showed that institutions with 50 percent or more Federal Pell Grant recipients are unlikely to satisfy the proposed 35 percent loan repayment rate threshold, and institutions with 40 percent or more of Federal Pell Grant recipients are unlikely to satisfy the proposed 45 percent loan repayment rate threshold. Similarly, other commenters cited studies indicating that minority students earn less than their white counterparts. For low-income students, the commenters concluded that student access to higher education would be adversely affected because the proposed thresholds would act as a disincentive to institutions to admit these students. The commenters suggested that, given these concerns, the Department should allow lower repayment rates and debt-to-earnings ratios for institutions based on the demographics of the institution's student body and its success rate in graduating minority students. Other commenters recommended that the Department implement a sliding scale repayment rate based on the number of Federal Pell Grant recipients at an institution. Under this approach, institutions with a larger percentage of Federal Pell Grant recipients would be subject to a lower threshold for the loan repayment rate. Commenters suggested that, alternatively, the loan repayment rates of Federal Pell Grant recipients could be evaluated separately from the loan repayment rates of non-Federal Pell Grant recipients, with a lower threshold established for Federal Pell Grant recipients. Commenters also noted that some of these same issues apply to institutions and programs dominated by women, because careers dominated by women tend to be lower-paying and many women take maternity leave or work part-time and these circumstances would lead to lower repayment rates and earnings for women.

One commenter noted that the Department's repayment rate data, when viewed across all sectors of the education industry, show that institutions with lower repayment rates serve high-risk students. The commenter argued that if the data demonstrate anything, it is that "at-risk" students (working adults with family commitments and no parental support, or students from lower socioeconomic backgrounds who are more susceptible to forces that might cause them to leave or take a break from school) have more difficulty repaying their student loans or are more inclined to use alternative methods to repay their loans, regardless of the type of school they attended.

Discussion: The Department does not agree that the thresholds should be adjusted to reflect the demographics or economic status of the students enrolled in gainful employment programs. Students are not well served by enrolling in programs that leave them with debts they cannot afford to repay, regardless of their background. Moreover, as illustrated in the *Student Demographics* section of the RIA, there are institutions and programs achieving strong results with students from disadvantaged backgrounds, and many programs serving even the most disadvantaged students are performing well under the debt measures.

Changes: None.

Comment: Some commenters stated that because the loan repayment rate was established outside the negotiated rulemaking process, it lacked transparency and the breadth of input from stakeholders and the public that would have assured its quality and relevancy.

Discussion: The loan repayment rate was discussed during the negotiated rulemaking sessions in the context of whether borrowers who attended a program were repaying their loans. The issue summaries used for the rulemaking sessions describing the repayment rate were published at that time on the Department's Web site and are available at *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity.html*. The negotiating committee did not reach consensus on proposed regulations (see 74 FR 43617). As a result the Department was not bound to any of the draft regulations for

the issues in the manner those issues were discussed with the committee. Consequently, the Department chose to propose a dollar-based repayment rate instead of the borrower-based repayment rate discussed by the committee. As opposed to a borrower-based calculation where all borrowers have the same impact on the repayment rate regardless of their debt loads, the proposed dollar-based calculation rewards, or gives more weight to, borrowers with higher debt loads that repay their loans. For example:

Borrowers A and B completed a program with $12,000 and $15,000, respectively, in loan debt. Borrowers C, D, and E withdrew from the program with loan debts of $3,000, $4,000, and $6,000, respectively. Under the proposed repayment rate, all loan debt incurred by borrowers who attended the program would be included in the denominator ($40,000) of the ratio. Presuming that program graduates are more likely to repay their loans, i.e., that Borrower A will repay the $12,000 debt and Borrower B will repay the $15,000 debt, but Borrowers C, D, and E will not repay their debts, the sum of Borrowers A and B's loans would be in the numerator, resulting in a 67.5 percent repayment rate ($27,000/$40,000). Under a borrower-based calculation, the repayment rate would be 40 percent (two out of the five borrowers were repaying their loans).

Changes: None.

Threshold for the Loan Repayment Rate and Debt-to-Earnings Ratios

Comment: Some commenters expressed concern that there was no reasoned basis to support the Department's selection of 45 percent and 35 percent as the repayment rate thresholds for determining, in part, if programs are fully eligible, restricted, or ineligible to participate in the title IV, HEA programs. The commenters believed that this approach was simply a way for the Department to try to close as many private sector schools as possible by adjusting the thresholds based on the market's ability to absorb displaced students from private sector schools.

On the other hand, some commenters opined that the proposed loan repayment rate needed to be strengthened, and recommended that the Department increase the threshold for each tier by at least 10 percentage points. Consequently, a program would have to achieve a repayment rate of at least 55 percent to remain fully eligible for title IV, HEA funds. Other commenters recommended a threshold of 50 percent for the loan repayment rate. Some commenters suggested that programs with repayment rates below 25 or 35 percent should lose eligibility. The commenters believed that it is important to recognize that the proposed thresholds are likely to overstate actual repayment rates because the proposed repayment rate excludes both private loans and parent PLUS loans and many students and families may have accrued substantial amounts of these types of debt for which repayment is not being measured. The commenters noted that in 2008–09, these two forms of debt accounted for 20 percent of all postsecondary education loans. The commenters believed that these circumstances demonstrated both the need to increase the repayment rate thresholds and the importance of including private loans in the debt-to-earnings measure.

Other commenters believed that no changes should be made in the proposed thresholds. Others argued that if a program satisfied the debt-to-earnings threshold, then it should be eligible for title IV, HEA funds. These commenters believed the loan repayment rate metric would not be a quality test of the program's results.

Another commenter argued that the proposed standards for the loan repayment rate were not strict enough for "low-value programs," which the commenter identified as programs where the percentage increase of post-graduate income is less than the program's debt-to-earnings ratio as a percentage of annual earnings for the program's graduates. The commenter recommended that the Department require a low-value program to maintain a 65 percent loan repayment rate in order for the program to maintain full eligibility.

A number of commenters noted that the mean repayment rate for all institutions is 48 percent and that an overwhelming majority of minority-serving institutions and community colleges, as well as many urban public and independent colleges and universities, would fail to meet the 45 percent repayment rate threshold if adopted by the Department. The commenters questioned the use of this standard of quality that almost one-half of all colleges would fail to meet. In addition, the commenters believed that repayment rates are influenced by a number of factors that have no relation to the quality of the educational program.

Some commenters believed that the Department did not justify its proposal that a program must have an annual loan payment of 8 percent or less of average annual earnings in order to meet the debt thresholds. The commenters suggested that the average annual earnings threshold should be adjusted from eight to at least 12 percent, which would be less than half of the expected upper level of spending on housing and more accurately reflect the role of education in a person's life.

Alternatively, commenters suggested the Department adopt a 10 percent threshold, pointing to the GAO study "Monitoring Aid Greater Than Federally Defined Need Could Help Address Student Loan Indebtedness" (GAO–03–508). The study indicated that 10 percent of first-year income is the generally agreed-upon standard for student loan repayment and that the Department itself established a performance indicator of maintaining borrower indebtedness and average borrower payments for Federal student loans at less than 10 percent of borrower income in the first repayment year in the Department's "FY 2002 Performance and Accountability Report" (see page 165, *http://www2.ed.gov/about/reports/annual/2002report/index.html*).

Some commenters noted that Sandy Baum and Saul Schwartz, economists upon whose 2006 study "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt" the Department relied for the discretionary earnings threshold in proposed § 668.7(a)(1)(ii) and (iii) and (a)(2)(ii), have criticized the 8 percent metric as not necessarily applicable to higher education loans because the 8 percent threshold (1) Reflects a lender's standard of borrowing, (2) is unrelated to individual borrowers' credit scores or their economic situations, (3) reflects a standard for potential homeowners rather than for recent college graduates who generally have a greater ability and willingness to maintain higher debt loads, and (4) does not account for borrowers' potential to earn a higher income in the future. Commenters emphasized that Baum and Schwartz believe that using the difference between the front-end and back-end ratios historically used in the mortgage industry as a benchmark for manageable student loan borrowing has no particular merit or justification.

Commenters also stated that the 8 percent debt-to-earnings threshold is not supported by any standard economic analysis of educational investment decisions. According to the commenters, such an analysis does not imply a limit on annual debt payment related to annual earnings, but uses a cost-benefit model that includes the gains to earnings resulting from education. The commenters believed the Department should recognize that

borrowing for education costs is different than borrowing for a home mortgage because education tends to cause earnings to increase. As a result, the commenters believed the Department should increase the threshold. For example, a commenter suggested that a 12 percent threshold would be more reasonable.

Some commenters did not agree with the Department's rationale for proposing that a program's annual loan payment may be as high as 30 percent of discretionary income under § 668.7(a)(1)(ii). The commenters argued that the Department should simply adopt the recommendations made by Sandy Baum and Saul Schwartz in the 2006 College Board study that annual student debt should not exceed 20 percent of discretionary income. The commenters believed that the average annual earnings threshold needed to be strengthened noting that allowing a threshold of up to 8 percent only for student loan debt already fails to account for a student's other debts, but allowing up to 12 percent is clearly without a sound rationale and should be eliminated from the regulations after a phase-in period. The commenters also noted that a student's debt is likely to be understated because the same interest rate used for calculating the annual debt service for Federal unsubsidized loans would also be used to calculate the debt service of private education loans which are used more by students attending for-profit institutions. For these reasons, the commenters argued that the Department should avoid using any threshold higher than 8 percent of annual earnings or 20 percent of discretionary income.

Discussion: In view of these comments, the Department is replacing the proposed two-tiered approach that would establish upper and lower thresholds for the debt measures with a single set of minimum standards. Under this simplified approach, the Department is establishing a minimum standard of 35 percent for the loan repayment rate, and a maximum standard of 30 percent of discretionary income and 12 percent of annual earnings for the debt-to-earnings ratios.

The Department set these thresholds with the goal of identifying programs that are failing to prepare students for gainful employment in a recognized occupation, as demonstrated by the prevalence of unaffordable debts and poor employment prospects among their former students. In recognition of the seriousness of steps to revoke eligibility, the Department is defining standards that identify the most clearly problematic programs.

The debt-to-earnings ratios were set after consideration of industry practice and expert recommendations. The ratios identify only programs where the majority of graduates have debt-to-earnings ratios that exceed recommended levels by 50 percent. Consistent with the views expressed in the literature, it allows programs to demonstrate that their debt is affordable based upon either total earnings or discretionary income. The combination of these measures also recognizes that borrowers can afford to contribute a greater share of their income to debt service as their incomes rise.

The repayment rate measure demonstrates that former students are, in fact, struggling to repay their loans. It identifies the approximately one-quarter of programs where 65 percent of former students attempting to repay their loans are nonetheless seeing their loan balances continue to grow.

As shown in Table A, approximately 26 percent of programs across all sectors with more than 30 borrowers in a four-year period fall below the 35 percent threshold based on one year of repayment rate data. The public two-year sector has the highest concentration of programs below the threshold, with 9.2 percent of programs falling below the threshold. These numbers are higher than the actual number of programs we expect to fall below the repayment rate threshold because they may not fully account for the treatment of borrowers who are eligible for Public Service Loan Forgiveness (PSLF) or in alternative repayment plans that allow payments that are equal to or less than accrued interest, or an institution's potential responses to the regulations, such as investments in debt counseling, which could raise programs' rates before the first official rates for FY 2012 are calculated in 2013. Moreover, the repayment rate distribution presented in Table A shows that two-fifths of programs with repayment rates below the 35 percent threshold were within 5 percentage points of meeting the threshold. Once the aforementioned factors are taken into account, the loan repayment rate for numerous programs would likely increase to over the 35 percent threshold, thereby meeting the repayment rate measure.

Table A: Cumulative Distribution of Estimated Large Gainful Employment Programs by Repayment Rate Category and Sector*

	4-year Institutions			2-year Institutions			Less-than-2-Year Institutions			
Repayment Rate (0% to...)	**Public**	**Private Nonprofit**	**Private For-profit**	**Public**	**Private Nonprofit**	**Private For-profit**	**Public**	**Private Nonprofit**	**Private For-profit**	All Institutions
5%	0.0%	0.0%	0.0%	1.1%	0.0%	0.0%	0.0%	0.0%	0.1%	**1.3%**
10%	0.0%	0.0%	0.0%	1.2%	0.0%	0.1%	0.0%	0.0%	0.2%	**1.5%**
15%	0.0%	0.0%	0.1%	1.3%	0.0%	0.2%	0.0%	0.1%	0.4%	**2.2%**
20%	0.0%	0.0%	0.8%	1.5%	0.0%	1.2%	0.0%	0.1%	0.7%	**4.4%**
25%	0.0%	0.1%	1.5%	2.1%	0.0%	2.6%	0.0%	0.1%	1.5%	**8.0%**
30%	0.3%	0.2%	2.7%	4.6%	0.0%	4.2%	0.1%	0.1%	2.8%	**14.9%**
35%	0.7%	0.3%	4.0%	9.2%	0.1%	6.2%	0.2%	0.2%	4.5%	**25.5%**
ELIGIBILITY THRESHOLD										
40%	1.0%	0.4%	5.7%	14.9%	0.1%	7.9%	0.3%	0.2%	5.6%	**36.0%**
45%	1.4%	0.6%	7.6%	20.3%	0.1%	9.4%	0.7%	0.3%	6.7%	**47.1%**
50%	2.0%	0.9%	9.3%	25.0%	0.2%	10.8%	1.0%	0.3%	7.8%	**57.2%**
55%	3.0%	1.1%	10.1%	27.9%	0.2%	11.3%	1.3%	0.3%	8.6%	**63.8%**
60%	3.7%	1.6%	10.5%	30.8%	0.3%	11.8%	1.4%	0.4%	9.3%	**69.8%**
65%	4.3%	2.0%	10.7%	32.2%	0.3%	12.3%	1.6%	0.4%	9.6%	**73.6%**
70%	5.3%	2.5%	10.8%	33.3%	0.4%	12.5%	1.7%	0.5%	10.1%	**77.2%**
75%	5.7%	3.2%	10.8%	33.7%	0.5%	12.7%	1.8%	0.5%	10.3%	**79.2%**
80%	6.0%	3.7%	10.8%	34.0%	0.6%	12.7%	1.8%	0.5%	10.4%	**80.6%**
85%	6.0%	3.9%	10.8%	34.0%	0.6%	12.8%	1.8%	0.5%	10.5%	**81.0%**
90%	6.0%	4.0%	10.8%	34.1%	0.6%	12.8%	1.8%	0.5%	10.5%	**81.2%**
95%	6.0%	4.0%	10.8%	34.1%	0.7%	12.8%	1.8%	0.5%	10.5%	**81.3%**
100%	6.0%	4.0%	10.8%	34.3%	0.7%	12.8%	1.9%	0.5%	10.6%	**81.7%**
Sector Total**	**6.2%**	**4.0%**	**11.1%**	**45.4%**	**1.0%**	**13.4%**	**4.9%**	**0.8%**	**13.2%**	**100.0%**

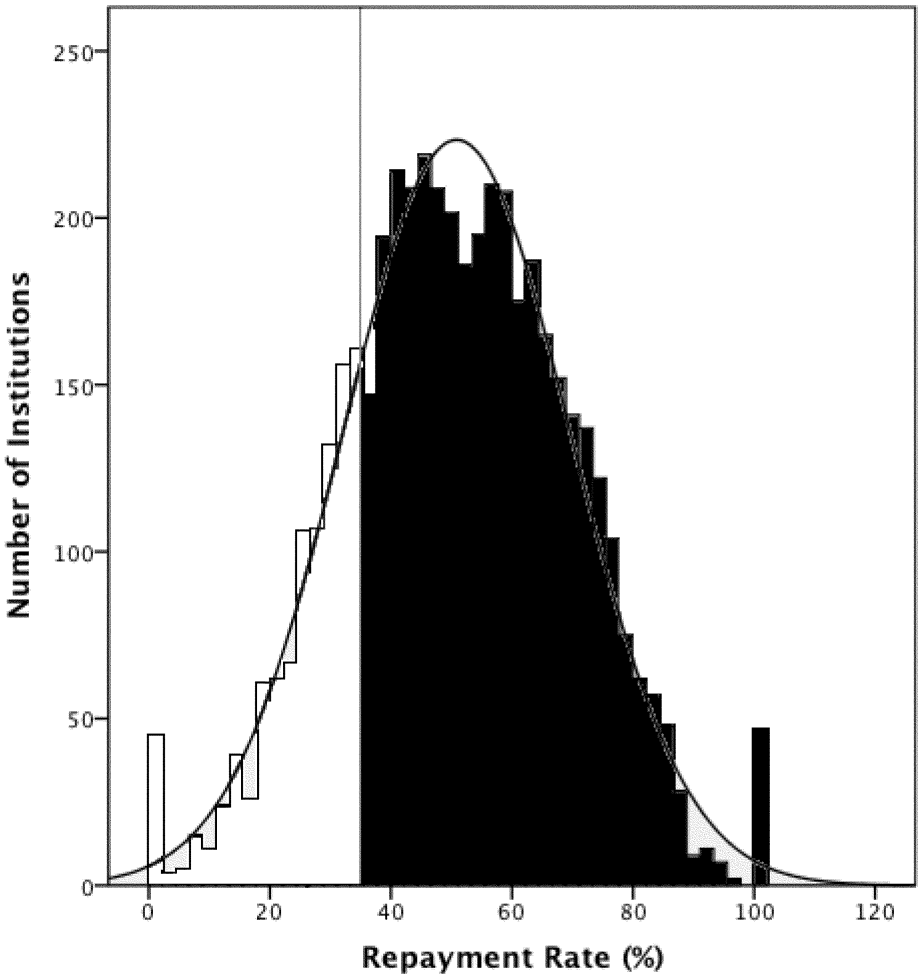
*Large program defined as having more than 30 borrowers entering repayment or completers in the 4YP.

**Sector total percentages include institutions with repayment rates that are unavailable.

Source: U.S. Department of Education analysis of data from the National Student Loan Data System and the Integrated Postsecondary Education Data System

Chart 1 shows the distribution of repayment rates across all types of institutions. The mean repayment rate for all of these programs, using the loan repayment rate specified in these final regulations, is 51 percent. The mean repayment rate for these programs at public institutions is 49 percent, 60 percent at private, non-profit institutions, and 43 percent at private, for-profit institutions.

Chart 1: Distribution of Repayment Rates in all Sectors



In developing the lower limit of the repayment rate in the July 26, 2010 NPRM, we attempted to define a relatively small subset of programs that could potentially lose eligibility. At the same time, we balanced that concern against the need to make the measure a meaningful performance standard. The programs within the lower boundary are, by definition, the worst performing when measured against both the repayment rate and debt-to-earnings ratios. Setting the threshold for eligibility at 35 percent identified approximately the lowest-performing quarter of programs.

A similar approach was taken in developing the repayment rate threshold for these final regulations. Although we have revised the methodology for calculating the repayment rate, the 35 percent threshold remains close to the 25th percentile among gainful employment programs. Table B shows frequency statistics associated with the new repayment rate measure across all institutional types.

Table B: Statistical Summary of Repayment Rates

Repayment Rates by Percentile						
5th	10th	25th	Median	75th	90th	95th
20.3%	26.9%	38.0%	50.6%	64.2%	75.0%	81.3%

With regard to the study by the College Board, economists Sandy Baum and Saul Schwartz preferred a debt-service approach based on discretionary income rather than total income. The authors argued that a percentage based on total income does not answer the question of how much students can borrow without having difficulties repaying their loans because the percentage of income that borrowers can reasonably be expected to devote to repaying their loans increases with income. However, the authors did not suggest that 20 percent is a reasonable debt-service ratio for typical borrowers. The authors suggested that the maximum affordable debt-service ratio is approximately 20 percent. In the July 26, 2010 NPRM, we adopted this suggestion as the primary measurement of affordable debt at most income levels.

However, because a gainful employment program would fail the discretionary income ratio whenever the

income of the students who completed the program was less than 150 percent of the poverty guideline, we proposed a second debt-to-earnings ratio where the annual loan payment would not exceed 8 percent of total income. As noted in the July 26, 2010 NPRM (see 75 FR 43620) and the Baum and Schwartz study, 8 percent is a commonly used standard for evaluating manageable debt levels. Under this "best of both worlds" approach, programs could satisfy the proposed debt-to-earnings ratios in one of two ways. Programs whose graduates have low earnings relative to debt would benefit from the calculation based on total income, and programs whose graduates have higher debt loads that are offset by higher earnings would benefit from the calculation based on discretionary income.

Chart 2 represents the interaction between the two debt measures and how programs could retain eligibility under either measure. Table C provides the data underlying Chart 2 and indicates the maximum median loan debt a program may have so that the monthly payment falls under the final debt threshold.

Chart 2: Allowable Debt Levels by Earnings (Areas under the Lines Represent Permissible Typical Debt Burdens)

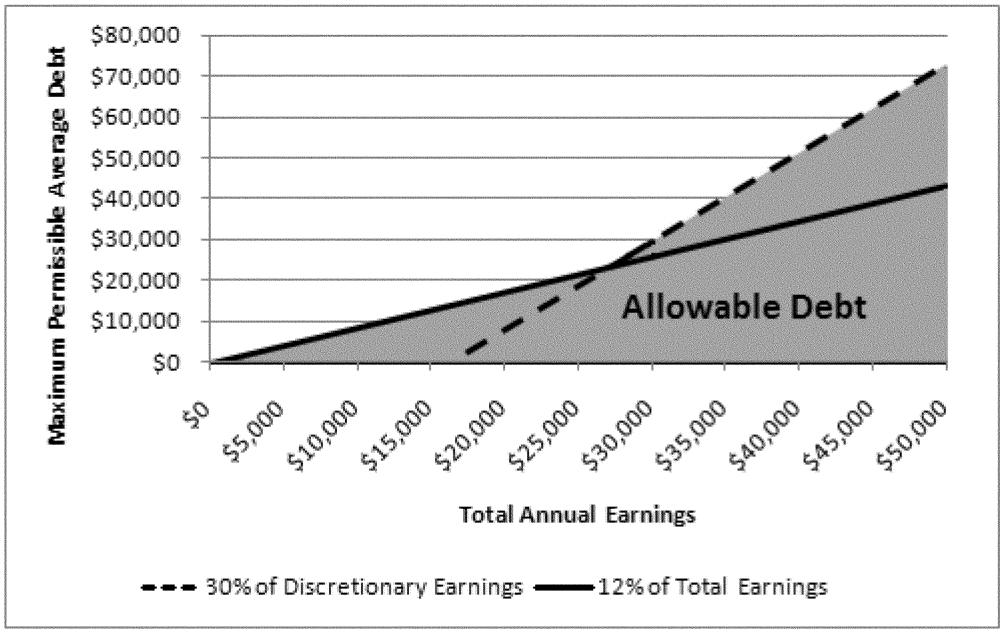


Table C: Allowable Debt Levels by Earnings

	Maximum Permissible Average Debt			
Average Annual Earnings	12% of Total Earnings	30% of Discretionary Earnings	Higher of Two Standards	Maximum Monthly Payment
$5,000	$4,345	$0	$4,345	$50
$10,000	$8,690	$0	$8,690	$100
$15,000	$13,034	$0	$13,034	$150
$20,000	$17,379	$8,157	$17,379	$200
$25,000	$21,724	$19,019	$21,724	$250
$30,000	$26,069	$29,881	$29,881	$344
$35,000	$30,414	$40,743	$40,743	$469
$40,000	$34,758	$51,605	$51,605	$594
$45,000	$39,103	$62,467	$62,467	$719
$50,000	$43,448	$73,329	$73,329	$844

For the loan repayment rate, the Department proposed a threshold of 45 percent for full, unrestricted eligibility.

This represented the mean repayment rate among institutions from all sectors (the actual repayment mean was 48 percent which was rounded down to 45 percent to establish the threshold).

The 20 percent discretionary income threshold, 8 percent total income threshold, and 45 percent repayment rate threshold in the proposed regulations established reasonable debt levels. Raising the baseline thresholds for the debt-to-earnings ratios by 50 percent set the boundary above which it could become increasingly more difficult for a borrower to make loan payments. In reducing the loan repayment rate threshold to 35 percent, which approximated the 25th percentile of the distribution of repayment rates, we set the boundary below which programs could potentially become ineligible for title IV, HEA funds. So, under the July 26, 2010 NPRM, programs that scored in between the baseline and lower thresholds would continue to qualify for title IV, HEA funds, but would be subject to restrictions.

Under the framework established in these final regulations, the Department shifts from focusing on programs that have problematic debt levels (programs subject to restrictions) to targeting the lowest-performing programs (programs where the annual loan payment exceeds 30 percent of discretionary income and 12 percent of annual earnings and repayment rates less than 35 percent). By adopting the more lenient thresholds for the debt-to-earnings ratios, we provide a tolerance of 50 percent over the baseline amounts to identify the lowest performing programs, as well as account for former students who completed a program but who may have left the workforce voluntarily or are working part-time. For the loan repayment rate, the 35 percent threshold continues to represent the 25th percentile of repayment rates rounded down to the nearest 5 percent, which in our view, allows for a minimally acceptable outcome where nearly two-thirds of borrowers would not be making payments sufficient to reduce by at least one dollar the outstanding balance of the loans they incurred for enrolling in a program. In addition, because a program now either passes or fails the minimum standards, unlike the approach in the July 26, 2010 NPRM we are not placing any restrictions on passing programs.

As discussed in more detail elsewhere in this preamble, under these final regulations, there will be some programs for which the Department will not have the data necessary to calculate the debt measures. Accordingly, we are clarifying that a program is considered to provide training that leads to gainful employment in a recognized occupation if the data needed to determine whether the program meets the minimum standards are not available to the Secretary.

With regard to the comment on "low-value programs," although we find the commenter's suggestion intriguing, the relationship between the variables (post-graduate income compared to the results of the debt-to-earnings ratio) do not provide a clear basis for setting the repayment rate at 65 percent. In any case, the suggested approach would add significant complexity and uncertainty, as institutions would not know what threshold their programs are expected to meet until they have determined their performance on the other threshold. More significantly, we are not convinced this approach would be better at identifying the poorest performing programs.

Changes: Section 668.7(a)(1) has been revised to establish minimum standards for a gainful employment program. The program satisfies the standards if its loan repayment rate is at least 35 percent, or the program's annual loan payment is less than or equal to 30 percent of discretionary income or 12 percent of annual earnings. Section 668.7(a)(1) also has been revised to state that a program is considered to meet the minimum standards if the data needed to determine whether a program satisfies those standards are not available to the Secretary.

Definitions

Definitions of "Program" (Proposed § 668.7(a)(3)(i)); Final § 668.7(a)(2)(i))

Comments: Commenters considered the definition of the term *program* to be too vague and requested additional guidance. For example, commenters questioned whether, under the proposed regulations, a program would contain multiple degree levels, whether the Department would evaluate a program at the institutional or branch level, and whether a program could include multiple areas or concentrations of study. Similarly, other commenters noted that because program performance varies greatly by campus location, the measures should be made at the campus level, and successful campuses would thus not be negatively affected by the regulations.

Discussion: We agree that the definition of the term *program* should be clarified. To properly track programs or associate the program with its debt measures, we identify a program by a unique combination of the institution's six-digit OPEID number, the program's six-digit CIP code, and credential level. For this purpose, the credential levels are undergraduate certificate, associate's degree, bachelor's degree, post-baccalaureate certificate, master's degree, doctoral degree, and first-professional degree.

Under this definition, a program with a unique identifier that is offered by an institution at its main campus or at any of its locations is considered the same program for the purposes of the reporting and disclosure requirements in § 668.6 and the gainful employment program requirements in § 668.7. In addition, with regard to whether a program could include multiple areas or concentrations of study, we believe the definition's use of CIP codes alleviates this concern as the CIP code evaluation would take into account those issues. We remind institutions that they are responsible for accurately assigning CIP codes to programs in their reporting to the National Center for Educational Statistics (NCES) under section 487(a)(17) of the HEA. The inaccurate assignment of CIP codes may adversely affect the institution's participation in the title IV, HEA programs. The Secretary would consider a CIP code inaccurately assigned if the Secretary determines that the program best conforms to the description of another CIP code.

The Department does not agree that the debt measures should apply at a campus level when a single institution has multiple locations. In these circumstances, a student may attend courses for his or her program at more than one location or take additional courses online. Even if a program may be attended, in its entirety, at individual locations of an institution, the program is essentially the same program at all of the locations of the institution. We believe that it would be difficult and arbitrary to attempt to distinguish among the various gradations in patterns of student attendance. Additionally, even though there may be some variation between locations, such as those resulting from locations in different States subject to different State licensure requirements for a particular career, we do not believe such variation justifies attempting to distinguish a program's performance based on being offered at multiple locations. Moreover, in many cases, dividing programs by location would make it more difficult to reliably assess performance due to the fact that many institutions may have a small number of students in a particular location.

Changes: In § 668.7(a)(2), we have revised the definition of *program* as described in this discussion.

Comments: Commenters did not believe the CIP code format is sufficiently granular to adequately distinguish among programs. The commenters noted that currently there are a number of gainful employment programs that share the same CIP code. For example, in the context of new and emerging health care fields, multiple programs may be designated in the "general" or "other" subcategories. The commenters believed that, because the CIP codes are not scheduled to be updated until 2020, they will rapidly become obsolete but will still be used to assess program performance.

Discussion: We believe that using the CIP codes is sufficient to identify a program, particularly when used in combination with the institution's OPEID and credential level as provided under the definition of *program.* We believe this coding convention greatly mitigates any concern related to the available codes under the CIP. We do not view the decennial updating of the CIP to be an impediment to the use of

these codes because new fields of study may also use more generic CIP codes until the next update of the CIP codes. However, if the CIP codes prove inadequate to reflect the diversity of offerings at the postsecondary level, the coding can be revised to reflect the greater depth required before 2020. In addition, through our oversight of institutional reporting under the Integrated Postsecondary Education Data System (IPEDS) completions survey, we can make adjustments to the CIP code categories more frequently to ensure that they appropriately reflect the programs being offered by institutions.

Changes: None.

Comment: One commenter stated that 59 percent of cosmetology schools, many of which offer only one program, were at risk of losing eligibility based on the data contained in the document on cumulative four-year institutional repayment rates that the Department released after issuing the July 26, 2010 NPRM. According to the commenter, these schools could lose eligibility because of the limited number of borrowers who make up the school's cohort and the impact that a single or relatively small number of borrowers can have on the school's repayment rate. The commenter noted that for schools with one or a limited number of program offerings, the loss of one program would result in the loss of the institution. The commenter recommended that the Department provide for very limited exemptions from the annual loan repayment rates for institutions with a small number of borrowers in repayment and consider instead basing the threshold on four-year cohorts of 120 students or less, consistent with the low-volume treatment for CDRs.

Discussion: The HEA identifies those programs that must provide training that leads to gainful employment in a recognized occupation in order to receive title IV, HEA funds. The statute makes no exception for an institution with only one program; accordingly, we cannot exempt institutions offering only one program from the debt measures. However, we are providing in these final regulations an exemption for a program with a small number of borrowers or completers because debt measures based on a few students completing the program or repaying their loans may not accurately reflect the program's performance.

In general, under these regulations, and as described in further detail under the heading, *Definitions of* "*Three-Year Period (3YP)*" *and* "*Prior Three-Year Period (P3YP)*" *(Proposed § 668.7(a)(3)(iii) and (iv)),* we will assess programs based on two years of performance against both debt measures. When a program has fewer than 30 borrowers or program completers in the two-year period, however, we will assess the program's performance across a four-year period. We also are revising the regulations to provide that programs that have fewer than 30 borrowers or program completers in the four-year period are considered to meet the debt measures due to the difficulty in reliably assessing the performance of programs with small numbers of students.

In addition, because the Social Security Administration (SSA) will attempt to match the identity data of the students included in a two- or four-year period to the identity data that it maintains, any mismatches may result in SSA not including students in its calculation of the mean and median earnings for a program. Consequently, there may be cases where more than 30 students completed a program, but SSA calculates the mean and median earnings for the program based on 30 or fewer students. For these cases, as discussed more fully under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g)),* the Department will use the mean and median earnings provided by SSA to calculate the debt-to-earnings ratios for the program, but where SSA is unable to provide earnings data for one or more students, the Department may adjust the median loan debt for the program based on the number of students that SSA excluded in calculating the mean and median earnings. SSA may not calculate the mean and median earnings for a program if the number of students excluded falls below a threshold established by SSA. In these cases, the Department will consider the program to have satisfied the debt measures.

Finally, we are revising the regulations to provide that programs with a median loan debt of zero are meeting the measures. This clarification is a logical extension of the debt measures since programs with a median loan debt of zero are not placing any debt burden on the majority of their students.

Changes: We have revised § 668.7(a)(2) to establish the term *four-year period* (4YP), which is defined as the period covering four consecutive FYs that occur on the third, fourth, fifth, and sixth FYs (4YP) prior to the most recently completed FY for which the debt measures are calculated. For a program whose students are required to complete a medical or dental internship or residency, as identified by an institution, the four-year period (4YP–R) covers the sixth, seventh, eighth, and ninth FYs (4YP–R) prior to the most recently completed FY for which the debt measures are calculated. We note that debt measures for programs using the 4YP–R will not be calculated until data covering those years are available. The definition of *four-year period* also provides that a required medical or dental internship or residency is a supervised training program that requires the student to hold a degree as a doctor of medicine or osteopathy, or a doctor of dental science; leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health-care facility that offers post-graduate training; and must be completed before the borrower may be licensed by the State and board certified for professional practice or service.

In addition, we have revised § 668.7(d) to provide that the debt-to-earnings ratios for a small program are calculated using the 4YP or the 4YP–R if 30 or fewer students completed a program during the 2YP or the 2YP–R, respectively. Similarly, the 4YP or the 4YP–R is used for the loan repayment rate, if the corresponding 2YP or 2YP–R represents 30 or fewer borrowers whose loans entered repayment during the 2YP or the 2YP–R, respectively.

The revised regulations in § 668.7(d) provide that, in determining whether the 2YP or the 2YP–R represents 30 or fewer students or borrowers, we remove from the applicable two-year period any student or loan for a borrower that meets the exclusion criteria under § 668.7(b)(4) or (c)(5). Under those sections, we do not include a student or loan for a borrower in the two- or four-year periods used to calculate the debt measures if the Department has information that (1) for the loan repayment rate, one or more of the borrower's loans were in an in-school or a military-related deferment status or, for the debt-to-earnings ratios, the student's loans were in a military-related deferment status at any time during the calendar year for which the Department obtains earnings data from SSA, (2) for both measures, the student died, (3) for both measures, one or more of the borrower's loans were assigned or transferred to the Department that are being considered for discharge as a result of the total and permanent disability of the borrower, or were discharged on that basis under 34 CFR 682.402(c) or 34 CFR 685.212(b), or (4) for the debt-to-earnings ratios, the student was enrolled in any other

eligible program at the institution or at another institution during the calendar year for which the Secretary obtains earnings information under § 668.7(c)(3).

We also have revised § 668.7(d)(2)(i) to provide that a program satisfies the debt measures if SSA does not provide the mean and median earnings for the program. In addition, the final regulations provide that if the median student loan debt of a program is equal to zero, the program would meet the debt measures.

Graduate Programs

Comment: Some commenters recommended that the Department exempt graduate programs from the gainful employment requirements because graduate students are sufficiently sophisticated to determine whether they can afford the education they seek and how much debt to incur. The commenters also noted that many graduate students are already employed and pose little risk of nonpayment, but have extremely high loan limits available to them, making them more likely to consolidate their loans, repay their loans under income-sensitive repayment plans, and incur what may be significant unpaid accrued interest that is subject to capitalization. Other commenters expressed concern that graduate students in a program would be likely to consolidate loans from the graduate program with loans from their undergraduate programs, and as a result the graduate program could find it harder to meet the repayment rate threshold if it enrolls students who enter with significant amounts of student loan debt. Alternatively, some commenters recommended that the Department limit the amount of debt counted in calculating the repayment rate to the amount used to pay tuition and fees for the program if the Department chooses not to exempt graduate programs. The commenters believe this approach would ensure that institutions are not improperly penalized for decisions made by students to borrow excessively, including incurring private loan debt, which may result in the institution being unable to continue to offer the graduate program of study.

Discussion: The HEA identifies those programs that must provide training that leads to gainful employment in a recognized occupation in order to receive title IV, HEA funds. These include graduate programs; therefore, we do not have a legal basis to categorically exempt these programs from the statutory requirements. However, some distinctions are recognized based upon the characteristics of those programs, such as the use of an extended repayment period in the calculation of the debt to earnings ratio. Based on the comments noting that students attending graduate programs may have different expectations about how long it will take to repay their loans due to the increased costs associated with those programs, we have extended the repayment period for certain of those programs to up to 20 years for the purposes of calculating the annual loan payment for the debt-to-earnings ratios. In addition, we recognize that many graduate students have outstanding student loans from prior postsecondary programs. When calculating the repayment rate for post-baccalaureate programs, we will consider a borrower with a consolidation loan to be successfully repaying his or her loans if the outstanding balance does not increase over the course of the most recently completed FY.

Changes: See changes discussed under the heading, *Loan Amortization,* and under the heading, *Loan Repayment Rate Calculation.*

Definitions of "Three-Year Period (3YP)" and "Prior Three-Year Period (P3YP)" (Proposed § 668.7(a)(3)(iii) and (iv))

Comments: Commenters disagreed with the Department's proposed regulations to use starting salary data for the "earnings" portion of the debt-to-earnings ratio calculation. They were concerned that 3YP data do not take into account the lifelong benefit of higher education and the fact that graduates will earn more money as they gain experience and responsibility. Commenters recommended that the Department eliminate the 3YP and P3YP distinctions and replace these two independent benchmarks with a single benchmark based upon income data for a six-year period.

A number of commenters indicated that it is impossible for medical and dental residents to satisfy the proposed gainful employment standards, under the proposed P3YP. According to the commenters, the proposed P3YP fails to account for the fact that most, but not all, medical and dental residents will undertake employment during years 4, 5, and 6 following graduation at entry level salaries. For example, it takes a minimum of three years of a residency before a medical doctor can become eligible for full licensure and able to practice medicine without supervision in all fifty States. Residencies in categorical subspecialties, such as neurology, anesthesia, or cardiology, can take up to eight years.

Along the same lines, commenters representing several medical and dental schools, and related residency programs that award postgraduate certificates, noted that the proposed repayment rate regulations failed to consider the nature of medical and dental training and required residency periods. Because the residency periods may be for three to eight years following medical and dental school graduation, the proposed repayment rate for these programs would be lower than it should be. The commenters stated that the compensation of medical residents is so small that it is not a recognized occupation according to the BLS and that medical school graduates are not gainfully employed until after they complete their medical residencies. Consequently, it could take several years for a physician or surgeon to achieve a median salary level. As a result, many medical school graduates opt for income-contingent, income-based, or extended repayment plans and consolidate their loans, leading to significant amounts of capitalized interest. The commenters stated that under the proposed repayment rate formula, the majority of U.S. medical schools would fail to meet the 45 percent repayment rate standard. Therefore, the commenters urged the Department to exempt from the regulations medical school programs and postdoctoral dental residency certificate programs.

Another commenter recommended that the Department allow institutions to base the loan repayment rate on either the four most recent Federal FYs or the prior set of four FYs (i.e., years 5 through 8) in order to better reflect earnings after graduation. The commenter offered that institutions choosing the prior four-year period should be required to comply with the stricter 45 percent repayment rate threshold. The commenter also noted that this approach could provide an option for schools during economic recessions when external factors can result in artificially reduced loan repayment rates.

Discussion: The Department proposed in § 668.7(a)(1)(ii) and (iii) to use the most current earnings available of the students who completed the program in a 3YP to calculate debt-to-earnings ratios. If an institution could show that the earnings of students in a particular program increase substantially after an initial employment period, the Department would use the P3YP. As discussed more fully under the heading, *Earnings of program completers,* those calculations have been modified to use two-year periods. This change to a two-

year period will allow an institution to show improvement in a program's performance in a shorter cycle. Under the proposed framework, approximately one-third of the students who are included in the 3YP would have completed a program or entered repayment during a particular year, whereas under these final regulations approximately one-half of the students in the 2YP will represent a single year. Accordingly, the current debt measures for a program will not be affected by former students in the program for more than a two-year period.

The Department agrees that the performance of programs whose graduates are required to complete medical or dental internships and residencies before they can begin professional practice should be measured at a later point in repayment than borrowers who would be expected to obtain gainful employment immediately after leaving a program. Although borrowers earn money and enter repayment, in a sense, the internships and residencies are a continuation of the educational program. As long as an institution identifies these programs, we will calculate the repayment rate based on the two-year cohort of borrowers who first entered repayment on their loans in the sixth and seventh years prior to the year the repayment rate is calculated rather than the third and fourth years used for all other borrowers. The debt-to-earnings ratios for these programs will be calculated based on the two-year cohort of borrowers who completed the program in the sixth and seventh years prior to the year the debt-to-earnings ratios are calculated. In order to be clear about those medical or dental internship or residency programs for which the 2YP–R (as well as the 4YP–R) would apply, we are providing in the definitions of *two-year period* and *four-year period* that a required medical or dental internship or residence is a supervised training program that contains three elements. First, the program must require the student to hold a degree as a doctor of medicine or osteopathy, or a doctor of dental science. Second, the program must lead to a degree or certificate awarded by an institution of higher education, a hospital, or a health-care facility that offers post-graduate training. Third, the program must be completed before the borrower may be licensed by the State and board certified for professional practice or service.

To provide an alternative for institutions that take immediate steps to improve a program's loan repayment rate during the initial three-year evaluation period, we will calculate the repayment rate based on the most recent two-year period, the two-year period alternate (2YP–A), which includes loans for borrowers who entered repayment during the first and second FYs prior to the most recently completed FY. We believe this provision parallels the alternative earnings approach described elsewhere in this preamble under which an institution may use alternative earnings data to recalculate the debt-to-earnings ratios for a failing program. Unlike that approach, however, the Department will automatically calculate the loan repayment rate for a program based on the 2YP and the 2YP–A (provided that the 2YP–A represents more than 30 borrowers whose loans entered repayment) for the covered two-year period and use the higher of those rates to determine whether the program satisfies the 35 percent repayment rate standard. Because it is intended to recognize rapidly improving programs during a transition period, the 2YP–A is available for repayment rates calculated for FYs 2012, 2013, and 2014 only.

Changes: Proposed § 668.7(a)(3)(iii) and (iv) defining a 3YP and P3YP have been removed. In their place, we have added a definition of *two-year period* in § 668.7(a)(2)(iv). Under this definition, for most programs, a *two-year period* is the period covering two consecutive FYs that occur on the third and fourth FYs (2YP) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2012, the 2YP is FYs 2008 and 2009. For a program whose students are required to complete a medical or dental internship or residency, as identified by an institution, a *two-year period* is the period covered by the sixth and seventh FYs (2YP–R) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2012, the 2YP–R is FYs 2005 and 2006.

We also have provided in the definition of *two-year period* that a required medical or dental internship or residency is a supervised training program that requires the student to hold a degree as a doctor of medicine or osteopathy, or a doctor of dental science; leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health-care facility that offers post-graduate training; and must be completed before the borrower may be licensed by the State and board certified for professional practice or service.

Finally, for FYs 2012, 2013, and 2014, the *two-year period* (2YP–A) is the period covered by the first and second FYs prior to the most recently completed FY for which the loan repayment rate is calculated. For example, if the most recently completed FY is 2012, the 2YP–A is FYs 2010 and 2011.

Restricted Programs (Proposed §§ 668.7(a)(2) and 668.7(e)); Failing Programs and Ineligible Programs (Final § 668.7(h) and (i))

Restricted Programs and Enrollment Limits

Comment: Some commenters objected to proposed § 668.7(e)(3), which would limit enrollment of title IV, HEA recipients in a restricted program to the average number enrolled during the prior three award years. The commenters believed that these growth restrictions, coupled with the employer affirmations in proposed § 668.7(e)(1), would result in the Department, rather than the market, controlling how many students are trained for a particular profession. The commenters argued that the Department would be exercising power over the job market, even though it is not equipped to assess the needs of the job market. According to these commenters, an analysis of whether a job market is growing, contracting, or otherwise changing requires consideration of many complex and interrelated factors, and that this analysis is beyond the Department's expertise in the educational sector. In addition, the commenters opined that the proposed regulations would have the effect of regulating job markets, not debt levels or whether a program prepares its students to earn an income. The commenters noted that a short-term oversupply of potential employees in a certain field could cause a program to become restricted, regardless of whether the program adequately trained its students for employment in that field.

Some commenters argued that title IV, HEA funds are not intended to be used only for a program that prepares a student for an occupation that is in demand at the time the student enters the program. Another commenter concluded that because restricted programs would likely have a significant number of Pell Grant students, limiting the number of title IV, HEA eligible students who can enroll in those programs would impede President Obama's 2020 higher education goal, because these are the types of students that institutions need to educate to meet that goal. In view of this consequence, this commenter suggested that the Department eliminate the proposed growth restriction and employer verification requirements and only

require institutions to make debt disclosure warnings to students in the institutions' promotional materials for these programs.

Some commenters recommended that the Department limit enrollment for a restricted program to the number of students enrolled during the previous award year. The commenters noted that under proposed § 668.7(e)(3), limiting enrollment to the average number of title IV, HEA eligible students enrolled during the last three award years could result in reducing enrollment. If a program has been growing over the last three years, the average enrollment for the three-year period would be lower than the highest enrollment for the most recent year. For example, if a program had an enrollment of 10 in year 1, 20 in year 2, and 30 in year 3, the average enrollment for all three years would be 20. The average enrollment would be 10 fewer than the highest enrollment for the three-year period.

Similarly, other commenters believed that reducing the number of title IV, HEA eligible students in a restricted program would likely cause institutions to scale back resources. They noted, however, that restricting enrollment to the most current award year level would drive improvement while still limiting growth. The commenters believed that this approach would avoid any diminishing of program quality that would otherwise occur when programs that could meet the debt thresholds are forced to scale back resources.

On the other hand, some commenters noted that the proposed average-enrollment approach might not reflect historic norms for a program experiencing rapid enrollment growth during the past three years and that a baseline reflecting growth in just those years might not provide an effective limitation. The commenters recommended that the Department place stricter enrollment limitations on restricted programs.

Commenters supporting the proposal to restrict enrollment argued that the restriction should be limited in duration. The commenters were concerned that institutions with large programs could continue to enroll title IV, HEA eligible students indefinitely without improving quality. Commenters also noted that nothing would prevent institutions from enrolling non-title IV students in restricted programs, thus allowing those programs to continue to grow. The commenters noted that many institutions enroll large numbers of borrowers who receive taxpayer-funded assistance from other government-funded educational programs such as the G.I. Bill. One of the commenters stated that according to the Department of Veterans Affairs, eight of the top 10 colleges with the most VA-funded students are for-profit institutions. In view of these concerns, the commenters recommended that the Department (1) require that a program on restricted status must improve in order to continue receiving Federal student aid, and (2) make the program ineligible if it is in a restricted status for three consecutive years.

In addition, commenters had several questions concerning the criteria the Department would use in determining how to count enrolled students for purposes of the enrollment restrictions.

Discussion: See the following discussion.

Ineligible Programs

Comment: Commenters expressed concern that the proposed regulations did not include a "grandfather" provision allowing students attending programs deemed ineligible to complete their program of study. The commenters believed that students enrolled in associate's and bachelor's degree programs should be permitted to attend the ineligible program and continue to receive title IV, HEA funds for longer than the one additional year proposed in the regulations. Commenters suggested alternative time periods including allowing a student to continue to receive title IV, HEA funds (1) until he or she completes the program, (2) up to the published length of the program, or (3) up to one and one-half times the length of the program. The commenters believed these periods were appropriate as long as the student is continuously enrolled and complies with satisfactory academic progress standards.

Another commenter contended that requiring a student in an ineligible program to rely on transferring to another institution to complete his or her degree or credential would result in substantial burdens for students, including disrupting the student's academic progress, adjusting to a new learning environment, and potentially having difficulties in the job market, including, but not limited to, having to explain to employers the reason for changing colleges midstream. The commenter argued that this limitation on student eligibility would not serve the Department's underlying policy goals because it would require students to decide among what the commenter believed to be three unappealing choices: (1) Remain in the program without title IV, HEA program assistance (but with a continued ability to obtain private educational loans at higher interest rates); (2) transfer to another program (with the accompanying negative consequences); or (3) leave the program without a credential but with student loan debt.

To help ensure that students in an ineligible program have adequate alternative options for obtaining a postsecondary education, other commenters suggested that the Department place an ineligible program on a probationary status for the first and second years after the year the program has been determined to be ineligible. The program would lose its eligibility for title IV, HEA funds only if it failed to meet the gainful employment standards for a third successive year. The commenters offered that, under this approach, the Department could require an institution to submit a plan to bring the program into compliance with the gainful employment standards, which would result in the institution having a reasonable amount of time to make needed adjustments. Similarly, other commenters recommended that in cases where more than 50 percent of an institution's students are enrolled in a particular program, the Department should not impose sanctions unless the program fails to meet the threshold requirements for three consecutive years.

Another commenter was concerned that a significant number of students enrolled in ineligible programs would not have meaningful access to more appropriate alternative educational opportunities and that there would not be the capacity to accommodate students from programs that fail the debt measures. The commenter opined that the Department should work with Congress to develop a transition plan to increase postsecondary capacity to address the needs of current and prospective students displaced when their program becomes ineligible under the regulations. The plan, according to the commenter, could include new investments in a range of programs that are currently authorized under the Higher Education Opportunity Act of 2008 (Pub. L. 110–315) (HEOA) but have never been funded, including the "Program to Increase College Persistence and Success;" the "Bridges from Jobs to Careers" grant program; and the "Business Workforce Partnerships for Job Skill Training in High Growth Occupation or Industries" grant program. In addition, the commenter believed that the Department should consider developing regulations or guidance to help ease student transitions between postsecondary institutions and other Federal training and employment programs, building on

successful State and local "career pathways" models that enable low-income and other at-risk individuals to acquire the skills they need for well-paying jobs and careers.

Other commenters believed that students who are unable or choose not to complete an ineligible program, or who are unable to or choose not to transfer to another program within the same institution, should have their Federal student loan debts discharged so that they have the opportunity to move on without penalty. The commenters noted that FFEL and Direct Loans may be discharged under the closed-school provisions of the title IV regulations. Another commenter suggested using the false certification provisions as the basis for discharging loans for students enrolled in ineligible programs. Other commenters believed that incurring loan debt for attending an ineligible program should be an allowable defense to collection for a student who is later unable to make loan payments.

Another commenter believed that the Department should give an institution an opportunity to lower tuition instead of making the program immediately ineligible. The commenter described a program designed for speakers of the Spanish language where a student takes automobile mechanics classes that are taught every day in the Spanish language for four hours, and then takes two hours of English as a Second Language on the same day. The commenter stated that the program is highly effective, but because it costs more than the institution's traditional programs it may become ineligible for title IV, HEA funds under the proposed metrics.

Commenters were also concerned that the proposed regulations did not specify when and under what standards an institution could apply to have an ineligible program regain its eligibility. The commenters recommended that the Department allow the institution to apply to regain eligibility for a program one full award year after the program became ineligible and determine whether the program regains its eligibility under the standards proposed for new programs.

Other commenters believed that no penalties should be imposed on a program for failing to meet a metric until after an institution is notified and provided with an opportunity to take corrective action. The commenters suggested that the Department allow the institution to bring the ineligible program into compliance during at least the same period of time that a student would be allowed to continue to receive title IV, HEA program funds for attending that program.

A commenter asked the Department to clarify how a student would be affected if a program is determined to be ineligible during the course of the student's studies. The commenter also questioned how the proposal disallowing the award of title IV, HEA program funds to students who begin attending an ineligible program after a specified date relates to a situation where a student has taken a leave of absence and the student resumes attending the program after the program became ineligible.

Discussion: As discussed under the heading, *Thresholds for the Debt Measures (§ 668.7(a)(1)),* we have simplified the regulations by establishing a single set of minimum standards that are applied over at least a three year period. Under the simplified approach, a program either passes or fails the minimum standards. Consistent with the general emphasis on disclosure and appropriate incentives, the debt warnings provided students during this extended period will play an important role.

Because the debt warnings in these final regulations are more extensive than the requirements proposed in the July 26, 2010 NPRM and the Department is seeking to focus the sanctions on the lowest-performing programs, we believe it is no longer appropriate to limit enrollment or place other restrictions on a gainful employment program.

We agree with commenters that institutions should be allowed some time to improve a program before it becomes ineligible for title IV, HEA funds, and we have therefore adopted the suggestion made by some of the commenters that a program not be subject to sanction for a three-year period. In § 668.7(h), we are providing that a failing program is one that does not satisfy at least one of the minimum standards for a FY. Under § 668.7(i), a failing program becomes ineligible if it fails the minimum standards for three out of the last four most recently completed FYs. If and when that occurs, the Department notifies the institution that the program is ineligible on this basis and that the institution may no longer disburse title IV, HEA funds to students enrolled in that program except as permitted using the procedures in § 668.26(d).

Using an extended period of three out of four FYs of failing the measures to make a program ineligible will provide greater flexibility and offer a measure of protection to programs that generally pass at least one of the measures but have an isolated and perhaps unusual year in which the program fails both debt measures. This change simultaneously responds to some of the concerns identified in the comments about the possibility that merely one year of failing the measures would result in a program becoming ineligible under the proposed regulations. In particular, this approach significantly reduces the chances that random variations in the caliber of a specific student cohort could put a program at risk of losing its eligibility for title IV, HEA funds. A good program could have a bad year, but it is far less likely that a good program could have three bad years out of four years. Extending the period of measurement to three out of four years allows for a more accurate reflection of typical performance.

Moreover, the approach helps to control for recessions and other variations in the labor market that could make it difficult for students (including those graduating from programs performing well on the measures) to get jobs. The average recession in the post-World War II period lasted for 11 months. See *http://www.nber.org/cycles/US_Business_Cycle_Expansions_and_Contractions_20100920.pdf.* In recent recoveries the unemployment rate has remained elevated for longer than the official recessionary period. With a longer observation period of three out of four years, programs will be less at risk of being judged by business cycle conditions that are out of their control.

At the same time, if the regulations had been altered to require two consecutive years of failing both measures for a program to lose eligibility, it is likely that some programs might not respond quickly enough to make relevant improvements. Using a period of three out of four consecutive FYs to determine a program's eligibility will also have the advantage of preventing a program that generally fails both measures from remaining eligible by simply passing one of the debt measures in one year. This extended period provides an opportunity for the institution to make a sustained assessment of the program's performance under both debt measures. This approach also provides an institution with time to make improvements to the program and evaluate whether it would be better to discontinue the program voluntarily.

As discussed more fully under the heading, *Debt warning disclosures (§ 668.7(j)),* because prospective and currently enrolled students face added risks for enrolling or continuing in failing programs, an institution must inform students of those risks and of the

options available to those students for continuing their education. The information provided to students through the debt warnings must address the questions of how long an institution may disburse funds to students enrolled in failing and ineligible programs and how students would be affected when a program becomes ineligible while they are enrolled. We believe that creating required disclosures of information to students while a program is failing and using a longer period to determine if a program is ineligible is better for students than allowing currently enrolled students in a program that loses eligibility to continue receiving Federal student aid funds.

With regard to the suggestions that the Department discharge the loans for students who are unable or unwilling to complete a failing program or transfer to another program, we note that the current loan discharge provisions are statutory and do not apply in these circumstances. Accordingly, a change in the law would be required to adopt these suggestions.

In response to the question of how an institution can reinstate the title IV eligibility of a program that becomes ineligible under these regulations, the institution must comply with the requirements under § 668.7(l). These provisions, discussed under the heading, *Additional Programs (proposed § 668.7(g)(2) and (3); Restrictions for ineligible and voluntarily discontinued failing programs (final § 668.7(l)),* describe the process by which an institution can reestablish the eligibility of an ineligible program or a failing program that the institution voluntarily discontinued, or establish the eligibility of a program substantially similar to an ineligible program.

Regarding the commenters' concern that a significant number of students enrolled in ineligible programs would not have meaningful access to more appropriate alternative educational opportunities and there would not be the capacity to accommodate students from programs that fail the debt measures, past experience with student loan default rates suggests that educational opportunities can continue to expand even if large numbers of institutions lose student aid eligibility. Pursuant to the Omnibus Budget Reconciliation Act of 1990, between 1991 and 1996, we eliminated approximately 1,148 schools from our student loan programs based on three consecutive years of unacceptably high default rates. Table D uses data from the National Postsecondary Student Aid Study (NPSAS) to show student enrollment between 1991 and 1996 by various characteristics. Over the course of this six-year period, schools that remained eligible for Stafford loans appear to have been able to accommodate the number of students who once attended, or otherwise would have attended, schools that lost eligibility.

Table D: Selected Characteristics of Undergraduate Students by Stafford Loan Receipt, 1989-90 and 1995-96

	Students			Subsidized Stafford Loan Borrowers		
	1989-90	1995-96	Change	1989-90	1995-96	Change
Public	**10,946**	**12,512**	**1,566**	**1,151**	**1,897**	**746**
4-year	4,736	5,055	319	872	1,633	760
2-year	5,998	7,254	1,256	258	261	3
Less-than-2-year	212	202	-9	20	3	-17
Private Nonprofit	**2,313**	**2,572**	**259**	**676**	**1,026**	**350**
4-year	2,072	2,356	284	620	988	368
Less-than-4-year	241	216	-26	56	38	-18
Private For-profit	**1,350**	**887**	**-463**	**821**	**466**	**-355**
2-years or more	453	431	-22	272	230	-42
Less-than-2-year	897	456	-441	549	236	-313
Total	**16,271**	**16,678**	**407**	**2,946**	**3,677**	**731**

Source: U.S. Department of Education, National Center for Education Statistics, 1989-90 National Postsecondary Student Aid Study (NPSAS:90).

As can be seen in Table D, overall undergraduate enrollment increased by some 400,000 in this timeframe, while enrollment at for-profit institutions declined by approximately one-third. In this case, the students appear to have increased their attendance at community colleges, by approximately 1.25 million students, as well as at public four-year universities.

The Department recognizes that the higher education landscape has changed since the early 1990s, with strong growth in for-profit institutions and innovations in online and distance learning options that allow for enrollment to expand at lower marginal costs. Therefore, we expect that the distribution of students leaving programs that fail the debt measures will differ from the situation in the 1990s, with a larger share of students expected to remain at institutions within the for-profit sector by moving to successful programs that increase enrollment in response to increased demand created by the closure of ineligible programs.

We appreciate comments suggesting that the Department work with Congress to develop a transition plan to increase postsecondary capacity to address the needs of potentially displaced students by funding programs authorized but not funded under the HEOA or to develop regulations to help ease student transitions between postsecondary institutions and other Federal training and employment programs. Congressional action would be required for these actions to occur.

The President's 2020 higher education goal is the guiding star for the Department. All of our efforts are directed to developing higher education strategies that support institutions in their efforts to better serve students and prospective students, particularly those who are from disadvantaged backgrounds, minority students, students with disabilities, working adults, and others that are at risk. However, the purposes of the 2020 goal will not be achieved by allowing institutions to continue offering low-performing programs that upon completion leave students with large debts and poor employment prospects.

These regulations have been developed specifically to provide opportunities for institutions to improve the gainful employment programs they are providing. Today, the effective programs must compete with ineffective programs. These regulations will first provide feedback to institutions so that they can improve programs against the debt measures. These regulations then provide a significant period of time for institutions to re-assess and re-design marginally effective programs. Further, the regulations would require institutions to provide prospective students and families with meaningful consumer information that includes these debt measures. Finally, and only after three years of failing all three debt measures within a four-year period, programs become ineligible. This approach balances the competing forces of costs and benefits associated with regulatory change to provide a path to improving gainful employment programs that will move us towards meeting our national college completion goals, while giving institutions the flexibility they need to continue generating quality, innovative education programs.

The final regulations are intended to strengthen programs, not cause them to close, and institutions are already acting to improve the performance of their programs. The likely result is not only better outcomes in terms of the debt measures but also, as described in the RIA, increased retention, in and graduation from, gainful employment programs. And if the institutions that are currently offering poor performing gainful employment programs fail to make the necessary improvements, we have no doubt that other for-profit providers—particularly those that are offering one of the many effective programs today—will fill the gap left by the termination of programs that fail three out of four FYs. The gainful employment regulations are a step toward achieving the President's 2020 goal.

With respect to the comments asking for clarification about how a student would be affected if a program is determined to be ineligible while the student was on a leave of absence, the institution will need to follow the procedures under § 668.26(d), regarding disbursement of funds after a program loses eligibility.

Changes: We have removed the thresholds and conditions that would have applied to restricted programs under proposed § 668.7(a)(2) and (e). In § 668.7(h), we specify that, starting with the debt measures calculated for FY 2012, a program fails for a FY if it does not meet any of the minimum standards.

In new § 668.7(i) we provide that, starting with the debt measures calculated for FY 2012, a program will become ineligible if it fails all of the debt measures for three out of the four most recent FYs.

Loan Repayment Rate (§ 668.7(b))

Loan Repayment Rate Calculation

Comment: Commenters argued that the definition of "repayment" as it relates to the repayment rate ignores students who are actively repaying their loans because the recognized repayment is limited to payments that reduce loan principal during a given FY. The commenters pointed out that this approach omits borrowers from the numerator of the repayment rate who are in good standing in repaying their loans, including some borrowers repaying under income-based, income-contingent, or graduated repayment plans. While the treatment is different in each of these payment plans, each can permit monthly payments that are equal to or less than accrued interest. In other words, under those plans, a borrower can be making reduced payments that leave interest unpaid. As a result, the loan amount outstanding does not decrease between the beginning and end of the FY. The commenters argued that because these repayment plans are attractive to borrowers who consolidate loans from multiple lenders, and to borrowers with loans from both undergraduate and graduate programs, institutions should not be penalized in the repayment rate calculation for borrowers who choose these plans. The commenters believed that institutions would be penalized by borrower choices beyond their control, particularly since those plans are promoted by the Department as a means of responsible borrower debt management.

Discussion: In the July 26, 2010 NPRM, the Department proposed considering students making payments under the income-contingent repayment (ICR) and income-based repayment (IBR) plans to be successfully repaying their loans if they were paying more than the interest accruing on their loans, or if they were working in fields that made them eligible for PSLF. The Department recognizes that some borrowers are meeting their obligations under the IBR and ICR plans but are not paying enough to reduce the outstanding balance on their loans. Considering all of these students to be successfully repaying their loans would create a loophole that would allow high repayment rates for programs based solely on enrollment in IBR and ICR, no matter how large the debts and how low the earnings of the programs' graduates. These plans are intended to help borrowers in financial distress; however, an educational program generating large numbers of borrowers in financial distress raises troubling

questions about the affordability of those debts. Therefore, we have struck a balance in these final regulations that recognizes the legitimate use of the ICR, IBR, and other plans that provide for scheduled payments that are equal to or less than the interest accruing on the loan but maintains protections against excessive reliance on these plans among a particular program's former students.

The Department is replacing the term Reduced Principal Loan (RPL) with the term Payments-Made Loan (PML) to clarify that under the revised methodology for calculating the repayment rate, payments made on a loan include not only those payments that reduce the outstanding balance but also payments made under certain repayment plans, or for certain consolidation loans, payments that do not reduce the outstanding balance. Under these final regulations, PML includes the loans of borrowers who are repaying under all of the FFEL and Direct Loan repayment plans, including repayment under the IBR and ICR plans. The Original Outstanding Principal Balance (OOPB) on loans of borrowers included in the applicable two- or four-year period who make payments during the most recently completed FY that reduce the loan amount to an amount that is less than the total outstanding balance of the loan at the beginning of that FY, will now be included in the numerator of the repayment rate. The final regulations clarify that loans that have defaulted in the past, including consolidation loans composed of at least one defaulted loan, are excluded from the numerator of the calculation, i.e., from the Loans Paid in Full (LPF) and the PML. To be consistent with the definition of PML, we are also clarifying that LPF do not include loans that have been in default.

When calculating the repayment rate for post-baccalaureate certificate, master's degree, doctoral degree, or first-professional degree programs, we will consider a borrower with a consolidation loan to be successfully repaying his or her loans if the outstanding balance does not increase over the course of the most recently completed FY.

For borrowers repaying under the IBR, ICR, and other plans that provide for scheduled payments that are equal to or less than the interest that accrues on the loan, the OOPB of loans for borrowers making scheduled payments under those plans that are equal to or less than the interest that accrues on the loan during the FY will be included, on a limited basis, as OOPB of PML in the numerator of the repayment rate. This approach will also benefit programs whose borrowers may be repaying their loans under these plans during and shortly after completing required medical or dental internships and residencies. However, to ensure that borrowers in gainful employment programs are thoughtfully counseled into entering the repayment plans that best meet their needs and do not have to rely excessively on the IBR or ICR plans because their programs leave them unable to secure sufficient employment to repay their loans, the Department is limiting the dollar amount of loans in negative amortization or for which the borrower is paying accrued interest only that will be included in the numerator as OOPB of PML to no more than 3 percent of the total amount of OOPB in the denominator of the ratio (percent limitation). This percent limitation is based on available data on a program's borrowers who are making scheduled payments under these repayment plans.

For the loans associated with a particular institution for which the Department has actual data on borrower repayment plans and scheduled payment amounts, that data will be used to calculate the amount to be included in the OOPB of PML. If the amount calculated is higher than the percent limitation, only the amount of the percent limitation will be included in the OOPB of PML.

The Department has information on the repayment plans and scheduled payments for Direct Loans and FFEL loans held by the Department. However, the Department does not currently collect information about the repayment plans and scheduled payments amounts on FFEL loans that it does not hold. The Department is developing plans to collect this information on loans that it does not hold. Until the Department determines that there is sufficiently complete data on program borrowers with scheduled payments that are equal to or less than accruing interest, the Department will include in the numerator 3 percent of the OOPB in the denominator of the ratio for all programs.

When applying the percent limitation on the dollar amount of the interest-only or negative amortization loans, the Department may adjust the limitation by publishing a notice in the **Federal Register**. The adjusted limitation may not be lower than the percent limitation specified in § 668.7(b)(3)(i)(C)(*1*) or higher than the estimated percentage of all outstanding Federal student loan dollars that are interest-only or negative amortization loans.

To establish this limitation, the loan servicing systems were queried to determine the value of the loans entering repayment on or after October 1, 2003 that were in a repayment plan that allowed a scheduled payment equal to or less than accruing interest. That query identified 1.1 percent of loans in this status. We will not treat interest-only or negative amortization loans unfavorably in the repayment rate calculation so long as they do not represent a disproportionate share of borrowers. The limit on the percentage of these loans that would count positively in the numerator of the repayment rate calculation was based on this 1.1 percent figure and adjusted up to 3 percent to provide some flexibility with regard to using repayment plans that allow a scheduled payment equal to or less than accruing interest, but to dissuade excessive use of these plans.

The regulations continue to recognize in the repayment rate borrowers who are full-time employees of public service organizations and who are working to qualify for PSLF under 34 CFR 685.219(c). The Department is developing an employer certification form that should be available by early 2012 and will allow borrowers, as frequently as annually, to document that they are engaged in PSLF qualifying employment. The OOPB of loans for borrowers who are in the process of qualifying for PSLF will be included in the numerator of the repayment rate as part of the OOPB of PML if the borrower submits a PSLF employment certification form to the Department that demonstrates that the borrower is engaged in qualifying employment and the borrower made qualifying payments on the loan during the most recently completed FY.

Changes: Section 668.7(b)(3) has been revised by replacing Reduced Principal Loan (RPL) in the numerator of the repayment rate ratio with Payments-Made Loans (PML). PML only includes loans that have never been in default or, in the case of a Federal Consolidation Loan or a Direct Consolidation Loan, neither the consolidation loan nor the underlying loan or loans have ever been in default.

PML includes a limited amount of the OOPB of loans in which a borrower is making scheduled payments under IBR, ICR, or other repayment plans that are equal to or less than the interest that accrues on the loan. Section 668.7(b)(3) clarifies the treatment of Federal Consolidation Loans or Direct Consolidation Loans (consolidation loans) of a borrower who is repaying loans related to a gainful employment program when the borrower is reducing the outstanding balance of the consolidation loan to an amount that is less than the outstanding balance of the

consolidation loan at the beginning of that FY. Section 668.7(b)(3) also clarifies that if the program is a post-baccalaureate certificate, master's degree, doctoral degree, or first-professional degree program, PML includes the total outstanding balance of a Federal or Direct Consolidation Loan that at the end of the most recently completed FY is less than or equal to the total outstanding balance of the consolidation loan at the beginning of the FY, and that the outstanding balance of a consolidation loan includes any unpaid accrued interest that has not been capitalized. Section 668.7(b)(3) specifies the documentation on which the Department will rely to include a borrower in the process of qualifying for PSLF in the loan repayment rate.

The definition of Loans Paid in Full (LPF) has been revised to clarify that these are loans that have never been in default or, in the case of a Federal Consolidation Loan or a Direct Consolidation Loan, neither the consolidation loan nor the underlying loan or loans have ever been in default.

Comment: Some commenters recommended that the Department apply the repayment rate only to those students who graduate or complete a program. The commenters argued that if the repayment rate is used as a proxy for determining whether the program prepares students for gainful employment (i.e., whether graduates have received the capabilities needed to succeed in the particular occupation), the relevant group measured should be those who successfully complete the program. The commenters believed that if students who fail to complete the program are included in the calculation, the Department would be merely rewriting the CDR provision. One of the commenters stated that measuring institutions based on former students who are not paying their loans is not a fair metric. The commenter stated that only those students who have maximum earnings potential because they completed the full program should be measured.

Discussion: The Department disagrees with the commenters that the repayment rate should focus only on program completers. The Department believes that in order to determine whether a program is succeeding in its mission of preparing students for gainful employment using title IV, HEA funds, it is important to examine the level of success of all enrollees in the program. Programs that experience a high number of drop outs and withdrawals leaving students with no employment skills and student loan debt they have insufficient means to repay cannot be said to be preparing students for gainful employment. Although we agree that students who complete the program have a better chance of repaying their student loans, we believe that including both program completers and noncompleters in the repayment rate calculation provides a more comprehensive picture of the program's overall success. Additionally, students enrolled in certain programs may not be required to receive the program's academic credential in order to secure employment or advance in their career field, and as a result, may be repaying their student loans. Regarding the comment about CDR, we explain the differences between the repayment rate and CDR under the heading, *Use of the cohort default rate as an alternate measure.*

Changes: None.

Comment: Commenters questioned the logic of including in the numerator of the repayment rate only those loans that were paid in full or whose principal balance was reduced during the FY. The commenters believed that institutions should not be penalized for the Federal government's policy decision to issue loans that are not credit based; offer borrowers flexible repayment plans; and promote deferments, forbearances, and loan consolidation to borrowers in repayment. The commenters recommended that the Department consider a loan to be in repayment for purposes of the repayment rate calculation if the borrower has made at least four payments during the most recent FY. Although the commenters welcomed as a positive first step the Department's decision to exclude from the repayment rate borrowers who are in an in-school or military-related deferment status, they argued that borrowers who have valid reasons for requesting deferment or forbearance, such as unemployment, maternity leave, disability, elder care, or economic hardship, should be given equal consideration. The commenters believed that a deferment or forbearance granted to a borrower who leaves the workforce for a period of time to care for children or a sick parent, or to undergo a medical procedure, is as legitimate as an in-school deferment that primarily benefits students at two and four-year public and non-profit institutions, and middle class students enrolled in graduate programs. Consequently, the commenters recommended that the Department either exclude from the repayment calculation all loans for which deferment or forbearance is pending or enact strict standards for issuing deferments and forbearances.

Discussion: We disagree with the notion that an institution should be shielded from Federal policy decisions regarding the student loan programs. The Department makes available its Federal student loan programs regulations to institutions before the institution agrees to participate in the title IV, HEA programs. Moreover, we believe the institution should be held accountable for how it delivers programs intended to provide gainful employment, particularly when most of its former student borrowers have to rely on economic hardship deferments, forbearances, and other means to avoid defaulting on their loans or managing life circumstances. To be sure, deferments, forbearances, and other program benefits are necessary to assist borrowers in loan repayment, but particularly heavy reliance on these tools among former students of a particular program raise questions about the performance of that program.

Concerning the request to enact stricter standards for deferment or forbearance, any such changes are outside the scope of the proposals we included in the July 26, 2010 NPRM and therefore we are not addressing them here.

With regard to the request that the Department exclude from the repayment calculation all loans for which deferment or forbearance is pending, we are excluding in these final regulations loans that are in deferment status for reasons that are clearly unrelated to whether a program prepares students for gainful employment. Specifically, we exclude from the repayment rate calculation loans that were in an in-school or military-related deferment status during any part of the FY, loans that were discharged as a result of the death of the borrower under 34 CFR 682.402(b) or 34 CFR 685.212(a), and loans that were assigned or transferred to the Department that we are considering discharging, or were discharged, on the basis of the total and permanent disability of the borrower. However, we are not excluding from the repayment calculation all loans for which deferment or forbearance is pending because we believe that if an institution provides a program that leads to borrowers securing gainful employment at sufficient salary levels to repay their student loans, the program will be able to meet the repayment rate threshold of 35 percent even if individual borrowers' life circumstances (e.g., needing to provide elder care or taking maternity leave) result in some of them using available deferment and forbearance benefits. Thus, the availability of deferment and

forbearance will not prevent a program from meeting the minimum loan repayment rate standards. Moreover, because the volume and frequency with which former students of a program use deferments and forbearances may be an indicator of program success in preparing students for gainful employment, we are not excluding all borrowers in deferment.

With regard to the comment that a loan should be counted in the numerator of the repayment rate if a borrower makes four payments in a FY, we believe that making only four payments in a FY would indicate strongly that the borrower does not have the capacity to repay the loan. Therefore, it would be inappropriate to include the loan in the numerator of the loan repayment rate.

Changes: Section 668.7(b) has been revised to exclude from the repayment rate calculation loans that were in an in-school or military-related deferment status during any part of the FY, loans that were discharged as a result of the death of the borrower under 34 CFR 682.402(b) or 34 CFR 685.212(a), and loans that were assigned or transferred to the Department that we are considering discharging, or were discharged, on the basis of the total and permanent disability of the borrower.

Treatment of Borrowers Carrying Forward Accrued Unpaid Interest

Comment: One commenter, whose analysis and recommendations were cited by numerous commenters, pointed out that although accrued interest is generally capitalized when a borrower first enters repayment, there are circumstances under which accrued unpaid interest remains outstanding and is not capitalized. Under these circumstances, due to the manner in which loan payments are applied (borrower payments are applied first to collection charges and late fees, next to accrued but unpaid interest, and finally to principal), the commenter concluded that there was an interest-related problem and called it the "persistence of interest." The commenter noted that in these circumstances, under the proposed regulations, a borrower making full monthly payments (i.e., payments that exceed the new interest that accrues each month on the loan) would not be counted in the numerator of the repayment rate because the borrower's payments would be applied to accrued, unpaid interest. According to the commenter, the treatment of these loans as nonperforming loans in the repayment rate calculation not only yields a lower repayment rate, but is also based on the past status of the loan. The commenter also pointed out that even if outstanding accrued interest is capitalized and added to principal, the interest-related problem continues to exist unless the capitalization takes place at the beginning of the FY. The commenter further stated that if the capitalization takes place during the course of the FY, it will appear to increase the principal balance when compared to the principal balance at the beginning of the FY, even if the borrower made payments that reduced loan principal prior to the capitalization.

The commenter also noted that there are many instances in which accrued outstanding interest stems from a past loan status, such as a brief deferment or forbearance period, that may leave the loan in a nonperforming status for purposes of the repayment rate for a significant period of time into the future. To address the "persistence of interest" factor in the repayment rate calculation, the commenter recommended that the Department modify the regulations to provide that the calculation be based on a comparison of the sum of the principal balance and the accrued unpaid interest on the loan at the beginning and the end of the given FY rather than on a comparison of the outstanding principal balance. The commenter supported the proposed approach of excluding from the numerator of the repayment rate borrowers' loans in deferment or forbearance status and loans for which borrowers are paying a scheduled $0 monthly payment or a payment that is less than the new accruing interest under the IBR and ICR plans.

Discussion: To determine whether a borrower's OOPB should be included in the numerator of the repayment rate, the Department will determine whether the total outstanding balance of a borrower's loan at the end of the FY for which the rate is being calculated is less than the total outstanding balance of the loan at the beginning of that FY, and the outstanding balance of a borrower's loan, at both the beginning and the end of the FY, will include any outstanding unpaid accrued interest that has not been capitalized. We believe that by including any outstanding unpaid accrued interest that has not been capitalized in the beginning year total outstanding balance of the loan, a borrower who makes full scheduled monthly payments on a loan that are greater than accruing interest will be able to show a reduced total outstanding balance for the loan by the end of the FY, even if interest is not capitalized or is capitalized at some point during the year.

Changes: The new term "Payments-Made Loans" (PML) in § 668.7(b)(3) specifies that the outstanding balance of a loan used in calculating the repayment rate includes any unpaid accrued interest that has not been capitalized.

Treatment of Consolidation Loans

Comment: Commenters objected to the Department's decision to view loans repaid through the consolidation process as not being paid-in-full until the consolidation loan is paid in full. The commenters noted that the Department has historically treated consolidation loans as a positive step for a borrower to take in managing student loan debt and stated that the Department was contradicting this position by treating consolidation loans unfavorably in the loan repayment calculation. These commenters noted that there is not sufficient data from the National Student Loan Data System (NSLDS) that would allow an institution to track repayment of a consolidation loan and recommended that such loans be treated positively in the repayment rate calculation (i.e., treated as in repayment) until the data is available to prove otherwise.

Other commenters questioned § 668.7(b)(2)(i) of the proposed regulations, which provides that a "consolidation loan is not counted [in the numerator] as paid in full." The commenters stated that it was unclear whether the repayment rate calculations would properly segregate consolidation loans according to source institution. The commenters believed that if the repayment rate calculation fails to properly attribute the underlying loans repaid through the consolidation for a borrower who consolidates during a given FY, the borrower's principal balance at the end of the FY will be greater than the principal balance at the beginning of that FY. The commenters believe this situation will also result in an institution not receiving credit in the numerator of the repayment rate for payments the borrower made on loan principal in the same FY in which the borrower consolidated the loan. To address this issue, the commenters recommended that the Department develop an acceptable and transparent method for determining the amount of a consolidation loan that is attributable to a particular program.

Another commenter recommended that any consolidation loan on which a borrower has made scheduled payments, including principal and interest, during the immediate prior calendar year should be treated as a reduced principal loan in the repayment rate calculation.

Discussion: Loan consolidation in the Federal student loan programs is a refinancing mechanism that allows a borrower to aggregate a number of loans to secure one repayment source, to extend the maximum available repayment period, and to reduce the monthly payment amount. The underlying loans are effectively refinanced through the consolidation process. Although the Department agrees that loan consolidation may be a positive step for a borrower, it does not represent payment by the borrower of the loans consolidated. The loans paid off through the consolidation process are reflected dollar-for-dollar in the new consolidation loan debt. We see no basis for treating a consolidation loan payoff as successful borrower repayment, or LPF, for purposes of the repayment rate.

The Department has a long history under the CDR process of successfully tracking loans that were in default and then repaid through consolidation and including those loans in the appropriate institution's CDR. For the repayment rate calculation, the Department has enhanced its capacity to look back through multiple consolidation loans and to assign loans repaid through consolidation to a program at an institution. Although a consolidation loan is not considered LPF until the entire consolidation loan is repaid, the OOPB of the underlying loans attributable to a gainful employment program is included in the numerator (i.e., PML of OOPB) if the borrower makes payments that reduce the total outstanding balance of the consolidation loan by the end of the FY under review.

As part of the data correction process contained in these final regulations, and discussed more fully under the heading, *Data access and review,* we will provide access to the NSLDS data underlying the repayment rates, including the information associated with consolidation loans. As a result, institutions will be able to request corrections to the assignment of borrowers and loan amounts, including the portion of consolidation loans, used to calculate a program's repayment rate.

Changes: Section 668.7(b)(1)(iii) has been added to specify that for consolidation loans, the OOPB is the OOPB of the FFEL and Direct Loans attributable to a borrower's attendance in the program. We have added § 668.7(b)(1)(iii) and revised § 668.7(b)(3)(i)(A) to clarify that if certain consolidation loan payments are made, the OOPB of the underlying loans attributable to a gainful employment program will be included in the numerator of the repayment rate.

Use of the Cohort Default Rate as an Alternate Measure

Comment: One commenter recommended that the Department eliminate the loan repayment rate and replace it with the CDR. Alternatively, the commenter suggested that the repayment rate be modified to count positively in the numerator all borrowers who are not delinquent in repaying their loans, including those that use various program benefits such as consolidation, forbearance, and deferment.

Some of the commenters requested that the Department clarify the definition of a reduced principal loan in the regulations. The commenters indicated that it was unclear whether a student would need to make more than one payment that reduces principal in the FY to be considered to have a reduced outstanding principal balance.

Discussion: The Department does not believe that the CDR is an appropriate measure of whether the students who attended a program are gainfully employed. The CDR is an institutional rate that only measures the number of an institution's borrowers who fail to make payments on a loan for an extended period of time. The CDR only includes a small group of the borrowers during a limited time period, and counts many of those borrowers as successes even if they are struggling to repay their loans. Borrowers using reduced payment plans may be seeing their loans grow rather than shrink because their incomes are low and their debts are high. As a result, the CDR is a better measure of potential loss to taxpayers than of the repayment burden on students.

Students attending programs leading to gainful employment in a recognized occupation often do so because they have been told that they will be able to secure employment that will allow them to pay off their debts. The Department's experience with the CDR and other institutional measures is that they may mask an under-performing program and obscure for students, the Department, and institutions the harm that can result from enrolling in a specific program. An institution's CDR may therefore be a misleading measure of an individual program's success in providing students with sufficient income to pay off education loan debt.

The repayment rate is intended to operate at the program level and track the loan repayment by borrowers formerly enrolled in specific programs, not simply those who reach a certain level of delinquency or who default. Gainful employment should allow the borrower to make all the scheduled payments on the loan during the given FY under review, not simply make intermittent payments.

Regarding the commenter's question about clarifying the term "reduced principal loan," as previously discussed, we have replaced the term "reduced principal loan" with the term "payments-made loan". The reduction of the borrower's total outstanding balance between the beginning and end of the FY can be as little as one cent in order for the OOPB of the loan to be included in the numerator of the program repayment rate. The outstanding balance of a loan includes any unpaid accrued interest that has not been capitalized.

Changes: None.

Control Over Student Borrowing

Comment: Many commenters stated that student overborrowing and related repayment difficulties, as reflected in repayment rates, are related to a program's inability to limit student borrowing. The commenters objected to the Federal requirement that a school offer students the maximum loan amount for which they are eligible even when the program believes that a student may have difficulty repaying the loans and wishes to recommend a lesser loan amount. The commenters believe that if they are required to offer the maximum loan amount to any student who meets the admission requirements and maintains satisfactory academic progress, they should not be held accountable for excessive borrowing and a borrower's failure to repay. Some of these commenters questioned the need for students to receive loan funds in excess of direct tuition and fee costs and requested authority to adopt institutional policies of limiting annual loan limits to direct costs. The commenters did not believe an institution's programs should be adversely impacted by debt a student chooses to take on for discretionary expenses. Several of these same commenters recommended that a school's regulatory authority under the Federal Perkins Loan program to consider a borrower's "willingness to repay" a loan before making a Perkins loan to a student should be applied to Direct Loan program loans.

Discussion: To ensure access to postsecondary education, the cost of attendance provisions in section 472 of the HEA recognize both direct costs (tuition, fees, books, and supplies) and indirect costs (room and board allowance and allowances for other educationally-related costs). Indirect costs are not viewed as discretionary or

unnecessary costs. The institution, however, has the authority to decline to originate a Direct Loan or to reduce a Direct Loan amount in section 479A(c) of the HEA. To prevent discrimination against certain students or categories of students that may result from the use of across-the-board policies by an institution, the HEA requires the institution to exercise its authority under this provision on a case-by-case, documented basis with a written explanation provided to the student. This authority provides an institution with the ability to address individual cases of unnecessary, excessive borrowing by students. Any change in this authority would require a change in the HEA.

In response to the statement that links excessive borrowing to an institution funding all admitted students who are making satisfactory academic progress, we note that the institution would have to disburse title IV, HEA funds to any student making satisfactory academic progress regardless of the amount of loans the student borrowed. For the debt-to-earnings ratios, if the institution identifies the amount of the tuition and fees for each student to the Department, we will limit the amount of loan debt included in that calculation for a student who completes a program to the total amount of tuition and fees the institution charged the student for enrollment in all programs at the institution. However, because the repayment rate is looking at the cumulative loan amounts in repayment, it would be inconsistent and impractical to limit the debt considered on a borrower-by-borrower basis. Such a limitation would require complex adjustments that would attribute, over time, the amount of the borrower's loan payments to a tuition-adjusted loan amount. This approach could produce an anomalous outcome where a borrower who is otherwise severely delinquent in repaying his or her loan could nevertheless be counted as successfully repaying the loan after any loan payments made by the borrower are attributed to the part of the loan used for tuition and fees.

Finally, the application of "willingness to repay" as a criteria when awarding Federal Direct Loans would require a change in the HEA.

Changes: None.

Data Access and Review

Comment: Commenters objected to the limited access institutions had through the NSLDS to the data elements that will be used to calculate the repayment rate, including accurately identifying the principal balance of a loan at various points over the life of a loan and whether a borrower had made payments to reduce loan principal during the FY. The commenters requested that the Department disclose, explain, and confirm the accuracy of the data from NSLDS that it will use to calculate programmatic repayment rates so that institutions can internally replicate and monitor their rates. The commenters believe that this situation denies them a reasonable opportunity to revise their policies and procedures to come into compliance before sanctions may be imposed against them. They urged the Department to revise the repayment rate regulations to clearly state that schools would not be penalized for data for students who were enrolled in or attended the school prior to the regulation's enactment, or July 1, 2014, whichever is earlier. They also asked the Department to provide repayment rate data to institutions, with available resources to explain the data, similar to the process we use with school CDR data. The commenters believe this will provide the institutions and the Department with time to test the underlying information and time for institutions to identify changes needed in their programs to meet the gainful employment regulations' requirements.

Discussion: The Department believes that § 668.7(e) of these final regulations includes sufficient safeguards regarding NSLDS data and reasonable access to these data before they are finalized. Specifically, as specified under § 668.7(e) and discussed more fully under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g)),* the Department will generate draft rates for institutional review prior to calculation of the final repayment rate for each FY for which rates are calculated. The Department will provide for each program the borrower-related data used to calculate the draft rate and the institution will be able to review and challenge the accuracy of the data. The Department believes that the Department's disclosure of draft rates and a school's ability to identify and correct the data in the NSLDS used to calculate the repayment rates prior to the calculation of final rates provides reasonable access to data for institutions and will assure the accuracy of the final rates.

Based on the effective date of these regulations, the first final repayment rates will be calculated for FY 2012 and will examine borrowers who first entered repayment in FY 2008 and FY 2009 and who have been in repayment for three to four years. Thus, these final regulations would not result in any program losing eligibility prior to the final calculation of debt measures for FY 2014. With that said, there is a great deal that institutions can do to ensure an acceptable repayment rate by working with former students to encourage repayment rather than non-payment. After considering the comments, we determined that this approach is in the best interest of the former students and taxpayers.

Changes: Section 668.7 of the regulations has been amended by adding a new paragraph (e) under which the Department notifies an institution of draft results of the debt measures for each of its programs. An institution may review and challenge the accuracy of the NSLDS loan data used to calculate the draft loan repayment results. The Department will not issue final repayment rates for a program until all of the data challenges for that program are resolved. Further detail regarding these changes is provided under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g)).*

Debt-to-Earnings Ratios (§ 668.7(c))

General

Comment: For an institution undergoing a change of ownership that results in a change in control from non-profit to for-profit status, some commenters suggested that the Department compute the debt-to-earnings ratios only after three years of data are obtained from the newly formed for-profit entity.

Discussion: In general, because the debt measures are calculated on a program basis, nothing about the calculations will change if an institution undergoes a change of ownership that results in a change in control, as described in 34 CFR 600.31. For example, if the same program (same CIP code and credential level) that was offered by the acquired institution continues to be offered after the change in ownership, the debt measures are calculated using data from before and after the changes in ownership. If that program was only offered by the acquired institution, the debt measures carry over to the acquiring institution.

However, in the commenter's example where control changes from a non-profit institution to a for-profit institution, we agree to delay calculating the debt measures for the degree programs previously offered by the non-profit institution that are now gainful employment programs of the for-profit institution. For these programs, the

Department will calculate the debt measures based on data provided under § 668.6(a) by the for-profit institution after the change in control.

Changes: None.

Debt Portion of the Debt-to-Earnings Ratios

Loan Debt

Comment: Some commenters argued that if the proposed regulations are intended to reduce student debt levels by forcing institutions to reduce tuition rates, this goal conflicts directly with the current 90/10 provisions in § 668.28 which inhibit, and in many cases effectively prohibit, for-profit institutions from reducing tuition. According to the commenters, the net effect of the proposed regulations combined with the 90/10 provisions would be to force institutions to enroll wealthier students and discourage institutions from serving minority and disadvantaged students. Similarly, other commenters believed that using debt measures to assess program quality may lead to adverse consequences for students by increasing pressure on institutions to comply with the 90/10 provisions and creating incentives for institutions to minimize risk by limiting applicants who may adversely impact the institution's metrics. The commenters contended that these consequences would be further exacerbated because temporary provisions under the 90/10 provisions in § 668.28(a)(6), related to counting as cash a portion of unsubsidized Stafford loan disbursements, will expire June 30, 2011.

Other commenters believed that the 90/10 provisions should be eliminated because they serve no good purpose and lead to price fixing or have compelled institutions to price a program at the maximum amount of title IV aid for which low-income students qualify to receive plus an additional 10 percent that is funded by other sources.

Discussion: The 90/10 provisions, which require a proprietary institution to derive at least 10 percent of its revenue from sources other than title IV, HEA program funds, are statutory and are therefore beyond the scope of these regulations. However, we are not persuaded that the 90/10 provisions conflict with the gainful employment measures. In a report published October 2010, the GAO did not find any relationship between an institution's tuition rate and its likelihood of having a very high 90/10 rate. This report, United States Government Accountability Office, "For Profit Schools: Large Schools that Specialize in Healthcare are More Likely to Rely Heavily on Federal Student Aid," October 2010, is available at *http://www.gao.gov/new.items/d114.pdf.* GAO's regression analysis of 2008 data indicated that schools that were (1) Large, (2) specialized in healthcare, and (3) did not grant academic degrees were more likely to have 90/10 rates above 85 percent when controlling for other characteristics. Other characteristics associated with higher than average 90/10 rates were (1) high proportions of low-income students, (2) offering distance education, (3) having a publicly-traded parent company, and (4) being part of a corporate chain. GAO defined "very high" as a rate between 85 and 90 percent, and about 15 percent of the for-profit institutions were in this range. Also, GAO found that in general there was no correlation between an institution's tuition rate and its average 90/10 rate. In one exception, GAO found that institutions with tuition rates that did not exceed the 2008–2009 Pell Grant and Stafford Loan award limits (the award amounts were for first-year dependent undergraduates) had slightly higher average 90/10 rates than other institutions, at 68 versus 66 percent.

The Department's most recent data on 90/10, submitted to Congress in February 2011 and available at *http://federalstudentaid.ed.gov/datacenter/proprietary.html,* show that only 8 of 1851 institutions had ratios over 90 percent and about 14 percent had ratios in the very high range of 85 to 90 percent. The GAO report and the Department's data suggest that most institutions could reduce tuition costs without the consequences envisioned by the commenters.

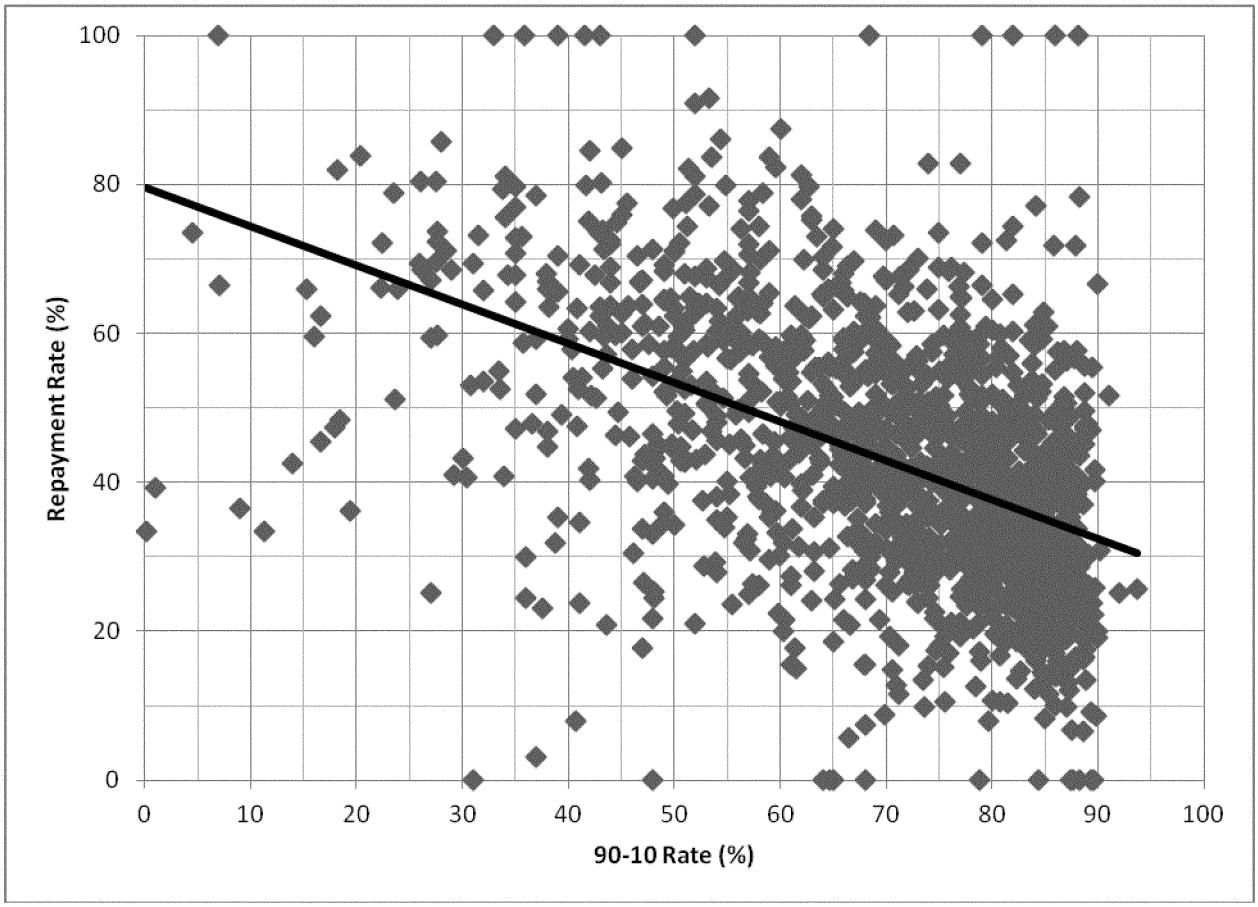
An analysis by the Department of the repayment rate indicates that it is entirely possible to meet both the 90/10 requirements of the existing statute and the repayment rate thresholds in these final regulations. Table E shows the distribution of for-profit institutions by 90/10 rate category and their performance on the repayment rate test. The percent of schools falling below the 35 percent repayment rate threshold increases with the 90/10 rate, indicating that many schools score well on both measures simultaneously. Moreover, even in the highest 90/10 rate categories, almost 50 percent of schools pass the repayment rate.

Table E: Repayment Rate Performance by 90/10 Category

90/10 Rate	Passing Programs	Failing Programs	Programs with No Repayment Rate	Total	% of Programs in 90/10 Category	Failing Rate in 90/10 Category
0% to 10%	5	1	10	16	0.9%	6.3%
10% to 20%	9	1	24	34	1.8%	2.9%
20% to 30%	20	1	16	37	2.0%	2.7%
30% to 40%	41	6	38	85	4.6%	7.1%
40% to 50%	84	14	44	142	7.7%	9.9%
50% to 60%	144	18	48	210	11.4%	8.6%
60% to 70%	204	48	56	308	16.6%	15.6%
70% to 80%	258	148	52	458	24.7%	32.3%
80% to 85%	114	144	38	296	16.0%	48.7%
85% to 90%	75	136	46	257	13.9%	52.9%
Above 90%	1	3	4	8	0.4%	37.5%
Total	955	520	376	1,851	100.0%	28.1%

Chart 3 is a scatter plot of paired institutional 90/10 and repayment rates. It includes the regression line that describes the linear relationship between the two rates when the 90/10 ratio is used to predict the repayment rate.

Chart 3: Repayment Rate Performance by 90/10 Ratio



At the upper end of the repayment rate distribution it appears there is roughly an equal likelihood that repayment rates will be either above or below the regression line. In other words, based simply on visual inspection there appears to be little relationship between 90/10 and repayment rates for institutions with relatively high 90/10 rates. A further analysis of the 1,475 institutions with both a repayment rate and 90/10 calculation reveals a correlation coefficient (R) between the two variables of −.483. That is, institutional 90/10 ratios tend to decline as their repayment rates increase. A correlation coefficient between 0.3 and 0.5 (irrespective of sign) is indicative of a moderate effect; a value greater than 0.5 is considered a large effect. Thus, the relationship between these two variables can be described as moderate. Continuing the analysis one step further, the R-Squared value is .233, meaning that about 23 percent of the variation in the repayment rates can be explained by the 90/10 rates. Thus we see no evidence here supporting the notion that better performance on the measures, i.e. increasing repayment rates, will adversely affect 90/10 calculations.

Several other factors also suggest that any tension between the 90/10 requirements and the gainful employment measures can be managed by most institutions. First, even though some of the provisions of the HEA that make it easier for institutions to meet the 90/10 requirements are time-limited, other provisions enacted in 2008 as part of the reauthorization of the HEA will remain in effect, such as the ability to count income from other programs that are not eligible for HEA funds. Second, institutions have opportunities to recruit students that have all or a portion of their costs paid from other sources. The changes to the HEA in 2008 also permit an institution to fail the 90/10 measure for one year without losing eligibility, and the institution can retain its eligibility so long as it does not fail the 90/10 measure for two consecutive years. Furthermore, institutions that have students who receive title IV, HEA funds to pay for indirect costs such as living expenses already are in the situation described by the commenters where the amount of title IV, HEA funds may exceed the institutional costs. These institutions are presumably managing their 90/10 measures using a combination of other resources, and this result would also be consistent with the findings in the GAO report described above.

Changes: None.

Comment: Some commenters argued that excluding parent PLUS loans from median loan debt greatly understates the debt levels associated with middle-class students attending public and non-profit institutions. At the same time, the amount of debt students incur for attending for-profit institutions is greatly overstated because most of these students are independent and low-income and are therefore more likely to receive additional support through unsubsidized Stafford loans instead of parent PLUS loans. Consequently, the commenters believed that excluding parent PLUS loans reflects the

Department's bias in depicting educational loan burdens and the costs of education attributable to various education sectors in general. Other commenters opined that an effect of the proposed regulations would be that an institution would counsel parents to incur more loan debt because parental debt would not count against it under the proposed metrics.

Discussion: Overall, only 3.5 percent of the students enrolled in certificate programs benefited from parent PLUS loans. Including these loans would have little impact on the debt measures. Moreover, including parent PLUS loans would distort the measures, which are designed to measure and assess a student's debt burden, because the student is not responsible for repaying loans incurred by a parent.

Changes: None.

Comments: With regard to the proposal that loan debt includes all debt incurred by a student from a FFEL or Direct Loan, a private education loan, or an institutional loan, some commenters opined that as a legal and practical matter institutions cannot control student debt in excess of tuition, fees, books, and prescribed charges that are part of the cost of attendance. The commenters reasoned that because excess debt varies depending on the circumstances of the individual student, not the educational program, it should not be included in calculating the debt-to-earnings ratios. Similarly, some commenters believed that the proposed regulations failed to address student over borrowing because the Department did not change current guidance prohibiting schools from limiting student indebtedness to the amount of tuition and fees.

Along the same lines, other commenters opined that the debt portion of the debt-to-earnings ratios would be a more realistic measurement of the amount of debt for which an institution should be responsible, if (1) all private loans are excluded from the calculation, unless institutions have some method of approving or declining student loan amounts, or have the ability to impact the amount of funds a student borrows, and (2) to alleviate the impact that student over borrowing can have on the debt-to-earnings ratios, institutions are held accountable only for debt incurred to pay actual educational expenses and not for excess amounts used for living and other expenses. The commenters offered that the amount incurred to pay actual educational expenses can be derived by using the amount institutions report as the net price on the College Navigator Web site. The reported net price minus any grant or gift aid received by a student would be the maximum amount of debt that the student would need to accumulate to pay actual education expenses.

Commenters contended that the proposed debt-to-earnings ratios would not cause an institution to reduce tuition and fees because the Department did not provide a systematic way for the institution to limit student borrowing. The commenters noted that a student would be eligible to receive the same amount of student loan funds ($9,500) for a one-year program costing $15,000 or for one costing $10,000. So without any borrowing limits, a student who receives $5,500 in Federal Pell Grant funds could still borrow the maximum loan amounts even if the institution reduced the cost of the program by 33 percent to $10,000. Consequently, the commenters reasoned that reducing program costs, even by unrealistic levels of 33 percent, would not guarantee a reduction in student debt associated with the program. The commenters suggested that for the July 26, 2010 NPRM to have its intended effect of reducing program costs, the total amount of debt included in the debt-to-earnings ratios should be capped at the cost of tuition and fees. Other commenters suggested that the amount of loan debt should be capped at the total of institutional charges less any grant aid received by students.

Another commenter stated that while the proposed regulations emphasized protecting the taxpayer from wasteful spending, the HEA encourages students to over borrow by funding living expenses instead of just tuition, fees, and books. The commenter believed that the HEA makes the taxpayer the student's individual bank, but under the proposed regulations, institutions would be the responsible party for these expenses. The commenter provided an example of an institution where student loans totaled $7.34 million for the 2009–10 award year, of which approximately $1.75 million, or 24 percent, was used for student living expenses. The year before, living expenses accounted for only 6 percent of total loans. The commenter suggested that the Department place limits on the amount of a loan that could be used for living expenses or not hold institutions responsible for this portion of student loan debt.

Discussion: Although a statutory change would be required to allow an institution to directly limit or control student borrowing, we are not persuaded that an institution that makes reasonable efforts to counsel its students about the dangers of over borrowing cannot affect student behavior. Nevertheless, for the purpose of calculating median loan debt the Department agrees to limit the total amount of loans a student incurs in completing a program to the total amount the institution charged the student for tuition and fees if the institution reports those amounts to the Department. Using the actual amount charged, instead of a derived or estimated amount, allows the Department to more accurately limit loan debt for the ratio calculations.

We are revising § 668.7(c)(2) to reflect this change. Under this section, an institution may report the total amount charged for tuition and fees for each student who attended programs at the institution. In cases where a student attends more than one program, the Department will compare the total amount of tuition and fees the student was charged for attending those programs to the total amount of loan debt the student incurred for attending those programs. Of course, for a student who attended only one program, we will compare the amount of tuition and fees charged to the loan debt incurred for that program. For each student, we will use the lower of the amount of tuition and fees charged or the total loan debt incurred for purposes of calculating the median loan debt for the program. However, because some programs would not benefit from limiting loan debt, reporting the amount charged is optional for the institution. In any event, the amount of the median loan debt the Department will provide to institutions for disclosure purposes under § 668.6(b) will not be limited to tuition and fees charges because we believe a prospective student should know how much loan debt a typical student incurred in completing the program.

In the Program Integrity Issues final regulations, we discussed generally in the preamble the process the Department will use to calculate the median loan debt of a program. In these final regulations, we are establishing how the Department determines the loan debt of each student in a program and derives the median loan debt of the program.

Under these provisions:

(1) Loan debt includes FFEL and Direct loans (except for parent PLUS or TEACH Grant-related loans) owed by the student for attendance in a program, and as reported by the institution under § 668.6(a)(1)(i)(C)(*2*), the amounts the student received from private education loans for attendance in the program and the amount from institutional financing plans that the student owes the

institution upon completing the program.

(2) Loan debt does not include any loan debt incurred by the student for attendance in programs at other institutions. However, the Department may include loan debt incurred by the student for attending other institutions if the institution providing the program for which the debt-to-earnings ratios are calculated and the other institutions are under common ownership or control, as determined in accordance with 34 CFR 600.31. We generally do not include educational loan debt from institutions students previously attended because those students made individual decisions to enroll at other institutions where they completed a program. Entities with ownership and control of more than one institution offering similar programs might have an incentive under these regulations to shift students between those institutions to shield some portion of the educational loan debt from the debt included in the debt measures under these final regulations. The provision in § 668.7(c)(4)(iii) will negate that incentive by permitting the Department to include that debt in the analysis. The regulations also provide that a determination of common ownership or control will be made under 34 CFR 600.31, which sets forth the definitions and concepts that the Department routinely uses to review changes of ownership, financial responsibility determinations, and identifying past performance liabilities at institutions.

(3) Under § 668.7(c)(5)(iv), the Department will not include a student in calculating the debt-to-earnings ratios for the program the student completed if the student is enrolled in another eligible program at the institution or at another institution. However, we clarify that the student must be enrolled in another program during the calendar year for which the Department obtains earnings data from SSA (the earnings year). We exclude the enrolled student based on the assumption that he or she will not be employed for the earnings year used to calculate the debt-to-earnings ratios for the program the student originally completed.

We illustrate in Table F how the Department will implement this process.

Table F: Attributing Loan Debt

	Educational Enrollment / Completion in Gainful Employment Programs			Which program's loans to include in the debt-to-earnings calculation for this gainful employment program		
	Was the student enrolled during the earning year* in any program at the same or another institution?	After completing the program, did the student complete a higher credentialed gainful employment program at this institution?	Was the student ever enrolled in a lower credentialed gainful employment program at this institution?	Include loan debt from this gainful employment program?	Include loan debt from lower credentialed gainful employment programs?	Notes
Student I	Yes	Yes or No	Yes or No	No	No	Student not included in debt-to-earnings calculation because we presume the student was not working during the earnings year*
Student II	No	No	No	Yes	No	Include loans from this program only.
Student III	No	Yes	Yes or No	No	No	This program's loan debt will be included when the higher credentialed program is evaluated.
Student IV	No	No	Yes	Yes	Yes	This program's loan debt will include loans from this program and from lower credentialed program(s).

*The earnings year is the calendar year that the Social Security Administration will use to report average and median earnings for a gainful employment program.

Changes: Section 668.7(c)(2) has been revised to provide that an institution has the option to report the total amount of tuition and fees the institution charged a student for attending programs at the institution. This section

also has been revised to provide that the Department calculates the median loan debt of the program for each student who completed the program during the 2YP, the 2YP–R, the 4YP, or the 4YP–R based on the lesser of the total loan debt incurred or the total amount of tuition and fees the institution charged the student for enrollment in all programs at the institution, if the institution provides this information to the Department. Also, we have added § 668.7(c)(4) to specify how the Department determines the loan debt for a student.

Comment: Some commenters expressed concern that the proposed debt-to-earnings ratios inappropriately inflate the cost of education by incorrectly capitalizing unpaid interest in determining median loan debt.

Discussion: The commenters are correct in noting that the Department will calculate median loan debt using loan amounts for unsubsidized loans that include capitalized interest. However, we do not believe this treatment inflates the cost of education because the interest incurred during program attendance is part of the cost of the loan. Moreover, the total amount of the student's loan debt may now be limited to the total cost of tuition and fees.

Changes: None.

Loan Amortization

Comment: Commenters urged the Department to calculate the annual loan amount for the debt-to-earnings ratios by using a more accurate loan amortization schedule. Under the proposed regulations, the annual loan debt for a program is based on a 10-year repayment schedule. The commenters noted that a fixed, 10-year amortization does not reflect the loan repayment behavior of many borrowers, and suggested that the Department determine the average length of repayment for borrowers who entered repayment during the four most recently completed FYs. Alternatively, the commenters suggested that the loan amortization rate should vary depending on the program students complete: 15 years for a certificate program, 20 years for a bachelor's degree program, and 25 years for a graduate degree program. The commenters stated that these amortization rates reflect the current costs of education and student repayment practices. Similarly, other commenters suggested using loan amortization schedules of 15 years for non-degree programs and 20 years for degree programs. Some commenters recommended that the Department use (1) the actual term of the loan applicable to each student based on each student's payment plan in effect at the time the ratios are calculated, and (2) each student's actual interest rate for the ratio calculations.

Other commenters expressed concern that using a debt-to-earnings metric that tracks earnings only over a three-year period while using a standard 10-year amortization schedule for loan debt over-weights the debt factor and under-weights the benefits of higher education. The commenters stated that if a borrower enters a new career upon completion of a degree program, the borrower's income is likely to increase with each passing year, but limiting the income timeframe to a three-year period fails to fully consider the potential for income gain in relation to debt. The commenters were also concerned that the debt-to-earnings metric did not take into account other benefits of higher education such as better health and life insurance coverage, a lower unemployment rate, and greater mobility to change jobs.

Some commenters believed the proposed regulations were heavily biased against longer term and higher-cost programs (e.g., health care programs). Students enrolled in higher-cost programs borrow more, but their earnings in the first three years after graduation are not likely to be substantially greater than those students who have earned less costly degrees. According to the commenters, these students may take seven years or more after graduation to experience the real financial advantage of the additional education they obtained.

Discussion: In view of the comments that a fixed 10-year repayment schedule may not be appropriate for all programs, the Department agrees to amortize the median loan debt for a program based on credential level. It would be impractical to use the actual terms of the loan for each borrower or the time frame the borrower realizes the benefit of higher education. Using the actual borrower data could also lead to repayment periods of less than 10 years. The average repayment period for Federal student loans remains a little over 8 years. We recognize the commenters' concern that longer programs could be significantly more likely to fail the debt-to-earnings ratios under the proposed 10-year repayment schedule. Consequently, we are adopting an approach along the lines suggested by some of the commenters: For undergraduate or post-baccalaureate certificate programs and associate's degree programs, loan debt will be amortized over 10 years; for bachelor's and master's degrees, 15 years, and for programs that lead to a doctoral or first-professional degree, 20 years. We believe this approach tracks the amount of debt that students incur at each level as they progress through their postsecondary education and will monitor the length of repayment by credential level to make any necessary future adjustments.

Changes: Section 668.7(c)(2)(ii) has been revised, in part, to provide that the Department will calculate the annual loan payment for a program by using a 10-year schedule for undergraduate or post-baccalaureate certificate programs and associate's degree programs, a 15-year schedule for bachelor's and master's degree programs, and a 20-year schedule for doctoral and first-professional degree programs.

Earnings Portion of the Debt-to-Earnings Ratios

Earnings of Program Completers

Comment: Some commenters opined that calculating a program's debt-to-earnings ratio based on earnings received during the first three years of employment does not take into account the lifelong benefit of higher education because as earnings increase with experience some graduates will be able to pay off their loans in the 10th or 15th year of repayment. Consequently, the commenters argued that the Department should use BLS data at the 50th percentile because doing so will more likely track what a student would make within the first 10 years of his or her career. For those professions not requiring a graduate or first-professional degree, the commenters suggested using BLS data at the 75th percentile. Some other commenters suggested that the Department allow institutions to use either SSA data or BLS wage data. For BLS data, the commenters recommended using wages at the 50th percentile for degree programs and at the 25th percentile for certificate programs.

Similarly, some commenters opined that a decision of whether to continue schooling beyond high school should be based on a comparison of the lifetime benefits and costs of that schooling. The commenters argued that using SSA data for the income portion of the ratio calculations does not accurately reflect the impact that postsecondary education will have on a student's lifetime earnings or the student's ability to ultimately repay his or her loan obligations. While noting that the Department's likely intent is to ensure that students are able to afford the necessary loan payments in the early

years after leaving school, the commenters cautioned that any deviation from a comparison of lifetime benefits to lifetime costs has the potential to harm students. For example, if education confers benefits to students—such as increased earnings throughout their careers—then regulations that have the effect of restricting students' ability to borrow to pay for that education can be detrimental. In addition, the commenters stated that because the starting salaries are often not that high for students enrolled in teacher education programs, those programs would perform poorly under the debt-to-earnings ratios even though they offer positive lifestyle benefits that are not reflected in teacher income. Considering the effect that low salaries have on the debt burden test, the commenters believed the proposed regulations would create an incentive for institutions to stop providing programs that lead to low-paying public sector employment.

Under proposed § 668.7(c)(3), the Department would have required institutions to prove that their graduates' salaries increased substantially in order to use P3YP salary data. Commenters stated that institutions do not have this salary data. Moreover, the commenters noted that there does not appear to be a good reason for requiring institutions to provide this proof because the Department can obtain income data for the six prior years as easily as the three prior years. Therefore, commenters recommended that the Department automatically calculate the debt-to-earnings ratios over the proposed 3YP as well as the P3YP and use the most favorable result to determine whether a program satisfies the debt-to-income requirements.

Other commenters noted that due to the extended length of required residencies, most medical and dental school graduates have relatively low earnings for several years. The commenters argued that because a residency is post-graduate medical education, the debt-to-earnings ratio for medical school graduates should be calculated not from the point when the student graduates from medical school, but rather from the start of the first full year after the student completes his or her medical residency.

Discussion: In response to concerns that using earnings of recent program graduates would penalize programs whose students typically begin careers in low-paying jobs, we agree to extend the employment period. As discussed more fully under the heading, *Definitions,* instead of using the earnings of students who completed a program during the three most recent award years (years 1 through 3), the Department will use the earnings of students who completed a program during the third and fourth FYs (years 3 through 4) prior to the FY for which the ratios are calculated. For example, the ratios calculated for FY 2016 will use the most recent earnings available for students who completed a program between FYs 2012 and 2013 (between October 1, 2011 and September 30, 2013). Although a longer employment period may better reflect the earnings connected to the education and training provided by a program, extending the employment period without cause, or extending it significantly as suggested by commenters advocating the use of lifetime earnings, may weaken or sever that connection. It would also delay the Department's efforts in identifying poorly performing programs. For medical and dental school graduates whose earnings are unquestionably higher after completing a required internship or residency, the Department will use the earnings of students who completed those medical and dental programs during the sixth and seventh FYs (years 6 through 7) prior to the FY for which the ratios are calculated. For example, the ratios calculated for FY 2016 will use the most recent earnings available for students who completed a program between FYs 2009 and 2010 (between October 1, 2008 and September 30, 2010).

Finally, the public service programs described in the comments would likely fare well under the loan repayment rate due to their former students' potential eligibility for Public Service Loan Forgiveness.

With regard to the comments about using the 50th or 75th percentile earnings from BLS, doing so would suggest that all programs yield similar or better earnings results than average. Moreover, because BLS includes wages only for those employed in an occupation (individuals trained in the occupation but not working, are not counted), adopting the 50th or 75th percentile earnings would allow significantly more debt than the typical graduate of a program would likely incur.

Changes: See the discussion of the changes to § 668.7(a)(2), under the heading, *Definitions.*

Actual Earnings From SSA and Bureau of Labor Statistics (BLS) Wage Data

Comment: Some commenters objected to the proposal that the Department would use the actual average earnings of program completers to calculate the debt-to-earnings ratios because neither the Department nor an institution would have access to individual earnings data. The commenters believed that an institution would be entirely ignorant of the figures used to determine whether a program violates the gainful employment regulations and would have no ability to challenge the underlying data. Furthermore, the institution would learn of any noncompliance only after the data set is closed. The commenters argued that this lack of access to the data compromises the institution's right to knowledge and notice. For this reason, the commenters suggested that the Department use earnings data publicly available from BLS to determine average annual earnings. The commenters stated that institutions have developed an understanding of how actual wages relate to BLS data and how BLS wage data relate to program length and tuition and fees. According to the commenters, by using BLS data, an institution would be in a better position to assist students in determining and reducing their debt-to-earnings ratios. Moreover, using BLS data would allow an institution to determine whether its programs satisfy the gainful employment requirements and to make necessary changes prior to being subject to penalties for noncompliance. For example, if an institution determines it does not have the ability to offer and satisfy the debt-to-earnings ratios for a program, it can revise the program or teach out students enrolled in the program and discontinue admissions. The commenters argued that if the Department's goal is to make an institution more accountable for the education it provides, then the institution must be informed, in advance, of the data the Department will use to determine whether its programs comply with the regulations. The commenters believed that using BLS data would further this goal as well as enhance and encourage more transparency throughout the admissions and enrollment processes.

Along the same lines, other commenters stated that institutions would be unable to monitor program performance under the debt-to-earnings ratios. First, the commenters were concerned that the proposed regulations did not specify the source of the earnings data and there was nothing in the proposed regulations that would limit the Department from changing the data source. Second, because the proposed regulations did not define the term "earnings" the commenters believed it was unclear as to what

measure would be used to determine whether a program satisfies the debt-to-earnings ratios. Other commenters questioned whether annual earnings would equal a full 12 months of earnings or be based on past calendar earnings because, if based on calendar year data, the data will not be representative of graduates' actual earnings if employment began mid-year or towards the end of the reporting period. Third, even if the Department specified SSA as the source of earnings data and defined "earnings," the commenters stated that institutions would still be unable to monitor program performance under the proposed debt-to-earnings metric because institutions do not have access to actual earnings for program graduates from SSA or any other source. Therefore, the commenters believed that institutions would be deprived of effective notice of the impact of the debt-to-earnings ratios and could not take effective action to improve program performance before being subject to sanctions. Finally, the commenters stated that some program graduates begin their careers in low paying jobs or internships. For example, graduates of the arts and fashion-based programs typically know they must begin at a low-paying position to prove themselves and get a foothold in a competitive market, or to retain the freedom to do creative work of their choice. The commenters were uncertain how the Department would assess whether an institution can show that students completing a program "typically experience a significant increase in earnings after an initial employment period" as described in the July 26, 2010 NPRM. Because of this uncertainty, the unavailability of SSA data on the actual earnings for program graduates, and the unrealistic expectation that program graduates would provide earnings data to an institution four to six years after completing a program, the commenters concluded that institutions would not be able to monitor program performance under the debt-to-earnings ratios.

For the following reasons, commenters opined that using actual SSA wage data to calculate the debt-to-earnings ratios would be arbitrary:

(1) Institutions have no access to the SSA actual earnings data and therefore have no way to determine whether their programs comply with the ratio requirements.

(2) By relying on actual earnings data, the Department does not consider that students may have valid reasons unrelated to the value or quality of their education for choosing not to seek employment or seeking low-wage or part-time employment.

(3) The proposed regulations fail to account for macro-economic conditions that could drive national unemployment rates or that are beyond the control of institutions.

(4) The SSA data fail to include comparable earnings for self-employed individuals and fail to include all of the earnings for graduates who operate small businesses or as independent contractors.

In addition, some commenters opined that because the proposed regulations do not control for the population served by institutions, the regulations discriminate against programs in economically disadvantaged areas. The commenters recommended using data from BLS or the U.S. Department of Agriculture's Economic Research Service (ERS) noting that the ERS provides wage data for metropolitan and non-metropolitan labor markets.

Some commenters believed that the proposed debt-to-earnings ratio does not reflect gainful employment in a recognized occupation but instead measures the post-completion debt retirement capacity of a program completer regardless of whether (1) after initial placement, he or she has been continuously employed in the occupation related to the program, or (2) he or she received a waiver for placement, or was never placed, because of continuing education or another acceptable reason allowed by an accrediting agency under its placement methodology. As a result, the commenters contended that the proposed regulations were heavily biased against programs for the health care professions that enroll principally women (ages 18–34) who often leave the workplace for child bearing during the three-year period after graduation.

Some commenters believed that using actual wage data from SSA might be acceptable if the Department did not count graduates who did not work, maintained full-time employment for short periods, or worked part time. The commenters offered that these situations could be more a reflection of the student than the education provided and would inappropriately lower the income used in the calculation.

Other commenters conceded that BLS earnings data and Standard Occupational Classification (SOC) codes may not be as complete as desired (the BLS data do not account for earnings by degree attainment and it is difficult to properly align or determine the SOC codes that apply to a particular program), but nevertheless endorsed using BLS data to provide a transparent way for institutions to manage their compliance with the regulations. These commenters supported using BLS data at the 25th percentile for non-degree programs and at the 50th percentile for programs leading to bachelor's degrees and higher credentials.

Other commenters supported using actual earnings and including all graduates (thus counting those who stray outside the strict mapping to an occupation), but were concerned that the Department did not propose to provide debt-to-earnings data, or results, on a quarterly, monthly, or more frequent basis. The commenters believed that failing to provide this data, would prohibit institutions from identifying negative trends and responding to any problems before being subject to sanctions.

Other commenters stated that because the for-profit sector enrolls a higher percentage of nontraditional and female students, the Department should use BLS median wages instead of SSA actual wages to provide a fixed, federally-targeted wage base that would minimize detrimental, differential, and possibly legally discriminatory, population effects. The commenters also suggested that the Department use the BLS median wage instead of the originally proposed 25th percentile wage to better reflect the earnings in any given occupation.

Other commenters believed that using actual earnings of part-time workers would force institutions to close down quality programs because those programs would not satisfy the debt-to-earnings thresholds. According to the commenters, program closures would have an enormous effect on female-dominated occupations in health sciences, where working mothers have the opportunity to work part-time or take leave from work to manage home and family responsibilities, by leaving thousands of predominantly low-income women without the opportunity for an education. To mitigate this circumstance, the commenters suggested that the Department use BLS wage data instead of actual earnings to calculate the debt-to-earnings ratios. Alternatively, if actual earnings are used, the commenters suggested that the Department add a multiplier to the average annual earnings that is commensurate with the proportion of enrolled women in a particular program.

Some commenters believed that the proposed loan repayment rate undercuts the validity and need for debt-to-earnings tests. The commenters reasoned that graduates who are repaying their loans have sufficient income, but if they are not repaying

their loans, the fact that their earnings may exceed some threshold appears to be irrelevant. These and other commenters stated that even the brightest, most skilled, and employable graduates will face earnings limitations in low-wage-earnings cities and surrounding areas. Consequently, because the proposed metrics do not account for differences in regional wages, the commenters were concerned that programs offered in those areas would fail the debt-to-earnings tests thereby depriving employers of the opportunity to hire qualified, well-trained graduates.

Some commenters believed that the proposed gainful employment regulations were irrational because programs would be subject to a potential loss of eligibility, strict enrollment limits, and other punitive measures based on metrics that did not exist at the time that students incurred loan debt that would now be subject to review under the proposed measures. In addition, the commenters stated that because the Department would impose punitive measures against programs based on aggregate data, not on the basis of individual student data, the proposed regulations are ill-designed to achieve the purposes identified by the Department in the July 26, 2010 NPRM. For this reason, the commenters opined that the proposed regulations were arbitrary and capricious because educational choices would be eliminated for students who were doing well themselves by repaying their loans, obtaining jobs in their field, and contributing to society in general.

Other commenters echoed these concerns noting that every student whose data would be used under the debt-to-earnings metric would have left an institution before the implementation date of the regulations, with some students leaving as early as five years before that date. In view of the "retroactive" nature of the proposed regulations, the commenters concluded that it would not be feasible for an institution to take any corrective actions before sanctions would be imposed by the Department.

Some commenters believed that the final regulations should not require institutions to retroactively gather data on individuals who previously enrolled in programs leading to gainful employment because many institutions would be unable to do so.

Discussion: The Department has several concerns about using BLS data to calculate the debt-to-earnings ratios. First, as a national earnings metric that includes untrained, poorly-trained and well-trained employees, BLS earnings data do not distinguish between excellent and low-performing programs offering similar credentials. Second, BLS earnings data do not relate directly to a program—the data relate to a SOC code or a family of SOC codes stemming from the education and training provided by the program. An institution may identify the SOC codes by using the BLS CIP-to-SOC crosswalk that lists the various SOC codes associated with a program, or the institution could identify through its placement or employment records the SOC codes for which program completers find employment. In either case, the BLS data may not reflect the academic content of the program, particularly for degree programs. Assuming the SOC codes can be properly identified, the institution could then attempt to associate the SOC codes to BLS earnings data. BLS provides earnings data at various percentiles (10, 25, 50, 75, and 90), but the percentile earnings do not relate in any way to the educational level or experience of the persons employed in the SOC code. So, it would be difficult for an institution to determine the appropriate earnings, particularly for students who complete programs with the same CIP code but at different credential levels. For example, there is no difference in earnings in the SOC codes associated with a certificate program and an associate's degree program with the same CIP code. Moreover, because BLS percentiles simply reflect the distribution of earnings of those employed in a SOC code, selecting the appropriate percentile is somewhat arbitrary. For example, the 10th percentile does not reflect entry-level earnings any more than the 50th percentile reflects earnings of persons employed for 10 years. Even if the institution could reasonably associate the earnings for each SOC code to a program, the earnings vary, sometimes significantly, between the associated SOC codes, so the earnings would need to be averaged or somehow weighted to derive an amount that could be used in the denominator for the debt-to-earnings ratios. Finally, and perhaps most significantly, BLS earnings do not directly reflect the earnings of the students who complete a program at an institution. Instead, BLS earnings reflect the earnings of workers in a particular occupation, without any relationship to what educational institutions those workers attended. While it is reasonable to use proxy earnings like those available from BLS for research or consumer information purposes, we believe a direct measure of program performance must be used in determining whether a program remains eligible for title IV, HEA funds. The earnings data we obtain from SSA will reflect the actual earnings of program completers without the ambiguity and complexity inherent with attempting to use BLS data for a purpose outside of its intended scope.

As noted by many of the commenters, a tradeoff in using SSA data rather than BLS data is timely access to the earnings data needed for making strategic decisions about program offerings and managing programs to comply with the gainful employment standards. Whereas BLS data are readily and publicly available, an institution will not have SSA data for a particular FY until the Department obtains the data from SSA. This delay is unavoidable because the Department will use the most recent earnings data available from SSA to calculate the debt-to-earnings ratios for each FY. To mitigate issues related to timely access, the Department will implement the following approach:

- For the debt measures calculated for FY 2011, we will provide for each gainful employment program offered by an institution the debt-to-earnings ratios for the 2YP covering FYs 2007 and 2008. Along with the ratio results, we will provide the associated median loan debt and SSA earnings data (the mean and median annual earnings). In addition, we will provide the loan repayment rates for each program for the same two-year period. We intend to provide the ratio results and underlying data for these FYs to the affected institution and only for informational purposes. The Department will provide the same data for each subsequent FY the ratios are calculated.
- As discussed more fully under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g)),* the Department is providing a process under which an institution may demonstrate that a failing program would satisfy a debt-to-earnings standard by using alternative earnings data from BLS, a State-sponsored data system, or from an institutional survey conducted in accordance with the National Center for Education Statistics (NCES) standards, to recalculate the debt-to-earnings ratios. These options are responsive to comments suggesting that the actual earnings give an inaccurate view of a program and that we allow other data sources to be used for the earnings calculation.

Under this approach, an institution will have an early view of the performance of its programs from which

it can make initial assessments and plans for improving or discontinuing failing programs. In addition, because a program will not become ineligible until the Department calculates the debt measures for FY 2014, the institution will have the SSA data for two additional FYs (FYs 2012 and 2013) to supplement and better inform its initial assessments. Moreover, to allow more time for improvements of potentially failing programs, beginning with the debt measures calculated for FY 2012, the institution may use alternative earnings data under the recalculation process described more fully under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g))* to extend the program's eligibility. The following Table G illustrates this approach.

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Table G: Implementation Timeframes under the Final Gainful Employment Regulations

DEBT MEASURES YEAR		FY 2011*	FY 2012**	FY 2013	FY 2014***	FY 2015	FY 2016
CALCULATION YEAR		FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
REPAYMENT RATE							
	Entered Repayment Years	FY 2007 FY 2008	FY 2008 FY 2009	FY 2009 FY 2010	FY 2010 FY 2011	FY 2011 FY 2012	FY 2012 FY 2013
	Repayment Activity Year	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
DEBT-TO-INCOME RATIOS							
	Years Completed Program	FY 2007 FY 2008	FY 2008 FY 2009	FY 2009 FY 2010	FY 2010 FY 2011	FY 2011 FY 2012	FY 2012 FY 2013
	Earnings Year	Calendar 2010	Calendar 2011	Calendar 2012	Calendar 2013	Calendar 2014	Calendar 2015
DEBT MEASURES RELEASE YEAR		2012*	2013**	2014	2015***	2016	2017

* Informational rates only
** First year for failing programs - 34 CFR 668.7(h)
*** First year for ineligible programs - 34 CFR 668.7(i)

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A program that fails the debt measures for FYs 2012, 2013, and 2014 becomes ineligible for title IV, HEA funds after the final rates are released for FY 2014. During this initial three-year window, an institution may use BLS earnings data to show that the program satisfies the minimum standards for one of the debt-to-earnings ratios. Despite our concerns about using BLS data, in view of the commenters' beliefs that BLS data appropriately provides some certainty to institutions seeking to evaluate their programs before actual earnings information is available and mitigates the consequences of employment choices or the effects of macroeconomic conditions that would otherwise be adversely reflected in the debt measures, we have established a way for an institution to use BLS data under the recalculation process for the initial evaluation period. Doing so provides three more years for many institutions to acclimate to the use of actual earnings data from SSA by allowing those institutions to extend the eligibility of an otherwise failing program to at least FY 2015. For FY 2015, the students in the 2YP (students who completed a program in FYs 2011 and 2012) would have attended the institution contemporaneously with the development and publication of these regulations and, therefore, the "retroactive implementation" that some commenters identified will largely be mitigated.

Moreover, an institution may be able to extend the eligibility of a failing program beyond FY 2015 by using alternative earnings data from a State-sponsored data system or an NCES-based institutional survey. In either case, we believe that providing an institution the opportunity to extend a failing program's eligibility through or beyond the initial three-year window addresses the commenters' concerns that the regulations apply to students who have already graduated from or dropped out of a program.

With regard to the comments that SSA data fail to include comparable earnings for the self-employed or independent contractors, we note that there are two SSA files: One that includes only wage earners and another that provides earnings information on sole proprietors and independent contractors. SSA will provide combined earnings information for the debt-to-earnings ratios.

In response to the comment about using ERS data, we note that both BLS and ERS data are for groups. BLS provides data by occupation and ERS provides data by the location of the wage earner. It is not clear how either of these data sources would be better than actual earnings provided by SSA. While it is possible that a State longitudinal data system could also provide accurate earnings data, neither ERS nor BLS would achieve the same coverage or accuracy.

The Department recognizes that some graduates will work part-time, become unemployed, or opt out of the labor force. As a result, the actual earnings data regarding a program's graduates are likely to include some individuals who are not working full-time for the entire year. However, we believe that actual earnings should be used for the following reasons. First, the quality of the program may be related to its graduates' ability to find full-time employment. As a result, when examining a program that generates an unusually large number of graduates without full-time employment, it is difficult to separate individual choices from program performance. Second, the Department designed the debt-to-earnings ratio to identify programs where the majority of program graduates are carrying debts that far exceed levels recommended by experts. If an institution expects a program to generate large numbers of graduates who are not seeking employment or who are seeking only part-time employment, it should consider reducing their debt levels rather than expecting their students to bear even higher debt burdens. Finally, if a particular programs' loans are affordable, it should succeed under the repayment test even if many of its graduates are not working full time.

Changes: None in this section. However, many of the changes in the final regulations address the issues raised in this section.

Comment: Commenters noted that the Department did not indicate in the proposed regulations whether earnings data would include some or none of following: gross income, investment income, income from earnings, income minus expenses for self-employed individuals, or reported income.

Some commenters requested that the Department clarify how graduates with no income data in the SSA records would be treated in calculating the debt ratios. Other commenters suggested including unemployment benefits as part of actual average annual earnings.

Some commenters urged the Department to use BLS wage data instead of actual average earnings from SSA because (1) according to these commenters, earnings for self-employed individuals are not reported to SSA, and (2) for a sole proprietorship where the company receives the income, the employee/owner may receive only a modest salary.

Discussion: In response to the questions and comments about earnings, the Department will use the data reported by an institution under § 668.6(a) to compile a list of students who completed a program at the institution during the applicable two- or four-year period and submit that list to SSA. Based on the most recent earnings data available, SSA will provide the Department with the mean and median annual earnings of the students on that list.

SSA defines a person's earnings for a taxable year as the sum of pay for services as an employee plus all net earnings from self-employment (minus any net loss from self-employment). Earnings include:

- Most wages from employment covered by Social Security;
- All cash pay for agricultural and domestic work, even if it is not considered "wages";
- Cash tips which equal or exceed $20 a month from work for an employer;
- All pay for work not covered by Social Security if the work is done in the United States, including work for Federal, State, and local units of government; and
- All net earnings from self-employment, including those not covered by Social Security.

SSA data privacy requirements restrict access to earnings on an individual basis. Therefore, SSA will provide the Department with the mean and median earnings figures based on all completers. However, because neither the institution nor the Department has access to the earnings information for those individuals, the process for correcting errors is limited to ensuring that the institution provided an accurate list of program completers, that the list of program completers was accurate when it was provided to SSA, and that the calculation by SSA was made for those individuals. With respect to any concerns that the earnings information maintained by SSA is not accurate, it is the earnings information reported to the Federal government that is gathered, maintained and disseminated under strict legal standards to ensure its accuracy, quality, objectivity, utility, and integrity. SSA will provide safeguards pursuant to section 6103(p)(4) of the Internal Review Code of 1986, as amended (IRC) for all Federal returns and return information received from taxpayers and the Internal Revenue Service (IRS). Contractors receiving returns or return information from the SSA pursuant to section 6103(l)(5) of

the IRC, in conjunction with section 6103(n) or (m)(7) of the IRC, are also subject to the safeguard provisions in section 6103(p)(4) of the IRC. In addition, SSA employees, and contractors employed under section 6103(l)(5) of the IRC, in conjunction with section 6103(n) or (m)(7) of the IRC, are subject to criminal and civil penalties imposed by sections 7213, 7213A, and 7431 of the IRC. SSA will ensure that all uses and redisclosures of tax information will be in compliance with the appropriate disclosure authorities.

These legal standards also include compliance with the requirements of the Information Quality Act (IQA) (section 515 of the Treasury and General Government Appropriations Act for FY 2001 (Public Law 106–554)), which obligates Federal agencies, including the SSA (see *http://www.ssa.gov/515/ssaguidelines.html*), to disseminate information in a manner that complies with the IQA. We are not aware of any authority that requires or even allows the Department to question the quality, objectivity, utility, and integrity of SSA's information under the provisions of the IQA or otherwise. Further, these data are used today by families to complete the Free Application for Federal Student Assistance and are considered as accurate income information for the purpose of determining aid eligibility. Therefore, the Department accepts this information as reliable, and limits corrections to the list of individuals for whom SSA calculates mean and median earnings. However, the Department has created an opportunity for institutions to provide alternative reliable earnings information, including BLS data (see discussion under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g)).*

With respect to the use of SSA data, we also wish to clarify that the data used will be for all program completers not just those receiving title IV, HEA program aid. Through these final regulations, the Department is establishing standards to determine the eligibility of a gainful employment program. These standards include calculating the median loan debt for all students enrolling in a program, including students who are not receiving title IV, HEA program funds. These students may be covering tuition costs from savings or scholarships, or their tuition may be paid by an employer, or through private educational loans that would be tracked by an institution and reported to the Department. We are therefore requiring institutions to collect this information and report it to the Department as a part of the determination of whether the gainful employment program is eligible for title IV, HEA program funds.

Changes: None.

Comments: Some commenters suggested that the Department adjust the SSA data because the actual income of students for the first three years after graduation does not provide a good or reliable measure of their overall salary levels. For example, many students graduate from school mid-year, many students may not be fully employed in their first year for numerous reasons unrelated to the quality of their programs, or there may be a sharp downturn in an economic sector or geographic region. Because institutions would bear the full risk that earnings will be under-reported in these circumstances, the commenters urged the Department to annualize the wage data.

Other commenters believed the proposed metrics should take into account high unemployment and underemployment rates by (1) not applying the metrics until the State or regional unemployment rate applicable to the institution (relevant unemployment rate) returns to the level existing on January 1, 2008 or some other earlier date preceding the start of the current economic malaise (reference date), or (2) adjusting the upper thresholds of the loan repayment rate and debt-to-earnings ratios to reflect the percentage change in the relevant unemployment rate since the reference date. For example, if the relevant unemployment rate is now 12 percent and it was 8 percent on the reference date, it has increased by 50 percent so the lowest acceptable loan repayment rate should be decreased by 50 percent from 35 percent to 17.5 percent and the maximum debt-to-earnings threshold should be increased from 12 percent to 18 percent and from 30 percent to 45 percent.

Similarly, other commenters believed that the Department should have a mechanism for considering the current economic conditions when determining the impact of repayment rates and debt-to-earnings results. The commenters recommended that the Department suspend or adjust the gainful employment calculations when the national unemployment rate is above seven percent, and suspend the regulations for States or regions that have more than a seven percent unemployment rate even when the national rate is less than seven percent.

Some commenters stated that a 10 percent unemployment rate and stagnant job growth may be a more important cause of a program's failure to satisfy the proposed metrics than the quality of the program. The commenters cautioned that further analysis is needed to gauge the impact of normal economic cycles on metrics used to determine program eligibility.

Other commenters believed that institutions would be inappropriately penalized when employment in a field is suddenly and adversely affected by regional economic downturns and when recently placed graduates refuse, or are economically unable, to relocate.

Discussion: In view of the suggestions to somehow adjust the debt measures to account for high unemployment or underemployment, we will use the higher of the mean or median annual earnings obtained from SSA to calculate the debt-to-earnings ratios. All things equal, the value of mean or median earnings is distribution dependent. In a prosperous economy where fewer people are unemployed and earnings are generally higher, average earnings are likely to be higher than median earnings. Conversely, during an economic downturn where more people are unemployed and earnings are depressed or stagnant, median earnings are likely to be higher than average earnings.

Programs that prepare students for jobs that suddenly become unavailable in a local community may begin to fail the debt measures unless the institution adjusts quickly to labor market conditions. By allowing programs to remain eligible until they have failed both measures three out of four FYs, the Department provides time for successful programs to adjust to market conditions.

Changes: Section 668.7(c)(3) has been revised to provide that the Department will obtain from SSA the most currently available mean and median annual earnings of the students who completed a program during the 2YP, the 2YP–R, the 4YP, or the 4YP–R. We will use the higher of the mean or median annual earnings to calculate the debt-to-earnings ratios.

Comment: Some commenters argued that program completers who are employed in mainly cash businesses, such as massage therapy and cosmetology, should not be included in the debt-to-earnings calculations because they may not fully report earnings to the IRS. Although the commenters did not condone the failure of individuals to report earnings accurately, they cited studies illustrating the magnitude of unreported or underreported earnings and urged the

Department to acknowledge this "underground" economy when formulating the debt-to-earnings ratio it will use as a measure of program quality. The commenters believed that using BLS earnings data, instead of actual reported earnings, would reduce the impact of program completers who do not report their full income.

Discussion: The Department does not condone any practice or behavior that leads to underreporting of earnings and will not otherwise encourage this behavior by adjusting SSA earnings. However, for a failing program, the Department provides flexibility for an institution to use alternative earnings data under the recalculation process (see the discussion under the heading, *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures (§ 668.7(f)), and Alternative earnings (§ 668.7(g)).*

Changes: None.

Comment: With regard to the proposed debt measure based on discretionary income, some commenters recommended that the measure account for family size. The commenters noted that a family of one earning $33,000 a year would have $16,800 in discretionary income, but a family of four with the same income would have no discretionary income. Because 48 percent of all undergraduates at for-profit institutions have dependent children, and 28 percent have at least two children, the commenters suggested that the Department adjust the measure for family size to reflect the real burden on families with children by (1) determining discretionary income based on a family size of two instead of one, (2) limiting the use of the discretionary income measure to programs whose graduates have average earnings sufficiently high to guarantee that a family's basic expenses could be met, regardless of family size, or (3) eliminating the discretionary income measure entirely to avoid leaving families with children unprotected. On the other hand, some commenters believed that this measure improperly failed to consider total family income, most notably, spousal income.

Discussion: We do not believe that it would be feasible to account for family size in calculating the debt-to-earnings ratio based on discretionary income. The Department will not have information about the current or future family size of students who complete a program. The Department cannot adopt the commenters' alternate suggestion to use a family size of two, instead of one, because we will not have information about the earnings for any other member of the family, or whether there is another family member.

Changes: None.

Alternative Metrics

Comment: Some commenters argued that the proposed gainful employment metrics evaluate only one aspect of the quality of programs—whether a student's initial debt burden was reasonable—but fail to account for other longstanding measures of program quality or a student's long-term return on his or her educational investment. The commenters believed that structuring regulations in this manner may discourage institutions from offering training in jobs with the potential for long-term salary growth for fear of losing program eligibility. For example, according to the commenters, based on BLS data, entry-level salaries for graduates from programs for auto technicians range from $19,840–$25,970. According to the commenters, salaries for auto technicians may have long-term growth potential because it can take a technician 2 to 5 years after graduation to become fully qualified. Mastering additional complex specialties also requires the technician to have years of experience and advanced training. Applying the proposed gainful employment measures to these programs may prevent students from pursuing training in these necessary fields. The commenters offered that a more reasonable measure of the quality of an educational program would be the student's return on investment (ROI), not a first-year debt service calculation. The commenters argued that a student's initial capacity to service debt should be one consideration in judging educational program quality but is not the essential metric, and that the analysis of a program should also take into account a student's potential long-term benefits and earnings.

Other commenters believed that, according to finance theory, the only correct method for determining the value of a program would be a Net Present Value (NPV) approach that considers the present value of all incremental lifetime earnings stemming from the program and the present value of the total costs of the program. The commenters contended that even if it were economically rational to base the regulations on a non-NPV approach, the proposed regulations are economically irrational because the debt-to-earnings and loan repayment tests are based on arbitrary three- and four-year evaluation periods that are too short to fairly reflect the benefits of education.

Some commenters suggested a variety of alternatives to the proposed gainful employment regulations including using retention rates, employment/job placement rates adjusted for local and economic conditions, and completion and CDRs. Other commenters believed there was no need to further define gainful employment because (1) national accrediting agencies require that the majority of students graduate and find jobs in the field in which they were trained, or (2) students who pass State licensing examinations are gainfully employable. Some commenters suggested that the Department require for-profit institutions to refund 100 percent of the student loans for students who drop out of a program, or not impose penalties on institutions that make those refunds.

Other commenters suggested that the Department use a composite score based on default, graduation, and placement rates. The commenters argued that institutions with exceptional, industry-determined rates have proven their success in providing quality education and therefore should be allowed to continue serving their students without impediments. The commenters noted that Congressman Robert Andrews pioneered a composite index in the 1990s and suggested using default, graduation, and placement rates along with the number of Pell Grant recipients to determine an overall score for an institution. According to the commenters, factoring in Pell Grant information would acknowledge the unhappy truth that impoverished students are less likely to complete higher education programs. To avoid punishing schools for accepting these students into their programs, the commenters suggested that the Department use a sliding scale, or "grading on a curve", that would help to equalize the additional difficulties faced by lower socioeconomic students.

Some commenters supporting the composite index approach suggested weighting the placement rate at 50 percent, the CDR at 30 percent, and the graduation rate at 20 percent. These commenters also believed that the index would need to be adjusted to reflect the number of Pell Grant-eligible students at an institution. The commenters argued that the composite index approach is superior to the proposed debt approach in the following ways. First, the composite index would not rely on one characteristic (debt load) or a complex loan repayment rate, but on a number of outcomes, most importantly the employment of graduates. Second, the index could be implemented readily since cohort default and graduation

rates are already tracked by the Department, and the great majority of for-profit colleges already track student placement. Third, this approach is analogous to the currently used financial responsibility composite score that integrates a basket of three financial measures into one index. Finally, it measures outcomes at the institutional level, rather than the program level, which introduces complexity and difficulty in implementing a gainful employment standard. The commenters stated that the index approach could be implemented relatively rapidly without disrupting the market and risking unintended consequences. If the metrics need refinement, the commenters offered that the Department could implement the index, and over the next 36 months (1) redefine how default rates are measured (potentially moving to measuring the repayment of principal in dollars), (2) redefine how graduation rates are measured (potentially moving to track all students), or (3) apply the index at the program level after the relevant information is gathered and analyzed.

Discussion: While we appreciate the suggestion to incorporate a return on investment calculation into the measures, we believe there are significant theoretical and practical reasons for not doing so. Commenters noted that finance theory dictates an NPV approach for determining the value of a program offered by an institution. To be sure, an NPV approach helps to distinguish among competing investment opportunities. However, inherent in an NPV calculation is a specified discount rate so that all future cash flows (income as well as expenses) can be described in terms of present-day values. Thus the selection of an appropriate discount rate is key to this calculation. Those with experience in making investment decisions are likely to have a good understanding of their own discount rates. This cannot be said for those with limited or no experience in such matters. If the Department were to incorporate an NPV calculation into the measures, we would have no basis for establishing a discount rate for borrowers who make personal investment decisions with respect to pursuing postsecondary education programs.

The Department agrees that there are long-term benefits, in particular with respect to increased lifetime earnings, for those with formal education or training beyond high school. We know from The National Longitudinal Survey of Youth conducted by BLS that the length of time an employee remains with the same employer tends to be shorter for younger workers and that the average worker will have about 11 different jobs in the first 25 years of his or her working lifetime. However, we are unaware of any ongoing, long-term tracking of work-life earnings by specific occupation. Thus, we lack a means for measuring actual long-term benefits and earnings by occupation.

We likewise appreciate the suggestions to use retention rates, employment/job placement rates, and completion and CDRs as alternative measures to the proposed measures. While these are all valid and useful indicators for specific purposes, they do not directly measure whether, or the extent to which, a student benefits from taking a program intended to provide gainful employment. For example, placing a student in a job related to the training provided by a program is a good outcome, but without considering the student's earnings it is difficult to say whether the student made a worthwhile investment in taking the program or whether the student has sufficient earnings to make monthly loan payments. Moreover, the specific indicators suffer from important shortcomings: Default rates measure only a portion of the borrowers who have had difficulty repaying their loans, the statutory definition of graduation rate excludes transfer and part-time students, and placement rates are defined differently by accrediting agencies and States. Although the concept of a composite index is compelling, the suggested index uses some of the same indicators, which in our view fall short of directly evaluating gainful employment. That aside, applying a composite index at the institutional level would mask poor-performing programs because only the overall performance of the institution, not each program, would be evaluated. Moreover, if the institution's overall performance is subpar, the composite index would jeopardize the eligibility of the entire institution. By using purpose-built measures applied at the program level, these regulations effectively target poor-performing programs without necessarily placing the entire institution at risk because only those programs become ineligible for title IV, HEA funds.

Changes: None.

Small Numbers (§ 668.7(d))

Comment: Some commenters argued that program closures would be harmful to students, especially if the loan repayment rate is based on a small sample of borrowers. Similarly, other commenters requested that the Department clarify how the debt-to-earnings ratios would be calculated for a small number of program completers.

Discussion: We agree that a program with a small number of borrowers or completers should not lose its title IV, HEA program eligibility based on its small numbers and have adopted in § 668.7(d) the standard under the CDR provisions in § 668.197 relating to treatment of institutions with 30 or fewer borrowers.

Changes: See the changes described under the heading, *Definitions.*

Draft Debt Measures and Data Corrections (§ 668.7(e)), Final Debt Measures (§ 668.7(f)), and Alternative Earnings (§ 668.7(g))

Comment: Some commenters noted that in the Cohort Default Rate (CDR) Guide, the Department provides institutions with procedural rights to review and challenge NSLDS data that they believe is inaccurate. The commenters recommended that the Department provide a similar correction and appeal process for an institution that fails to meet the gainful employment standards. Another commenter recommended that the Department include additional regulatory language that would (1) define an institution's right to appeal inaccurate data and include a reasonable time for an institution to review the Department's data, and (2) establish a process by which an institution is allowed to review and correct data to ensure inaccurate data is not released to the public.

Other commenters believed that the proposed regulations did not provide a meaningful way for an institution to appeal or contest the use of SSA wage data. The commenters suggested that the Department include a provision that accounts for mitigating circumstances beyond an institution's control that affect earnings data and allows the institution to present data demonstrating the long-term salary potential of its program completers.

Some commenters urged the Department to return to the approach proposed during negotiated rulemaking under which the debt-to-earnings ratios would be calculated by using the higher of BLS earnings data or actual earnings of graduates. Specifically, some of the commenters requested that the Department use the higher of: (1) The most current BLS national or regional earnings data at the 50th percentile for persons employed in occupations related to training provided by a degree program and the most current BLS national or regional earnings data at the 25th percentile for persons employed in occupations related to training provided

by a non-degree program; or (2) actual earnings data submitted by the institution that demonstrate a substantial number of students who completed the program during the three-year period had earnings, from occupations related to the training provided by the program, that are higher than the BLS earnings data. The commenters recommended using BLS wage data because actual earnings data fail to capture wages in the occupation or occupations for which the program provided training to students. Under the commenters' approach, institutions would also have the opportunity to submit to the Department actual earnings data that they collect about students in a relevant occupational field. In addition, the commenters believed that a modest adjustment to the Department's negotiated rulemaking proposal would be necessary to account for inherent differences in the amount of debt that students in degree programs have compared to students in non-degree programs. The commenters argued that the inherently higher debt burden for students in degree programs is not offset by initial earnings immediately after students graduate because degree students are making a lifetime investment in their future. According to the commenters, BLS earnings data at the 50th percentile properly reflect this lifetime investment decision.

Commenters argued that the proposed debt-to-earnings calculations do not adequately take into account external factors that may affect earnings of program graduates. For example:

- A 10 percent unemployment rate and stagnant job growth may contribute more to a program's failure to satisfy the proposed metrics than the quality of the program. The commenters cautioned that further analysis is needed to gauge the impact of normal economic cycles on metrics used to determine program eligibility.
- For the three-year cohort of program completers, only the most recent annual earnings are used to calculate the debt-to-earnings ratios. However, completers in the cohort could work full-time for two years and then due to economic conditions may be able to work only part-time or may choose to work part-time.
- Using actual earnings data places on the institution all of the risk that students may underreport income to the Federal agency.

In view of these factors, the commenters suggested that the regulations provide for mitigating circumstances or allow institutions to use BLS data to comply with the debt-to-earnings metrics.

Discussion: We are persuaded that an institution should be able to correct the data used to calculate the debt-to-earnings and loan repayment rates for a program to determine with certainty whether the program meets the minimum standards and to guard against requiring institutions to publicly disclose incorrect rates. As suggested by the commenters, we are adopting a data challenge and correction process in these final regulations that is similar to the process used for CDRs.

We also agree that an institution should be able to use alternative, but reliable, earnings data to demonstrate that a program meets the minimum standards for the debt-to-earnings ratios. The data collected by SSA is used to determine the amount of Federal benefits that a wage earner will ultimately be eligible to receive. The data collected also are used as a primary source for earnings information for Federal income tax purposes. As a result, the data are extremely accurate and likely will be the best source of income data. The data the SSA collects, maintains, and disseminates is compliant with the requirements of the IQA. Therefore, the Department accepts this information as reliable, and in these final regulations will limit corrections to the list of individuals for whom SSA calculates mean and median earnings.

However, we understand that institutions will not have access to individual wage records maintained by the SSA. As a result, to provide institutions with additional assurance on the accuracy of the data and to provide greater flexibility for institutions, the Department will accept alternative reliable earnings data on a particular program's graduates from State longitudinal data systems and from institutional surveys conducted in accordance with NCES statistical standards.

In addition, the Department understands that data on typical earnings by occupation are already available from BLS, while SSA data will not be available for a number of months. Making earnings data available now will help institutions analyze the impact of the regulations on their programs and set targets for improvement. As a result, the Department is prepared to accept BLS earnings data under certain circumstances for debt measures calculated for FYs 2012, 2013, and 2014.

Under § 668.7(e), *Draft debt measures and data corrections,* we establish a two-step process whereby an institution first corrects information about the students that will be included in the draft debt-to-earnings ratios (pre-draft corrections) and then corrects information about borrowers and loan amounts after the Department issues draft debt measures (post-draft correction process).

In the pre-draft corrections process, an institution will be able to review and correct the information about the students that the Department intends to use to calculate the draft debt-to-earnings ratios. For each FY beginning with FY 2012, we will provide to the institution for each program a list of the students in the applicable two- or four-year period. Those lists will be based initially on the information provided by the institution under the program reporting requirements in § 668.6(a) but may be revised by the Department to account for students who are excluded from the ratio calculations under § 668.7(c)(5). We will identify the students that we exclude. After the lists are made available, the institution will have 30 days to provide evidence identifying the students who should be included on or removed from the list and to otherwise correct or update the identity information provided by the Department about each student. The institution may not correct any information about the students on a list after this 30-day period. If the information provided by the institution is accurate, that information is used to create the final list of students that the Department submits to SSA. The Department will calculate the draft debt-to-earnings ratios based on the mean and median earnings provided by SSA for the students on the final list. However, the institution may not challenge the accuracy of the mean or median annual earnings the Department obtained from SSA to calculate the draft debt-to-earnings ratios for the program.

We are establishing this process to make certain that the list identifying the students in the applicable two- or four-year period is accurate before transmitting the list to SSA. As discussed earlier in this preamble, SSA will perform an identity match to ensure that the earnings data it maintains are properly associated with the individuals on the list. In cases where the identity match fails, SSA will exclude those students from its calculation of the mean and median earnings for the program. Where these instances arise or for any other reason that SSA excludes students, the Department will adjust the median loan debt to compensate for the loss of earnings of the excluded students. Based on the Department's experience matching to SSA to determine student eligibility, we anticipate that identity mismatches or

other exclusions by SSA will be very limited—less than 2 percent of all students submitted to SSA. As a result, these mismatches will not materially impact the debt-to-earnings ratios for most programs. Therefore, as a practical matter we will limit the median loan adjustment to failing programs that have at least one mismatch. In these cases small variations in the ratio results could be the difference between a program failing and passing the measures. The Department will adjust the median loan debt for the program by removing the highest loan debt associated with the number of students excluded by SSA. For example, SSA excludes four students from the calculation. The Department identifies the students on the list with the highest loan debts and removes those four students from the calculation of the median loan debt for the program. We would then use the adjusted median loan debt to recalculate the debt-to-earnings ratios for the program.

In the post-draft corrections process, for each FY beginning with FY 2012, we will notify an institution of the draft results of the debt measures for each of its programs. No later than 45 days after the Department issues the draft results, the institution may challenge the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, or the median loan debt for the program that was used for the numerator of the draft debt-to-earnings ratios. To challenge the information, the institution must submit evidence showing that the borrower loan data or the program median-loan debt is inaccurate. For the draft loan repayment rate, the institution may also challenge the accuracy of the list of borrowers included in the applicable two- or four-year period used to calculate the draft loan repayment rate by submitting evidence showing that a borrower should be included on or removed from the list, or by correcting or updating the identity information provided for a borrower on the list, such as name, social security number, or date of birth.

If the updated information provided by the institution is accurate, the information is used to recalculate the debt measures for the program. Like the CDR data challenges and appeals, no sanctions will be imposed on an institution during this corrections process.

We note that the 45-day correction period under the post-draft corrections process begins on the date the Department issues a particular draft result. For example, we may issue a draft loan repayment rate for a program on May 1 but not issue the draft debt-to-earnings ratios for that program until June 1. The 45-day correction period for the loan repayment rate would start on May 1 and a separate 45-day period for the debt-to-earnings ratios would start on June 1.

In § 668.7(f), *Final debt measures,* we specify that the recalculated debt measures, and any draft debt measures that are not challenged or are unsuccessfully challenged, become the final debt measures for the program. The Secretary will notify the institution of these final debt measures.

Under § 668.7(g), *Alternative earnings,* we provide that an institution may recalculate the final debt-to-earnings ratios for a failing program to show that the program would meet a debt-to-earnings standard by using the median loan debt for the program and alternative earnings data from: A State-sponsored data system, an institutional survey conducted in accordance with NCES statistical standards, or BLS.

State data. An institution may recalculate the final debt-to-earnings ratios under § 668.7(g)(2) using State data only if the institution obtains earnings data from State-sponsored data systems for more than 50 percent of the students in the applicable two- or four-year period, or a comparable two- or four-year period, and that number of students is more than 30. The institution must use the actual, State-derived mean or median earnings of the students in the applicable two- or four-year period and demonstrate that it accurately used the actual State-derived data to recalculate the ratios.

Currently, only about half of the States have longitudinal data systems and those systems track employment outcomes only for students who find jobs within a State. Consequently, it may be difficult for an institution to obtain State earnings data if it offers a program in several States or in States with no data systems or if its program graduates find employment outside the State in which the institution is located. Although we expect more States to implement these systems, to make it easier for an institution to use data from multiple State systems under this alternative:

(1) The regulations provide that the institution must obtain State earnings data for the majority of the students who completed a program (more than 50 percent), not for all the students who completed the program during the applicable two- or four-year period.

(2) For students who find employment in a State outside the State in which the institution is located, the institution may enter into an agreement with the other State in which the student is employed to obtain earnings data for those students, if the other State agrees to provide the data.

Survey using NCES Standards. An institution may also recalculate the final debt-to-earnings ratios for a failing program under § 668.7(g)(3) using reported earnings obtained from an institutional survey conducted of the students in the applicable two- or four-year period, or a comparable two- or four-year period, only if the survey data is for more than 30 students. The institution may use the mean or median annual earnings derived from the survey data. In addition, the institution must submit (1) a copy of the survey and certify that it was conducted in accordance with the statistical standards and procedures established by NCES and available at *http://nces.ed.gov,* and (2) an examination-level attestation by an independent public accountant or independent governmental auditor, as appropriate, that the survey was conducted in accordance with the specified NCES standards and procedures. The attestation must be conducted in accordance with the general, field work, and reporting standards for attestation engagements contained in the GAO's Government Auditing Standards, and with procedures for attestations contained in guides developed by and available from the Department of Education's Office of Inspector General. The attestation is required to ensure that the survey was conducted properly, which allows for a more expedited review by the Department of the institution's recalculation submission.

The NCES standards were last revised in 2002. They comprise the statistical standards and guidelines for NCES, the principal statistical agency within the U.S. Department of Education. NCES' primary goal in establishing these standards was to provide high quality, reliable, useful, and informative statistical information to public policy decision makers and to the general public. In particular, the standards and guidelines described in the following paragraphs are intended for use by NCES staff and contractors to guide them in their data collection, analysis, and dissemination activities. The standards and guidelines serve to provide a clear statement for data users regarding how data should be collected in NCES surveys and the limits of acceptable applications and use.

In establishing the standards and guidelines, NCES articulated a view that other organizations involved in similar public endeavors would find the standards and guidelines useful in their work as well. Accordingly, we believe

that the application of this existing standard is appropriate given the need for high-quality data on earnings to use as an alternative source for earnings data.

In evaluating whether an institution has met the statistical standards and guidelines, the Department will look to determine particularly whether the institution met the NCES standard related to response rate. The purpose of this standard is to specify design parameters for survey response rates. The following is a summary of the key elements of the NCES response rate standard. High survey response rates help to ensure that the results are representative of the target population. Surveys conducted by or for an institution must be designed and executed to meet the highest practical rates of response and to ensure that nonresponse bias analyses are conducted when response rates suggest the potential for bias to occur.

When an institution collects data from all program completers—a universe data collection—it must be designed to meet a target unit response rate of at least 95 percent. A unit-level nonresponse bias analysis is recommended in the case where the universe survey unit response rate is less than 90 percent. When an institution conducts a sample survey, a unit response rate must be calculated without substitutions (see NCES Standard 1–3). A sample survey data collection must be designed to meet unit-level response rate parameters that are at least consistent with historical response rates from surveys conducted with best practices. The following parameters summarize current NCES historical experiences: For longitudinal sample surveys, the target school-level unit response rate should be at least 70 percent. In the base year and each follow-up, the target unit response rates at each additional stage should be at least 90 percent. For cross-sectional samples, the target unit response rate should be at least 85 percent at each stage of data collection.

Sample survey data collections must be designed to meet a target item response rate of at least 90 percent for each key item. For the purposes of meeting the requirements related to gainful employment, items related to placement and earnings would be considered key items. A nonresponse bias analysis is required at any stage of a data collection with a unit response rate less than 85 percent. If the item response rate is below 85 percent for any items used in a report, a nonresponse bias analysis is also required for each of those items (this does not include individual test items). The extent of the analysis must reflect the magnitude of the nonresponse. In longitudinal sample surveys, item nonresponse bias analyses need only be done once for any individual item, unless there is a substantial deterioration in the item response rate.

BLS Data. An institution may also recalculate the debt-to-earnings ratios under § 668.7(g)(4) using BLS earnings data only if the institution identifies and provides documentation of the occupation by SOC code, or combination of SOC codes, in which more than 50 percent of the students in the 2YP or 4YP were placed or found employment, and that number of students is more than 30. The institution may use placement records it maintains to satisfy accrediting agency or State requirements if those records indicate the occupation in which the student was placed. Otherwise, the institution must submit employment records or other documentation showing the SOC code or codes in which the students typically found employment.

For the identified SOC code or codes, the institution must use the most current BLS earnings data to calculate the debt-to-earnings ratio. If more than one SOC code is identified, the institution must calculate the weighted average earnings of those SOC codes based on BLS employment data or institutional placement data. In either case, the institution must use BLS earnings at no higher than the 25th percentile.

With regard to the 50 percent requirement, we believe that the BLS earnings data associated with the SOC codes must represent the majority of students that were placed or found employment to be used as an adequate proxy for the actual earnings of the program's graduates. For this reason, the Department may require the institution to submit all the placement, employment, and other records maintained by the institution for the program that the institution examined to determine whether those records identified the SOC codes for the students who were placed or found employment. In addition, for the same reasons we do not calculate debt measures for programs with small numbers of borrowers or completers, an institution may not use the BLS data-based recalculation if 30 or fewer of the program's graduates were placed or found employment during the applicable two- or four-year period.

Finally, for the reasons discussed under the heading, *Actual earnings from SSA and Bureau of Labor Statistics (BLS) wage data,* an institution may recalculate the ratios using BLS data only for FYs 2012, 2013, and 2014.

Under § 668.7(g)(5), an institution must notify the Department of its intent to use alternative earnings no later than 14 days after the date the institution is notified of its final debt measures and must submit all supporting documentation related to the recalculation of the debt-to-earnings ratios using alternative earnings no later than 60 days after the date the institution is notified of its final debt measures. Pending the Department's review of the institution's recalculation, the institution is not subject to the requirements arising from the program's failure to satisfy the debt measures, provided the submission was complete, timely, and accurate. If we deny the submission, we will notify the institution of the reasons for the denial. If the Department approves the institution's submission, the recalculated debt-to-earnings ratios become final for that FY.

Changes: New § 668.7(e), (f), and (g) have been added to provide for the data corrections, draft debt measures, final debt measures, and alternative earnings processes described in the *Discussion* section.

Debt Warning Disclosures (§ 668.7(j))

General

Comment: Commenters raised a number of concerns and questions regarding the debt warning disclosures described in proposed § 668.7(d). First, commenters asked the Department to clarify whether the prominent warning referenced in paragraph (d)(1) and the disclosure of repayment rates and debt-to-earnings measures referenced in paragraph (d)(2) applied to programs or institutions. The commenters believed that the proposed regulations could be interpreted to require disclosures for all programs and warnings for specific programs or to require disclosures and warnings for only restricted programs. Second, commenters questioned whether the debt warning disclosures should be included with, or made separately from, all other required disclosures, and whether enrolled students should be notified annually or only when a program is in restricted status. Third, some of the commenters requested additional information about the types of institutional materials that would have to contain the warnings. Giving the example of an institution that provides numerous programs, only some of which are subject to the debt warning disclosures, the commenters questioned whether the institution would have to list the programs subject

to the disclosures in all of its promotional, enrollment, registration, and other materials. Other commenters recommended that the Department revise the regulations to clarify that the warnings must be placed on all institutional materials that pertain to any program required to provide a debt warning. These commenters asked the Department to clarify the meaning of a "prominent warning" and whether the warning would have to be on every page of an institution's Web site or only on the institution's homepage.

Some commenters expressed concern that institutions would try to hide the required disclosures within their institutional materials and Web sites and suggested that the Department provide more specificity in the final regulations about the format and content of the disclosures to prevent this outcome.

Some commenters asked the Department to clarify the phrase "admissions meetings" and the types of interactions these meetings would include. Some of these commenters believed that this term could be interpreted to mean only in-person meetings and recommended specifying that in-person meetings and online or telephonic communications would all be covered under this phrase.

To improve the clarity of the regulations, commenters recommended technical changes such as changing the title of the paragraph from "debt warning disclosures" to "debt warnings and disclosures." These commenters argued that the suggested phrase would more accurately describe the substance of the requirements. The commenters further noted that it is appropriate to separate warnings and disclosures because the two are very different in nature: disclosures can provide information without judgment, while warnings can provide important context about what the information means.

Commenters also asked the Department to clarify the relationship between the proposed disclosure requirements and other disclosure requirements under the title IV, HEA regulations.

Discussion: See the discussion under the heading, *Implementation date.*

Concerns About Properly Disclosing the Debt Warnings

Comment: Some commenters supported our proposal to require debt warning disclosures. These commenters believed that the disclosures would help to ensure that prospective and enrolled students have adequate information to make decisions about where to pursue a program of study. However, the commenters believed that the proposed regulatory language was ambiguous, raising concerns that institutions would attempt to circumvent the regulations by (1) not providing students with enough contextual information to fully understand the meaning of a debt warning disclosure, (2) using language that would not be easily understood by prospective or enrolled students, or (3) manipulating the timing or delivery of the debt warning disclosures to pressure students to enroll. Specifically, the commenters were concerned that the proposed requirements would allow institutions to include only a bare minimum of information in the debt warning disclosure and that this information would not clearly convey to a student the risks of borrowing to attend a particular program.

To address the first issue, the commenters recommended that the Department require institutions to be more specific about a program's actual status. According to the commenters, this would help to ensure that students would have as much information as possible about the status of the program in which they were enrolling and of the potential impact that status could have on the student's Federal financial aid. The commenters believed that using this approach would better inform student choices about what programs to attend and would also encourage students to compare different programs. Some of the commenters suggested that, to facilitate student analysis of different programs, institutions' debt warning disclosures should also direct students to the Federal Web site *http://www.collegenavigator.gov,* which provides a comparison of college costs and programs. Similarly, other commenters recommended that the Department create a Web site that would list programs that are in compliance with the Federal requirements and programs that are not, thereby allowing students to compare programs at different educational institutions. These commenters recommended requiring institutions to include a reference to this Web site on the debt warning disclosure to ensure that students are aware of alternative school options, asserting that, as a result of marketing and sales strategies of some institutions, a student may erroneously believe that a particular school is unique in providing the flexibility or curricular training that the student needs.

With respect to the second issue regarding ensuring clarity and accessibility of the debt warning disclosure, commenters agreed that the Department should require that the language used in disclosures be as transparent as possible. However, there was disagreement among these commenters about how prescriptive the Department should be. Some of the commenters believed that it would be sufficient for the Department to specify the minimum content that must be included in a debt warning disclosure but that institutions should develop the disclosures. These commenters recommended that the Department develop and circulate examples of the language that could be used by institutions in lieu of mandating specific wording. They asserted that this would protect students by creating a minimum threshold for the types of information that must be included in the debt warning disclosures so that institutions would not have an opportunity to leave out important content, but would still provide necessary flexibility for institutions. Some of the commenters recommended that institutions be allowed to add context, such as the percentage of borrowers in a given program of study, to the disclosures to give students a better understanding of the rates. The commenters pointed out that a very small population of borrowers could dramatically skew the rates at an institution and stated that institutions should have the opportunity to explain this anomaly to prospective and current students. However, the commenters recommended that the Department monitor institutions providing this type of contextual information closely and strictly enforce existing regulations on misrepresentation.

Another group of commenters believed that the Department should be far more prescriptive in mandating the content, format, and location of the debt warning disclosures to limit institutions' ability to mislead students. In making these recommendations, some of these commenters noted that other agencies, such as the Federal Reserve Board, have prescribed specific formatting and layout standards for disclosure requirements, and they believed that the Department should adopt a similar approach. Some commenters recommended that the Department develop, through a collaborative process with students and institutions designed to determine the most effective language and delivery mode, a standardized disclosure form that explains to students the risks they face in choosing to attend a school that has failed to meet the Department's debt thresholds and advises students to enroll in a school that is in compliance with those thresholds.

Additionally, commenters stressed that the Department should require that

debt warning disclosures be made in understandable, plain English to ensure that the information is accessible to students and consumers. Some of these commenters further recommended that the Department require institutions to provide, to the extent practicable, the debt warning disclosures in a language or at a level that students can understand to ensure that students are not misled by the disclosures because they cannot fully access their meaning.

Some of the commenters also suggested that the Department require institutions to not only disclose the program's most recent loan repayment rate and debt measures, but also to define a "loan repayment rate" and to provide context with regards to the required repayment rates for program eligibility. The commenters believed that students would be misled or confused by the disclosures unless they understood what the terms meant and could compare the rates against the Department's regulations and the rates for similar programs at other schools.

With respect to the third issue regarding timing of disclosures, commenters were also concerned that institutions would undermine the intent of the regulations by unfairly manipulating the timing of their disclosures. Specifically, the commenters raised the possibility that students would not be provided with the debt warning disclosures early enough in the enrollment process or in a manner appropriate to inform their decisions about whether to enroll in a program. Some commenters suggested potential solutions to address this issue. For example, some commenters recommended that the Department require institutions to provide the disclosures to a student both orally (unless there is no oral communication) and in writing, at the first contact between the prospective student and the institution, rather than at the time of enrollment. The commenters argued that waiting to make the disclosure at the time of enrollment is too late to inform consumer decisions because the student likely already feels committed to the program at that point. They believed that it was necessary to provide the information orally because written information is too easily glossed over, particularly if it is mailed after the admissions meetings are held. Other commenters recommended requiring a delay of seven days between the time that an institution provides a student with a disclosure and the date that the institution may enroll the student. Citing the legal precedent set by the Mortgage Disclosure Improvement Act, which mandates that creditors abide by a seven-day cooling-off period before closing a loan, the commenters believed that the level of financial commitment required in financing a higher education is comparable to the commitment involved in taking on mortgage debt. Accordingly, they argued that consumers should be afforded the same sort of protections given to home buyers, particularly because student loan debt cannot be discharged in bankruptcy and may be collected from Federal tax refunds and social security payments. The commenters further believed that this waiting period is necessary because it would allow students time to digest the information and research other program options before enrolling, protecting students from the coercive enrollment techniques used at some institutions.

Discussion: See discussion under the heading, *Implementation date.*

Concerns about feasibility and burden of warnings

Comment: Some commenters believed that the proposed debt warning disclosures were not feasible. They asserted that it would be unduly burdensome for institutions to include the prominent warnings in every newspaper ad, television ad, and sign, and in all materials used in meetings with admissions representatives. The commenters further believed that including this information in their materials would potentially confuse students.

In addition to questioning the feasibility of implementing the proposed regulations, some of the commenters argued that the Department did not have the statutory authority to require a prominent warning, stating that this requirement was unprecedented and too broad in scope. The commenters noted that in the regulations governing other disclosure requirements under the HEA, the Department has not mandated a specific manner of disclosure, and they asserted that the Department therefore should not do so in this case.

As an alternative, some of the commenters suggested that the Department amend the proposed regulations to require institutions to only make these disclosures by providing written information to each applicant about its repayment rates prior to the student's enrollment. Other commenters recommended that the regulations require warnings to be clearly stated on the institution's Web site and on the enrollment agreement, and that the warnings be provided to the student in writing by the admissions representative before the prospective student signs an enrollment agreement.

Discussion: See discussion under the heading, *Implementation date.*

Implementation Date

Comment: Some commenters stressed that the Department should make the proposed provisions in § 668.7(d) effective as soon as possible to help inform consumer decisions. While noting that program level assessments may be unavailable immediately, the commenters suggested requiring institutions with both high rates of borrowing and defaults to place this information in a clear and conspicuous location on the institution's Web site and marketing materials as a stop-gap measure. The commenters argued that this transparency might accelerate efforts by institutions with at-risk programs to revise program content and instruction and provide more effective job counseling, job placement, and other support services that could reduce the risk to students and taxpayers.

Discussion: In view of these comments and other changes we are making in these regulations, we have made a number of changes to the proposed regulations on debt warnings and disclosures to students. We believe that this new approach appropriately distinguishes and clarifies the program disclosure and debt warning requirements, will help to ensure that students are provided with sufficient information about a program's continued eligibility for title IV, HEA funds, and addresses commenter concerns that institutions will undermine the intent of the regulations.

We agree that disclosures and warnings serve very different purposes and students should have basic, comparable information across all gainful employment programs. Accordingly, in these final regulations, we are separating the disclosure and warning requirements.

Under § 668.6(b) of the Program Integrity Issues final regulations, institutions are required to disclose, for each gainful employment program, the occupations that the program prepares students to enter, the on-time graduation rate, the tuition and fees charged to a student for completing the program within normal time, the placement rate for students completing the program, and the median loan debt incurred by students who completed the program, as well as any other information the Secretary provided to the institution about that program. Under § 668.7(f), or § 668.7(g) if the institution submitted a successful request for recalculation, of these final regulations, the Secretary will provide to each institution the final repayment

rate and debt-to-earnings ratios for each gainful employment program at that institution. Accordingly, an institution must disclose the final repayment rate and debt-to-earnings ratio (for total earnings) for each gainful employment program along with the other information required in § 668.6(b), regardless of whether the program passed the debt measures in § 668.7(a)(1).

With respect to the disclosures established in § 668.6(b)(1) in the Program Integrity Issues final regulations, we strongly encourage institutions to timely update the disclosures whenever a change occurs in the information. We believe that it is reasonable to expect that an institution will update this information on the program Web site as soon as administratively feasible, but no later than 30 days after the date the change occurs. For example, if at any point during the year, the institution changes the amount of tuition and fees that it charges a student for completing the program within normal time, the institution should update that information on the Web page for that program within 30 days. Similarly, when an institution receives its final repayment rate and debt-to-earnings ratios, it should update that information on the Web page for that program within 30 days. We encourage institutions to have procedures in place to update information on a regular basis to assure that students and consumers have accurate, current information for all of the gainful employment programs at an institution.

Under § 668.7(j) of these final regulations, institutions must issue debt warnings to prospective and enrolled students for each gainful employment program at the institution that is a failing program to ensure that students are aware of and understand that a particular program has a greater risk than another program. In response to the suggestion that we develop differentiated disclosure requirements based on a program's level of risk, we have developed a two-tiered warning system that we believe appropriately balances the needs of students with the level of risk that a program will fail to remain eligible for title IV, HEA program funds. On the one hand, knowledge of a program's failure to meet the debt thresholds will inform a student's decision about which institution to attend. On the other hand, we recognize that the number of times a program has failed translates into very different levels of risk. We address these considerations under this approach by differentiating between a warning after a first year failure ("first year warning") and a warning after a second year failure ("second year warning").

Under § 668.7(j)(1), if a failing program does not meet the debt measure minimum standards for a single FY, the institution must issue a warning that contains the following information. This first year warning must directly alert currently enrolled and prospective students that the program has failed to meet the minimum standards in § 668.7(a)(1), and, to ensure that students understand the meaning and context of this warning, the institution must in plain language and in an easy to understand format explain the debt measures and show the amount by which the program did not meet the minimum standards. The first year warning must further explain any steps that the institution plans to take to improve the program's performance under the debt measures. While this warning requires a direct communication with enrolled and prospective students, it is not a publicly disclosed warning. An institution must continue to provide this warning to enrolled and prospective students until the institution has been notified by the Secretary that the program has met one of the minimum standards or the institution is notified that it has not met the minimum standards a second time.

We believe that a program that has only failed the debt measures for one year is still capable of significantly improving, and we want to support the development or improvement of programs that provide strong, viable opportunities for students to earn high-value credentials. We are concerned that requiring too harsh a warning early on will result in unnecessary program closures. Accordingly, the first year warning provides basic information that will ensure that a student is aware of a program's performance on the debt measures, and is able to evaluate, based on the steps that the institution lays out for improvement, whether to remain in that program or explore other options.

An institution must issue a second year warning after a failing program fails to meet the minimum standards for two consecutive FYs or for two of the three most recently completed FYs. Given that a program in this situation has only one additional FY to meet the minimum standards, it is critical that students be made aware of the possibility that they will no longer receive aid to attend that program. In view of that, a second year warning must, in addition to the information required for a first year warning, further include: (1) A plain language explanation of the actions the institution plans to take in response to the second failure, including, if the institution plans to discontinue the program, the timeline for doing so and the options available to the student; (2) a plain language explanation of the risks associated with enrolling or continuing in the program, including the potential consequences for, and options available to, the student if the program becomes ineligible for title IV, HEA program funds; (3) a plain language explanation of the resources available, including *http://www.collegenavigator.gov,* that the student may use to research other educational options and to compare program costs; and (4) a clear and conspicuous statement that a student who enrolls or continues to enroll in the program should expect to have difficulty repaying his or her student loans. An institution must continue to provide this warning to enrolled and prospective students until the program has have met one or more of the minimum standards for two of the three most recently completed FYs. The following Table H illustrates the application of these requirements under several different scenarios.

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Table H: Illustrative Scenarios

Scenario #1

Performance on Debt Measures	Year 1	Year 2	Year 3	Year 4
Fail	1W			
Pass		--		
Fail			2w	
Fail				X

Scenario #2

Performance on Debt Measures	Year 1	Year 2	Year 3	Year 4
Fail	1W			
Fail		2W		
Pass			2w*	
Fail				X

***This (second) second year warning should be updated to reflect any changes in student options, etc.**

Scenario #3

Performance on Debt Measures	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Fail	1W					
Pass		--				
Fail			2W			
Pass				--		
Fail					2W*	
Pass						--

*This (second) second year warning should be updated to reflect any changes in student options, etc.

Scenario #4

Performance on Debt Measures	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Fail	1W					
Pass		--				
Pass			--			
Fail				1W		
Fail					2W	
Fail						X

Scenario #5

Performance on Debt Measures	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Fail	1W						
Pass		--					
Pass			--				
Fail				1W			
Pass					--		
Fail						2W	
Fail							X

1W = provide 1st debt warning until next notified of final rate (including during recalculation)

2W = provide 2nd debt warning until next notified of final rate (including during recalculation)

-- = no warning required

X = no longer eligible

In general, an institution must provide a student with the information necessary to make reasoned and informed choices about pursuing an education. This includes any options that the institution will provide to the student. For example, in some cases, the student may be able to transfer into another program at the institution, or the student may be able to arrange to transfer credits to another institution in the area. In other cases, an institution may opt to permit a student to withdraw from the program with a full refund for the cost of the program. Whatever the options, the institution must explain them clearly to the student in an easily understandable manner. Under this approach, institutions have the responsibility, but also the flexibility, to create the best options for serving their students in failing programs. The institution must also describe the risk and potential consequences of remaining in the program, namely, that the student will still be liable for any student loan debt incurred if the student is unable to complete the program. Further, the institution must provide students with resources that they can use to research other education options and program costs. We have specified that an institution must direct students to *http://www.collegenavigator.com* as one resource available to students.

We agree with commenters that it would be helpful for the Department to separately publish information regarding a program's final debt measures. This information can complement other information about gainful employment programs to help students choose among well-performing programs and avoid poorly performing programs. Under § 668.7(g)(6), therefore,

we are providing that the Secretary may disseminate the final debt measures or information about, or related to, the final debt measures to the public in any time, manner, and form, including publishing information that will allow the public to ascertain how well programs perform under the debt measures and other appropriate objective metrics. While institutions are also required to disclose this information, we think that the Department's dissemination of this information will facilitate students' access to the information and their ability to draw comparisons of programs.

We are requiring in § 668.7(j)(5) that, if an institution voluntarily discontinues a failing program under § 668.7(l)(1), it must notify enrolled students at the same that it provides the written notice to the Department that it relinquishes the program's title IV, HEA program eligibility. We believe that this is necessary to ensure that enrolled students are notified promptly of any plans by the institution to discontinue a program so that they can make reasoned and informed choices about pursuing an education.

Under § 668.7(j)(4), for the second year warning, the institution must prominently display the debt warning on the home page of the program Web site and include the debt warning in all promotional materials related to the failing program that it makes available to prospective students. The Department considers promotional materials to include a wide range of materials pertaining to the program, from course catalogues, to brochures, to television ads, to poster advertisements. For example, if a poster advertisement on a public bus mentions a failing program, even as part of a list of programs offered at the institution, the warning must be included on that poster. If the poster advertises the institution as a whole, or other programs at the institution that have not failed the minimum standards for more than one of the three most recently completed FYs, then the institution is not required to include the warning in that material.

With respect to currently enrolled students, we have clarified under § 668.7(j)(3)(i) that an institution must provide the first or second year warnings to these students as soon as administratively feasible, but no later than 30 days after the date the Secretary notifies the institution that the program failed the minimum standards. We believe that this requirement balances the need for students to be informed as quickly as possible of the risk involved in remaining in a program with the recognition that in some cases, such as a program with a high number of students, it may take an institution more than a few days to comply with the debt warning requirement.

We agree with commenters that there should be no undue pressure on students to enroll in a particular program, and are requiring under § 668.7(j)(3)(ii) that an institution provide the first and second year warnings to a prospective student at the time the student first contacts the institution requesting information about the program. If the prospective student intends to use title IV, HEA program funds to attend the program, the institution may not enroll the student until three days after the debt warnings are first provided to the student. Additionally, if more than more 30 days passes from the date the debt warnings are first provided to the student and the date the student seeks to enroll in the program, the institution must provide the debt warnings again. In this situation, the institution may not enroll the student until three days after the debt warnings are most recently provided to the student under this section.

We believe that this approach will be more effective than requiring institutions to provide the debt warnings only at the time that the student enrolls in a program because, as some of the commenters noted, by that point a student most likely already feels committed to enroll in the program. Requiring that the debt warnings be given at a point in time close to but prior to the time that a student actually enrolls will ensure that the information is still fresh in the student's mind, particularly if this point in time is far removed from the first point of contact. It will also provide students a final chance to consider the commitment involved in taking on student loan debt without the pressure to enroll immediately. While we considered limiting this cooling-off period to seven days, as suggested by some of the commenters, we believe that the longer period of three to 30 days will allow and encourage students to digest the information in the debt warnings fully, compare that information to the information available from other institutions offering similar programs, evaluate the potential consequences of enrolling in the program, and research other education options. We also note that institutions are expected to comply with any applicable State laws including those requiring a cooling-off period.

In response to concerns that a warning may be difficult to find or understand, we have clarified the manner in which institutions must provide these warnings. First, we have specified that a first year warning must be delivered directly to the student orally or in writing in accordance with the procedures established by the institution. Delivering the debt warning directly to the student includes communicating with the student face-to-face or telephonically, communicating with the student along with other affected students as part of a group presentation, and sending the warning to the student's e-mail address. We would expect this direct warning to occur in the mode of correspondence that the institution typically uses to communicate with the student in order to ensure that the student has received the debt warning. For example, if an institution regularly corresponds with the student via electronic mail, it can be reasonably certain the student received the warning.

We are further providing in these final regulations that, if an institution chooses to communicate this first year warning to a student orally, the institution must maintain documentation of how that information was provided, including any materials the institution used to deliver the warning. We believe this would include such materials as a copy of the script or any other written materials used to deliver the warning. Further, if an institution provides the warning orally to a group of affected students, it would have to document each student's presence to demonstrate that the warning was given directly to each student. For a second year warning, an institution may use any of the methods described for the first year warning; however, it must at a minimum provide the warning to the student in writing. So, if an institution opts to provide the second year warning orally, it must be provided in written form as well. We believe that requiring that the warnings be given directly to the student will address the commenters' concerns that a student will overlook the warning because the institution must ensure that it is received.

Second, we have specified that both the first and second year warnings must be made in "plain language" and in an "easy to understand format" to require that the warnings be understandable the first time that an individual reads or hears them. Although we are not mandating the specific language that must be used in the debt warnings, we anticipate developing a model warning form through the information collection process under the Paperwork Reduction Act of 1995 (PRA) to guide institutions

in providing these debt warnings to students. In the meantime, the Web site, *http://www.plainlanguage.gov,* contains guidelines and numerous examples that will be helpful to institutions in complying with these regulations.

With respect to ensuring the prominence of the debt warnings, we are requiring in § 668.7(j)(4) that the second year warning included in an institution's promotional materials must be prominently displayed on the program home page of the institution' Web site. Institutions may not bury the warnings for a program on a Web site that students have to search for or are unlikely to look at. The requirement to prominently display the debt warning "on the program home page" means that the actual information must be found on that page. A link to a downloadable document or to another page with the information would not meet the requirements of this section. We believe that requiring the use of plain language, specifying the content that must be included, and prescribing where on the Web site the warnings must be located will go far to ensure that institutions cannot hide this important information from students.

Third, we have added a requirement in § 668.7(j)(6) that, to the extent practicable, an institution must provide alternatives to English-language warnings for those students for whom English is not their first language. We believe this is necessary because a student receiving a warning in a nonnative language may not be able to fully appreciate the gravity of the warning and its implications. This means that, for example, an institution that serves a large Hispanic population would be expected to provide the debt warnings in Spanish for students for whom English is not their first language. We have included the phrase "to the extent practicable" to acknowledge that an institution may serve students that speak a wide variety of languages and that it may not be feasible to provide the warnings in every single language or dialect. However, we believe that it is appropriate to require the alternatives wherever possible to ensure that students can understand the meaning of the debt warnings. We do not believe that it is necessary to require alternate warnings for students with lower literacy levels, as suggested by some of the commenters, because we believe that the "plain language" requirements address this issue. Using plain language requires that the warning be presented in simple, understandable terms that are accessible to all audiences, including students who have only basic literacy skills.

For the disclosures under § 668.6(b) that an institution must make for all of its gainful employment programs, an institution is strongly encouraged to maintain accurate electronic and printed materials. While the Program Integrity Issues final regulations do not specify a timeframe within which an institution must update the Web site and other promotional materials, the Department expects that institutions will make a good faith effort to maintain current information. We believe that it is reasonable to expect that any changes will be made by no later than 30 days after the date that the change in the information occurred. For the disclosure of the tuition and fees under § 668.6(b)(1)(iii), for example, we would expect an institution to update any electronic materials as soon as it is administratively feasible but no later than 30 days after the date that the Department notifies the institution that the program has failed. Along these lines, we strongly encourage institutions to include within any printed promotional materials a link to the electronic Web site that contains the current disclosure information and an explanation to students and consumers that while the information in the printed materials was accurate at the time of printing, that they may obtain more current information on the homepage of the program Web site.

With respect to the relationship between the disclosure requirements in §§ 668.6(b) and 668.41 through 668.49, the disclosure requirements in § 668.6(b) are more prescriptive than those under the Student Right to Know (SRK) provisions under § 668.41–.49. We specified in the Program Integrity Issues final regulations that the disclosures in § 668.6(b) must be prominently posted on the home page of the program Web site and that the institution must include a prominent and direct link on any other Web page containing general, academic, or admissions information about the program to the single Web page that contains all of the required information. By contrast, while the SRK disclosures must be given to enrolled or prospective students "through appropriate publications, mailings, or electronic media," they are not required to be included on the home page of a program Web site. Specifically, under § 668.41(b), an institution may satisfy the disclosure requirements by posting the information on an Internet Web site that is reasonably accessible to the individuals to whom the information must be disclosed. We remind institutions that the provisions in § 668.6(b) that were published in the Program Integrity Issues final regulations go into effect on July 1, 2011 in accordance with the master calendar. These disclosure requirements will provide students with a level of protection beginning this year. The changes in § 668.7(j) in these final regulations will go into effect one year later on July 1, 2012, and the debt warnings will enhance this protection going forward.

Finally, we disagree with the commenters who believed that the debt warning requirements are too broad in scope or that establishing them is beyond our statutory authority. As discussed earlier, the Department has broad authority to promulgate regulations regarding gainful employment programs. In the context of regulating these programs, we believe it is critical to require debt warnings because a program may lose its eligibility when the next set of debt measures becomes final, and an institution may recruit students to enroll in that program without restriction unless, and until, the program loses eligibility. By including the stricter warning in all promotional materials that mention the program by name, students will be in a better position to evaluate the marketing information describing the program before engaging in further contact with the institution or its representatives. This is particularly important when the institution is recruiting students to enroll in a program that may lose its title IV, HEA program eligibility soon after the student enrolls, since such a change could significantly impair the student's ability to complete the program. Institutions may also provide prospective students with information showing the improvements to the program that have been made and other similar actions taken to improve the outcomes for program graduates. We believe that requiring these debt warnings in the marketing materials is a reasonable step to protect students while permitting institutions to continue enrolling students in programs that are at risk of losing eligibility under the gainful employment metrics.

Changes: We have replaced proposed § 668.7(d) with new § 668.7(j). Under § 668.7(j)(1)(i), an institution must provide enrolled and prospective students in a failing program that has failed the minimum standards for one FY with a first year warning prepared in plain language and presented in an easy to understand format that explains the debt measures and shows the amount by which the program did not meet the minimum standards and describes any

actions the institution plans to take to improve the program's performance under the debt measures. Under § 668.7(j)(1)(ii), an institution must provide the debt warning orally or in writing directly to the student, in accordance with the procedures established by the institution. The regulation provides that delivering the warning directly to the student includes communicating with the student face-to-face or telephonically, communicating with the student along with other affected students as part of a group presentation, or sending the warning to the student's e-mail address. Under § 668.7(j)(1)(iii), an institution must maintain documentation of any warning that it gives to students orally, including any materials the institution used to deliver that warning and documentation of the student's presence at the time of the warning. Under § 668.7(j)(1)(iv), an institution must continue to provide the debt warning until it is notified by the Secretary that the failing program now satisfies one of the minimum standards in § 668.7(a)(1).

Under § 668.7(j)(2), an institution must, in addition to the information in § 668.7(j)(1)(i), provide enrolled and prospective students in a failing program that has not met the minimum standards for two consecutive FYs or for two out of the three most recently completed FYs a second year warning in writing that, in plain language and an easy to understand format, explains the actions the institution's plans to take in response to the second failure. If the institution plans to discontinue the program, the explanation must include the timeline for doing so and the options that students have available as a result of those plans; explains the risk associated with enrolling or continuing in the program, including the potential consequences for and options available to a student if the program becomes ineligible for title IV, HEA program funds; explains the resources available to students, including *http://www.collegenavigator.gov,* for the purpose of researching other educational options and comparing program costs; and states in a clear and conspicuous manner that a student who enrolls or continues in the program should expect to have difficulty repaying his or her student loans. This warning must be given in written form, in addition to any other method chosen by the institution.

Under § 668.7(j)(3), we have specified when an institution must provide prospective and enrolled students with the first and second year debt warnings. For an enrolled student, the institution must provide the debt warnings as soon as administratively feasible but no later than 30 days after the date the Secretary notifies the institution that the program has failed the minimum standards. For a prospective student, the institution must provide the debt warnings at the time the student first contacts the institution requesting information about the program. If the prospective student intends to use title IV, HEA program funds to attend the program, the institution may not enroll the student until three days after the debt warnings are first provided to the student. Additionally, if more than more 30 days pass from the date the debt warnings are first provided to the student and the date the student seeks to enroll in the program, the institution must provide the debt warnings again. The institution may not enroll the student until three days after the debt warnings are most recently provided to the student under this section. In § 668.7(j)(4), we have required institutions that must comply with the requirements in § 668.7(j)(2) to prominently display the debt warning on the program home page of its Web site and include the debt warning in all promotional materials it makes available to prospective students. These debt warnings may be provided in conjunction with the disclosures required under § 668.7(b)(2).

In § 668.7(j)(5), we have specified that if an institution voluntarily discontinues a failing program under § 668.7(l)(1), it must notify enrolled students at the same time that it provides the written notice to the Department that it relinquishes the program's title IV, HEA program eligibility. Finally, in § 668.7(j)(6), we have required institutions to provide alternatives to English-language debt warnings to students for whom English is not their first language, to the extent practicable.

In § 668.7(g)(6), we have provided that the Secretary may disseminate the final debt measures and information about, or related to, the debt measures to the public in any time, manner, and form, including publishing information that will allow the public to ascertain how well programs perform under the debt measures and other appropriate objective metrics.

Additional Concerns on Reporting

Comments: Some commenters believed that the final regulations should ensure that student debts are reasonable, both in relation to earnings and whether the debts are repaid, by discouraging borrowing altogether. Consequently, the commenters suggested that the Department provide incentives to colleges to offer low-tuition programs or other mechanisms that help students avoid borrowing. To that end, the commenters stated that in cases where fewer than 35 percent of a program's enrollees rely on Federal loans, the program should not be subject to any of the potential limitations under proposed § 668.7. The commenters reasoned that a program in which only a small percentage of students take out loans will, by definition, have a Federal median loan debt of zero, and therefore the program most likely would not be limited under these regulations. Therefore, the commenters believed it would be counterproductive and needlessly burdensome to subject institutions to further reporting requirements for such programs. According to the commenters, exempting these programs would ensure that Federal oversight efforts and institutional regulatory burden are efficiently balanced.

Discussion: Although programs with zero median loan debt will not be adversely impacted under these regulations, we do not agree that those programs should be exempt from the data reporting requirements under § 668.6 based solely on institutional burden. On the contrary, isolating those programs from an established reporting stream may be more burdensome for an institution. In any event, students choosing among programs should have access to information about the typical debt burdens associated with those programs, and the Department needs the data to determine whether programs satisfy the minimum standards for the loan repayment rate under § 668.7(b).

Changes: None.

Transition Year (Proposed § 668.7(f); Final § 668.7(k))

Comment: With respect to the proposal under which the Department would cap the number of ineligible programs, commenters were concerned that the proposed regulations did not provide any means for institutions to appeal or verify whether their programs were accurately placed below the cap. Commenters also requested that the Department clarify (1) that the 5 percent cap on ineligible programs applied only to the transition year (2012–13 award year), and (2) how the Department would select the ineligible programs falling below the cap based on the number of students who completed those programs. Other commenters proposed extending the 5 percent cap from one to two years as added insurance against unintended, negative consequences for students.

Commenters suggested that the Department treat the 2012–13 award

year as an "information" year and begin the actual "phase-in year" in award year 2013–14. Other commenters suggested a three-year transition period so that the Department and institutions have sufficient time to collect the required data and make accurate determinations. Similarly, some commenters suggested that the Department provide a three-year transition period, from July 1, 2012 to July 1, 2015, during which the Department would simply notify institutions of how their programs performed under the gainful employment metrics. Another commenter recommended a transition period of up to seven years to prevent loss of student access to educational programs, and to allow programs sufficient time to implement the new disclosure requirements under § 668.6(b) and other program changes that could affect 3-year or 4-year student cohorts entering repayment.

Finally, some commenters asked how the 5 percent cap would be applied. Specifically, the commenters asked whether the cap would be applied by sector or overall.

Discussion: In response to the question of how an institution can verify that a program fell below the 5 percent cap, under these regulations the institution may challenge the accuracy of the data used to calculate the repayment rate that is subsequently used by the Department to sort the ineligible programs under the cap provisions. The other data used for the cap, students completing programs, are reported by institutions and that data will be publicly available.

The Department does not believe that any additional time is needed beyond the first year of eligibility because, as discussed more fully under the heading, *Actual earnings from SSA and Bureau of Labor Statistics (BLS) wage data* an institution will have gainful employment data for several years before a program could become ineligible. The Department will apply the 5 percent cap for programs that become ineligible based on final debt measures for FYs 2012, 2013, and 2014. FY 2014 is now the first year that a program could become ineligible. As set forth in these final regulations, the cap is set at 5 percent but that percentage now applies to the total number of students who completed gainful employment programs in each of three institutional categories—public, private nonprofit, and proprietary, instead of the proposed categories. We made this change in response to concerns voiced by proprietary institutions that the impact of the new regulations would have the biggest impact on them as a sector. This change therefore allows no sector to bear more than 5 percent of the initial impact of the regulations.

With regard to how the Department will select programs falling under the cap, we assume the commenter is referring to a situation where the number of students completing a program crosses over the 5 percent mark. For example, a program is 10th on the list of programs with the lowest repayment rates. The total number of students completing programs in that institutional category is 100,000, so the 5 percent mark is 5,000. If the first nine programs totaled 4,900 students and 200 students completed the 10th program, the 10th program would not fall under the cap because including the 200 students who completed it would cross over the 5 percent mark and could not be subject to the sanctions specified in these final regulations.

Changes: We have redesignated proposed § 668.7(f)(2), transition year, to new § 668.7(k) and are providing that, based on final debt measures for FYs 2012, 2013, and 2014, the Department will cap the number of ineligible programs by first sorting all programs by category of institutions (public, private non-profit, and proprietary), then by loan repayment rate within that category from the lowest to the highest rate, and finally, starting with the ineligible programs with the lowest repayment rate, by determining ineligible programs accounting for a combined number of program completers during FY 2014 that does not exceed 5 percent of the total number of program completers in that category.

Additional Programs (Proposed § 668.7(g)(2) and (3)); Restrictions for Ineligible and Voluntarily Discontinued Failing Programs (Final § 668.7(l))

Background: The July 26, 2010 NPRM contained proposals regarding Department approval of the eligibility of new gainful employment programs. Because the Department was concerned that some institutions might attempt to circumvent the proposed gainful employment standards in § 668.7(a)(1) of the July 26, 2010 NPRM by adding new programs before those standards could take effect, we published the Gainful Employment/New Programs final regulations, which take effect on July 1, 2011. In the Gainful Employment/New Programs final regulations, we established requirements in 34 CFR 600.10 and 34 CFR 600.20 under which an institution must notify the Department at least 90 days before it intends to offer an additional gainful employment program. The notice must include a narrative explaining among other things how the institution determined the need for the program and how the program was designed to meet market needs. Under these requirements, an institution is not required to obtain approval from the Department to offer the program unless the Department alerts the institution at least 30 days before the program's first day of classes that the program must be approved for title IV, HEA program purposes. A summary of the comments, discussion, and the regulatory language supporting these requirements is contained in the Gainful Employment/New Programs final regulations and can be accessed at *http://www.ifap.ed.gov/fregisters/FR102910GainfulEmploymentFinal.html.*

We are not modifying this notification and approval process for new gainful employment programs in these final regulations; however, the Department is continuing to consider whether this process may be simplified and narrowed further after these new regulations are in place. We may address these issues in a separate rulemaking proceeding.

Note: We did not summarize or address in the Gainful Employment/New Programs final regulations the comments we received on proposed § 668.7(g)(2), regarding restricting approval of a program based on projected growth estimates and institutional ability to offer gainful employment programs, or (g)(3) regarding calculation of the debt measures if an additional program constitutes a substantive change based on program content. A summary of these comments and our responses are included in the following discussion.

Comments: Several commenters argued that limiting an institution's ability to establish new programs should only apply to an institution with a record of poor performance, such as an institution whose programs were restricted or determined in the previous three years to be ineligible under the debt measures. The commenters believed this approach would provide an incentive to institutions to keep their programs fully eligible and would reduce the burden on institutions that have a strong record of preparing students for gainful employment. One commenter suggested that the Department modify the proposed approval process so that it applies only to an institution where over 50 percent of the institution's programs are on a restricted status. Another commenter recommended that institutions be allowed to bypass Department approval entirely if programs representing 50 percent or more of the institution's total enrollment or programs representing 50 percent of the institution's enrollment

in the same job family are not restricted or ineligible.

Several commenters stated that additional programs should be allowed to prove their worth over time, and that the Department should not calculate debt measures until relevant data are available. Along the same lines, another commenter stated that an additional program should not be required to meet either the loan repayment rate or debt-to-earnings standards until the program has been in continuous operation for a period sufficient to calculate the program's three-year CDR.

Some commenters expressed concerns with proposed § 668.7(g)(3), under which an additional program's loan repayment rate and debt-to-earnings ratios would be based on data from the additional program and, for the first three years, loan data from all other programs currently or previously offered by the institution that are in the same job family as the additional program. (The BLS describes a job family as a group of occupations based on work performed, skills, education, training, and credentials and identifies the SOC code for each occupation in a job family at: *http://online.onetcenter.org/find/family*.) Under this proposal, if the additional program constituted a substantive change based solely on program content as provided in § 602.22(a)(2)(iii), the program's loan repayment rate and debt-to-earnings ratios would not be calculated until data were available.

Commenters expressed concern that applying the loan repayment rate and debt-to-earnings standards to additional programs in the same job family would inhibit or prevent an institution from improving, over time, the content and, by extension, the loan repayment rate and debt-to-earnings standards of gainful employment programs currently offered by the institution. Another commenter opined that improvements made to an existing gainful employment program over time might constitute a "substantive change" but was concerned that such a program would continue to be subject to the standards of other programs in the same job family instead of a loan repayment rate and debt-to-income measure that was unique to that program.

Other commenters argued that an institution's ability to offer effective and affordable additional programs would be stymied if the Department uses data from programs in the same job family to approve a new program. These commenters urged the Department to use data from the new programs as soon as it became available. One of the commenters cited an example of an institution that offers a new one-year certificate program in addition to or in place of a two-year associate's degree program in the same area. According to the commenter, under the Department's proposal, the metrics for the shorter certificate program would be based on data from the longer, more costly, associate's degree program, increasing the likelihood that the additional program would not be approved.

Another commenter expressed concern that the loan repayment rates and the debt-to-earnings ratios at new schools and existing schools that offer additional programs that constitute a substantive change based solely on program content may not be representative of the true repayment and income characteristics of the institution's students because the metrics would be based on the experience of recent graduates rather than experienced graduates with higher incomes and greater loan repayment rates. The commenter suggested that the Department permit an institution to rely on job family data from similar gainful employment programs at its institution or at affiliated institutions to approve a new program because these programs will have graduates who have higher incomes and higher loan repayment rates.

Another commenter expressed concern about the impact of the Department's proposals on the approval of new green technology education programs. The commenter objected to the Department's proposals because approval of new green technology programs would be based on data from programs currently or previously offered by the institution that are in the same job family; however, the term "same job family" does not exist for this category of programs. The commenter feared that applying this requirement to green technology programs would devastate the economy and provide no support to President Obama's stated goal of creating a new economic segment in emerging green technologies.

Commenters also asked the Department to clarify whether a gainful employment program would have to reestablish eligibility, or be treated as a new program, if the program became ineligible but was allowed to continue operating because it was ranked above the 5 percent threshold for the transition year.

Discussion: With regard to commenters' concerns about the use of job families, we believe that the due diligence undertaken by an institution in developing and designing a program that meets markets needs, as required under 34 CFR 600.20(d), mitigates the need to condition the initial performance of a new program based on the performance under the debt measures of related programs offered by the institution. Moreover, in view of the concerns raised that the proposed job-family approach may inhibit the development of new programs or not properly reflect the performance of new programs, we are adopting the suggestion made by the commenters that we calculate the debt measures for all new programs only when the data become available for those programs. So, in lieu of the job-family approach, we provide under § 668.7(a)(1)(iii) that a program is considered to provide training that leads to gainful employment if the data needed to determine whether the program satisfies the minimum standards are not available to the Secretary.

We generally agree with the commenters that restrictions on an institution's ability to offer new programs should be based on the performance of an institution's program under the debt measures. In keeping with the focus in these final regulations on the poorest performing programs, we believe it is appropriate to prevent an institution from immediately recycling an ineligible program or a failing program that the institution voluntarily discontinued. Therefore, in new § 668.7(l) we are providing that an ineligible or voluntarily discontinued failing program remains ineligible for title IV, HEA funds until the institution reestablishes the program's eligibility under 34 CFR 600.20(d).

With respect to failing programs, under these final regulations, we are providing that an institution may not reestablish the program's eligibility for two or three FYs following the FY the program was discontinued depending on when the institution voluntarily discontinued the program. And, with respect to ineligible programs, an institution may not reestablish the eligibility of that program or establish the eligibility of a substantially similar program until three FYs following the FY the program became ineligible.

The Department is establishing these "wait-out" periods to provide incentives for institutions to improve programs rather than allow programs to fail and lose eligibility for title IV, HEA funds. Consistent with our approach in defining the debt measures to identify the poorest performing programs, institutions should not be able to merely reestablish the eligibility of failed programs without taking the time to substantially improve those programs or making other adjustments to ensure that the programs do not fail again.

A program that becomes ineligible because it failed the measures three out of four FYs is required to wait three years before it may reestablish that program's eligibility or establish the eligibility of program that is a substantially similar program to the one that became ineligible. The three year wait-out period reflects the three years the program failed the debt measures and is severe enough that it provides an added incentive to an institution to take the actions needed to avoid a failing program from becoming ineligible. However, where a program becomes ineligible, the Department is concerned that an institution may attempt to evade the wait-out period by repackaging that program and establishing under 34 CFR 600.20(d) the eligibility of the repackaged program as a new program. Consequently, the wait-out period also applies to a "substantially similar program" to avoid the outcome where the repackaged program, in the guise of a new program, would not have any prior history under the debt measures. The wait-out period provides a material break in the program's eligibility for title IV, HEA program funds to mark that the prior history of that ineligible program under the debt measures will not be used if the program later reestablishes its eligibility. This approach ensures that students are not placed in a program that may be so similar to the failed program that they have a high likelihood of finding themselves in another failed program. We believe this temporary limitation on an institution's ability to seek eligibility for a program that is substantially similar to one that lost eligibility is a reasonable consequence of the institution's impaired capability to offer that program under the measures in these regulations.

An institution that voluntarily discontinues a failing program will be required to wait two or three years before the Department will allow the institution to reestablish the eligibility of that program. The wait-out periods generally reflect the number of years the program failed the debt measures. So, an institution that voluntarily discontinues a program after being required to provide the first-year debt warnings, or within 90 days of receiving a notice from the Department that it must provide second year debt warnings, will have to wait two years before it may seek to reestablish the eligibility of that program. On the other hand, an institution that voluntarily discontinues a failing program after the 90-day period could continue to offer the program up to the date that the program would otherwise become ineligible under the debt measures—three years. In this case, there would be no material difference between a failing program discontinued by the institution and an ineligible program. We note that an institution retains the ability to seek to establish the eligibility of a program substantially similar to a voluntarily discontinued program without any waiting period.

These temporary two or three year restrictions do not affect the eligibility of any other programs an institution already offers that are substantially similar to the program that lost eligibility, nor does it prevent an institution from seeking to establish the eligibility of new programs that are not substantially similar to the ineligible program. The effective date for reestablishing the eligibility of an ineligible program or failing program that was voluntarily discontinued is July 1, 2012. However, the Department will not issue FY 2012 final debt measures until calendar year 2013.

With regard to the comment on the status of an ineligible program measured for the transition year, that year is counted as a failing year even if the program's ranking is over the 5 percent cap. That year will count as a failing year for purposes of determining whether the program meets the eligibility requirements in subsequent years.

Changes: New § 668.7(l) provides that an ineligible program, or a failing program that an institution voluntarily discontinues, remains ineligible until the institution reestablishes the eligibility of the program under 34 CFR 600.20(d). For these purposes, an institution is considered to have voluntarily discontinued a failing program on the date the institution provides written notice to the Secretary that it relinquishes title IV, HEA program eligibility for the program.

We have also provided in § 668.7(l) that an institution may not seek to reestablish eligibility of a failing program it voluntarily discontinued until the end of the second FY following the FY the program was discontinued if the institution voluntarily discontinued the program at any time after the program is determined to be a failing program, but no later than 90 days after the date the Secretary notified the institution that it must provide the second year debt warnings under § 668.7(j)(2). For an institution that voluntarily discontinues the failing program more than 90 days after the date the Secretary notifies the institution that it must provide the second year debt warnings, the institution is prohibited from seeking to reestablish eligibility for the program until the end of the third FY following the FY the program was voluntarily discontinued.

In this new section, we also have provided that an institution may not seek to reestablish the eligibility of an ineligible program, or to establish the eligibility of a program that is substantially similar to the ineligible program until the end of the third FY following the FY the program became ineligible. Under the regulations, we consider a program to be substantially similar to an ineligible program if it has the same credential level and the same first four digits of the CIP code as that of the ineligible program.

Certification Procedures (Proposed § 668.13(c)(1))

General

Comment: Commenters noted that section 498(h)(1) of the HEA only authorizes the Secretary to provisionally certify an institution when considering the institution for initial certification, reviewing the institution's administrative capability and financial responsibility for the first time, reviewing an institution in connection with a change of ownership, or when reviewing the institution's application to renew its certification.

Therefore the commenters believe that placing an institution on provisional certification if a program is subject to the eligibility limitations under the gainful employment provisions in proposed § 668.7(e) or becomes ineligible under the gainful employment provisions in proposed § 668.7(f) has no foundation in the law and is not in line with other conditions under § 668.13(c) that could place in an institution on provisional certification.

Commenters objected to provisionally certifying an institution when a single program is determined ineligible for not meeting the standards for the gainful employment provisions in § 668.7(a). The commenters offered alternative methods for determining if an institution should be provisionally certified. For example, a commenter suggested the Department consider the relationship between the number of programs subject to gainful employment sanctions and the total number of programs offered or the average past enrollment in sanctioned programs compared to the enrollment in all eligible programs.

Discussion: Section 668.13(c) provides the circumstances for when the Department may provisionally certify an institution. We initially proposed to amend § 668.13(c)(1)(i) to provide that

the Department may provisionally certify an institution if one or more programs offered at the institution failed to prepare students for gainful employment in a recognized occupation in accordance with § 668.7.

We believe § 668.7, as revised in these final regulations, provides institutions whose programs fail the gainful employment debt measures with sufficient and comprehensive protections, such as the draft debt measures and data corrections in § 668.7(e) and the alternative earnings process specified in § 668.7(g), before any of its programs lose eligibility for title IV, HEA funds. Therefore, placing these institutions on provisional certification is no longer necessary.

Changes: We have removed proposed § 668.13(c)(1)(i)(F) from the regulations. Therefore, we are not amending current § 668.13.

Initial and Final Decisions (Proposed § 668.90(a)(3))

Comment: Commenters were concerned that the termination proceedings against a program that does not meet the standards for gainful employment in proposed § 668.7(a) would violate an institution's due process rights because the institution would not be allowed to examine the earnings of program completers maintained by another Federal agency. Some commenters referenced findings from several court cases noting that procedural due process requires that a party against whom an agency has proceeded to withdraw a benefit or service be allowed to rebut evidence offered by the agency. The commenters stated that it would be difficult for an institution to challenge data if the institution could not access the information against which it is being measured to determine if it is accurate data. The commenters believed the courts would support the position that not allowing an institution to examine the earnings of program completers maintained by another Federal agency would violate the institution's due process rights.

Some commenters questioned how the Department, SSA, or the hearing official could confirm that the list of program completers was accurate. Commenters suggested that the source of data used to calculate the debt-to-earnings ratios under § 668.7(c) should be data that can be made accessible to institutions.

Other commenters noted that the Department should clarify the evidence an institution would need to supply to document that its data is more reliable than the Federal data and specify the minimum standards that must be met. For example, the minimum standards might include income for all program completers that can be documented by employers unaffiliated with the institution.

Some commenters noted that under the Cohort Default Rate (CDR) Guide, the Department provides procedural rights to challenge NSLDS data that they believe is inaccurate. The commenters recommended that the Department provide a similar process for an institution that fails to meet the gainful employment standards. Another commenter recommended that language be added to the final regulations that would define an institution's appeal rights and establish a process by which an institution is allowed to review and correct data to ensure inaccurate data is not released to the public.

A commenter was concerned that the appeals process under proposed § 668.90(a)(3)(vii) may result in possible abuses and delays similar to problems experienced in the CDR sanction process. The commenter believed institutions were successful in changing the CDR process to expand the appeal process for reasons ranging from hardship to mitigating circumstances. The commenter stated that over time the definition of "default rate" was weakened and institutions continued to increase enrollment while delaying final action by appeals. The commenter suggested that the hearings be limited to appeals about the accuracy of the data and recommended that the Department clarify how an administrative law judge should consider alternative evidence to the government's data.

Other commenters noted that the Department did not specify who would appoint the hearing official or the required qualifications for this position and recommended that the hearing official be a trained, impartial administrative law judge with no affiliation to a proprietary institution.

Discussion: Section 668.90(a)(3) sets forth the limitations on the matters and decisions rendered in termination proceedings by a hearing official in accordance with subpart G of part 668. We initially proposed to add a provision under § 668.90(a)(3)(vii) that would allow a termination action against a program for not meeting the standards for gainful employment in § 668.7(a). The proposed regulations required the hearing official to accept as accurate the average annual earnings calculated by another Federal agency, i.e., SSA, for the list of program completers identified by the institution and accepted by the Department. An institution could provide the hearing official with a different average annual amount to be used to calculate the debt-to-earnings ratio for the same list of program completers that had been determined to be reliable.

In response to concerns raised by commenters about our proposal, we have developed an administrative process that implements many of the suggestions made by commenters. This process provides an institution with a reasonable amount of access to information and time to review draft debt measures and to challenge the accuracy of certain information used to calculate the debt measures (loan repayment rate and debt-to-earnings ratio) similar to the process used to review and challenge CDRs. For instance, an institution that questions the accuracy of the debt-to-earnings ratios may review the list of students that the Department will provide to SSA to determine that the correct cohort of students will be used by SSA to calculate the mean or median annual earnings. The institution may not challenge the accuracy of the mean or median annual earnings the Secretary obtains from SSA. However, an institution may challenge a final debt measure for a program that does not satisfy the debt-to-earnings ratios by using earnings data from BLS during a transitional period, a State-sponsored data system, or an institutional survey conducted in accordance with NCES standards.

With regard to the comment that the appeals process under proposed § 668.90(a)(3)(vii) may result in possible abuses and delays similar to problems experienced in the CDR sanction process, the proposed change to § 668.90(a)(3)(vii) has been replaced with procedures established under § 668.7. Section 668.7(d), (e), and (g) limits challenges to the data used to calculate the debt measures rather than allowing for the various circumstances under which an institution may challenge, adjust, and appeal decisions affecting the institution's CDRs. Therefore, we believe that the procedures established under § 668.7 will be less susceptible to abuse and delays than the CDR process. Also, by removing proposed § 668.90(a)(3)(vii), there is no longer a need to address in the final regulations the appointment or qualifications of the hearing official as requested by some commenters.

Details of the administrative process can be found under the preamble discussion under the headings, *Small numbers (668.7(d)),* and *Draft debt measures and data corrections (§ 668.7(e)), Final debt measures*

(§ 668.7(f)), and Alternative earnings (§ 668.7(g)).

Changes: We have removed § 668.90(a)(3)(vii) of the proposed regulations that would allow a termination action against a program that failed the gainful employment standards in § 668.7(a). Therefore, current § 668.90 will not be amended.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in regulations that may (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as "economically significant" regulations); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

Pursuant to the terms of the Executive Order, we have determined this regulatory action will have an annual effect on the economy of more than $100 million. Therefore, this action is "economically significant" and subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, we have assessed the potential costs and benefits—both quantitative and qualitative—of this regulatory action. The agency believes that the benefits justify the costs.

The Department has also reviewed these regulations pursuant to Executive Order 13563, published on January 21, 2011 (76 FR 3821). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

We emphasize as well that Executive Order 13563 requires agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." In its February 2, 2011, memorandum (M–11–10) on Executive Order 13563, improving regulation and regulatory review, the Office of Information and Regulatory Affairs has emphasized that such techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these regulations only upon a reasoned determination that their benefits justify their costs and we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on this analysis and for the additional reasons stated in the preamble, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

A detailed analysis, including the Department's Regulatory Flexibility Act Analysis, is found in Appendix A to these final regulations.

Paperwork Reduction Act of 1995

Section 668.7 contains information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department has submitted a copy of this section to OMB for its review. In general, throughout the preamble, we discuss debt-to-earnings ratios, repayment rates, draft rates and required disclosures of the final repayment rate and the debt-to-earnings ratios in the context of being calculated in or beginning in FY 2012. We have chosen in this section to reference FY 2013 so that our analysis can include critical data tied to second year failure of a debt measure and the level of debt warning notice required after a second year failure. We believe that only by including this data in our analysis can we provide complete and accurate information regarding burden under these final regulations.

Section 668.7(g)(6)(i) also contains information collection requirements. However, that burden is already reflected under OMB Control Number 1845–0107.

Section 668.7—Gainful Employment in a Recognized Occupation

Under § 668.7(c)(2)(i)(A)(*2*) of these final regulations, institutions are provided the option to report the total amount of tuition and fees the institution charged a student in a gainful employment program. The advantage of exercising this option occurs when the debt-to-earnings ratios are calculated. In cases where students borrowed more than the amount of tuition and fees (such as additional amounts for room and board, books and supplies, or for other living and personal costs), the amount of indebtedness used for the debt-to-earnings calculation is limited to the amount that the institution reported it charged for tuition and fees.

We estimate there will be a very high percentage of proprietary institutions that will exercise this option. We estimate that proprietary institutions will choose this option for 99 percent of the applicable 4,067,680 students for a total of 4,027,003 students. On average, we estimate that it will take the institution 2 minutes (.03 hours) per student to report this information for a total of 120,810 hours of additional burden under OMB Control Number 1845–0109.

We estimate there will be a high percentage of private non-profit institutions that will exercise this option. We estimate that private non-profit institutions will choose this option for 90 percent of the applicable 242,705 students for a total of 218,435 students. On average, we estimate that it will take the institution 2 minutes (.03 hours) per student to report this information for a total of 6,553 hours of additional burden under OMB Control Number 1845–0109.

We estimate there will be a moderately high percentage of public institutions that will exercise this option. We estimate public institutions will choose this option for 80 percent of the applicable 4,426,327 students for a

total of 3,541,062 students. On average, we estimate that it will take the institution 2 minutes (.03 hours) per student to report this information for a total of 106,232 hours of additional burden under OMB Control Number 1845–0109.

Collectively, we estimate that these reporting requirements will increase burden for institutions by 233,595 hours under OMB Control Number 1845–0109.

Under § 668.7(e)(1) in these final regulations, before issuing the draft debt-to-earnings ratios, the Secretary will provide to an institution a list of the students who will be included in the applicable two- or four-year period used to calculate the debt-to-earnings ratios beginning in FY 2012. No later than 30 days after the date the Secretary provides the list to the institution, the institution may (1) provide evidence showing that a student should be included on or removed from the list or, (2) correct or update the student identity information. While this will increase burden to institutions participating in the pre-draft data challenge, the increase is estimated to be modest. In many cases, institutions will be comparing the information that they have previously sent to the Department about their students in gainful employment programs with this pre-draft list. If the corrected and updated information is accurate, the corrected information will be used to create a final list that will be sent by the Department to SSA in order to calculate the draft debt-to-earnings ratios.

We estimate that only those institutions who have concerns that their programs may be failing or believe that they have a failing program will submit a pre-draft data challenge. Therefore, we are multiplying by two the total estimated number of failing programs that will submit a pre-draft data challenge.

We estimate that 601 gainful employment programs will initially fail the debt measures during FY 2013. We estimate that 323 gainful employment programs will fail the debt measures for the second time during FY 2013 for a total of 924 failing programs. We estimate that twice that number of failing programs or 1,848 pre-draft corrections will be submitted.

We estimate that proprietary institutions will submit a total of 1,552 pre-draft data challenges. On average, we estimate that institutional staff will take 1.5 hours per submission to analyze the draft data supplied by the Department to the institution and to submit the institution's pre-draft data challenge for a total of 2,328 hours of increased burden under OMB Control Number 1845–0109.

We estimate that private non-profit institutions will submit a total of 44 pre-draft data challenges. On average, we estimate that institutional staff will take 1.5 hours per submission to analyze the draft data supplied by the Department to the institution and to submit its pre-draft data challenge for a total of 66 hours of increased burden under OMB Control Number 1845–0109.

We estimate that public institutions will submit a total of 252 pre-draft data challenges. On average, we estimate that institutional staff will take 1.5 hours per submission to analyze the draft data supplied by the Department to the institution and to submit its pre-draft data challenge for a total of 378 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(e)(1), we estimate pre-draft data challenges will increase burden for institutions by 2,772 hours under OMB Control Number 1845–0109.

Under § 668.7(e)(2) in these final regulations we will notify an institution of the draft results of the debt-to-earnings ratios for each gainful employment program. No later than 45 days after the Secretary issues the draft results of the debt-to-earnings ratios for a program and no later than 45 days after the Secretary issues the draft results of the loan repayment rate for a program, the institution may challenge the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, or the median loan debt for the program that was used for the numerator of the draft debt-to-earnings ratios. Institutions submitting a post-draft corrections challenge will provide evidence showing that the borrower loan data or the program median loan debt is inaccurate. The institution may challenge the accuracy of the list of borrowers included in the applicable two- or four-year period used to calculate the draft loan repayment rate by submitting evidence showing that a borrower should be included on or removed from the list, or correcting or updating identity information provided for a borrower on the list, such as the name, social security number, or date of birth.

We estimate that 601 gainful employment programs will fail the debt measures issued for FY 2013. We estimate that 323 gainful employment programs will fail the debt measures issued for FY 2013 for the second time for a total of 924 failing programs.

We estimate that 776 programs will fail the draft debt measures at proprietary institutions. On average, we estimate that institutional staff will take 5 hours per program to analyze the draft data supplied by the Department to the institution and to submit its data challenge for a total of 3,880 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 22 programs will fail the draft debt measures at private non-profit institutions. On average, we estimate that institutional staff will take 5 hours per program to analyze the draft data supplied by the Department to the institution and to submit its data challenge for a total of 110 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 126 programs will fail the draft debt measures at public institutions. On average, we estimate that institutional staff will take 5 hours per program to analyze the draft data supplied by the Department to the institution and to submit its data challenge for a total of 630 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(e), we estimate debt measures challenges will increase burden for institutions by 4,620 hours under OMB Control Number 1845–0109.

Under § 668.7(g), *Alternative earnings,* in these final regulations we provide that an institution may demonstrate that a failing program would meet a debt-to-earnings standard by recalculating the debt-to-earnings ratios using the median loan debt for the program as determined under § 668.7(c) and using alternative earnings from: A State-sponsored data system; an institutional survey conducted in accordance with NCES standards; or, for FYs 2012, 2013, and 2014, the Bureau of Labor Statistics (BLS).

Under § 668.7(g)(2) of these final regulations, for final debt-to-earnings ratios for a failing program, an institution may use State data to recalculate those ratios for a failing program only if the institution obtains earnings data from State-sponsored data systems for more than 50 percent of the students in the applicable two- or four-year period, or a comparable two- or four-year period, and that number of students is more than 30 students; and the institution uses the actual, State-derived mean or median earnings of the students in the applicable two- or four-year period. In the institution's submission, it must demonstrate that it accurately used the actual State-derived data to recalculate the ratios.

We estimate that 18 percent of the 776 failed programs during the FY 2013 period at proprietary institutions will choose to use State-sponsored system

data to provide alternative earnings. Based on this estimate, proprietary institutions will submit alternative earnings data from State-sponsored systems for 140 programs. On average, we estimate that institutional staff will take 2 hours per submission to acquire the alternative earnings data from State-sponsored systems, recalculate the ratios, and submit that data to the Department for a total of 280 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 5 percent of the 22 failed programs during the FY 2013 period at private non-profit institutions will choose to use State-sponsored system data to provide alternative earnings. Based on this estimate, proprietary institutions will submit alternative earnings data from State-sponsored systems for one program. On average, we estimate that institutional staff will take 2 hours per submission to acquire the alternative earnings data from State-sponsored systems, recalculate the ratios, and submit that data to the Department for a total of 2 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 10 percent of the 126 failed programs during the FY 2013 period at public institutions will choose to use State-sponsored system data to provide alternative earnings. Based on this estimate, proprietary institutions will submit alternative earnings data from State-sponsored systems for 13 programs. On average, we estimate that institutional staff will take 2 hours per submission to acquire the alternative earnings data from State-sponsored systems, recalculate the ratios, and submit that data to the Department for a total of 26 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(g)(2), we estimate using State-sponsored system data for alternative earnings will increase burden for institutions by 308 hours under OMB Control Number 1845–0109.

Under § 668.7(g)(3) of these final regulations, for final debt-to-earnings ratios calculated by the Secretary for FY 2012 and any subsequent FY, an institution may use survey data to recalculate the ratios for a failing program only if the institution: (1) Uses reported earnings obtained from an institutional survey conducted of the students in the applicable two- or four-year period, or a comparable two- or four-year period, and the survey data is for more than 30 students; (2) submits a copy of the survey and certifies that it was conducted in accordance with the statistical standards and procedures established by NCES and available at *http://nces.ed.gov;* and (3) submits an examination-level attestation by an independent public accountant or independent governmental auditor, as appropriate, that the survey was conducted in accordance with the specified NCES standards and procedures.

We estimate that 2 percent of the 776 failed programs during the FY 2013 period at proprietary institutions will choose to use survey data to provide alternative earnings. Based on this estimate, proprietary institutions will submit survey data to provide alternative earnings for 16 programs. On average, we estimate that institutional staff will take 40 hours per submission to attain survey data, to formulate the alternative earnings based upon that data, and to submit that data to the Department for a total of 640 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 0 percent of private non-profit and public institutions will choose to submit alternative earnings data based upon an NCES compliant survey.

Collectively, under § 668.7(g)(3), we estimate the burden for institutions to use an NCES compliant survey for alternative earnings will increase burden by 640 hours under OMB Control Number 1845–0109.

Under § 668.7(g)(4) of these final regulations, for the final debt-to-earnings ratios calculated by the Secretary for FYs 2012, 2013, and 2014, an institution may use BLS earnings data to recalculate those ratios for a failing program only if the institution: (1) Identifies and provides documentation of the occupation by SOC code, or combination of SOC codes, in which more than 50 percent of the students in the 2YP or 4YP were placed or found employment, and that number of students is more than 30; (2) uses the most current BLS earnings data for the identified SOC code to calculate the debt-to-earnings ratio; and (3) submits, upon request, all the placement, employment, and other records maintained by the institution for the program under § 668.7(g)(4)(i) that the institution examined to determine whether those records identified the SOC codes for the students who were placed or found employment.

We estimate that 776 programs at proprietary institutions will fail the debt-to-earnings ratios issued for FY 2013 and choose to use BLS data to provide alternative earnings. We estimate that proprietary institutions will provide alternative earnings information using BLS data for 75 percent of the total number of failed programs which equals 582 alternative earnings submissions. On average, we estimate that institutional staff will take 5 hours per submission to formulate the alternative earnings based upon BLS data and submit that data to the Department for a total of 2,910 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 22 programs at private non-profit institutions will fail the debt-to-earnings ratios issued for FY 2013 and choose to use BLS data to provide alternative earnings. We estimate that private non-profit institutions will provide alternative earnings information using BLS data for 55 percent of the total number of failed programs, which equals 12 alternative earnings submissions. On average, we estimate that institutional staff will take 5 hours per submission to formulate the alternative earnings based upon BLS data and submit that data to the Department for a total of 60 hours of increased burden under OMB Control Number 1845–0109.

We estimate that 126 programs at public institutions will fail the debt-to-earnings ratios issued for FY 2013 and choose to use BLS data to provide alternative earnings. We estimate that public institutions will provide alternative earnings information using BLS data for 80 percent of the total number of failed programs which equals 101 alternative earnings submissions. On average, we estimate that institutional staff will take 5 hours per submission to formulate the alternative earnings based upon BLS data and submit that data to the Department for a total of 505 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(g)(4), we estimate using BLS data for alternative earnings will increase burden for institutions by 3,475 hours under OMB Control Number 1845–0109.

Under § 668.7(g)(5) of these final regulations, institutions must notify the Secretary of the institution's intent to use alternative earnings no later than 14 days after the date the institution is notified of its final debt measures. Additionally, institutions must submit all supporting documentation related to recalculation of the debt-to-earnings ratios using alternative earnings, no later than 60 days after the institution is notified of its final debt measures.

We estimate that proprietary institutions will notify the Secretary of their intent to use alternative earnings in the recalculation of the debt-to-earnings ratios and will submit their documentation in a timely manner for 776 programs that failed the debt measures issued for FY 2013. On

average, we estimate that it will take institutional staff 15 minutes (.25 hours) to notify the Secretary of the institution's intent to use alternative earnings no later than 14 days after the date the institution is notified of its final debt measures for a total of 194 hours of increased burden under OMB Control Number 1845–0109.

We estimate that private non-profit institutions will notify the Secretary of their intent to use alternative earnings in the recalculation of the debt-to-earnings ratios and will submit their documentation in a timely manner for 22 programs that failed the debt measures issued for FY 2013. On average, we estimate that it will take institutional staff 15 minutes (.25 hours) to notify the Secretary of the institution's intent to use alternative earnings no later than 14 days after the date the institution is notified of its final debt measures for a total of 6 hours of increased burden under OMB Control Number 1845–0109.

We estimate that public institutions will notify the Secretary of their intent to use alternative earnings in the recalculation of the debt-to-earnings ratios and will submit their documentation in a timely manner for 126 programs that failed the debt measures issued for FY 2013. On average, we estimate that it will take institutional staff 15 minutes (.25 hours) to notify the Secretary of its intent to use alternative earnings no later than 14 days after the date the institution is notified of its final debt measures for a total of 32 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(g)(5), we estimate the burden for institutions to notify the Secretary of their intent to use alternative earnings to recalculate the debt-to-earnings ratios and submit the supporting documentation will increase burden by 232 hours under OMB Control Number 1845–0109.

Under § 668.7(j)(1) of these final regulations, the institution is required to provide for each enrolled and prospective student a warning prepared in plain language and presented either orally or in writing directly to the students when a program fails the debt measures for the first time. The initial warning explains the debt measures and shows the amount by which the program did not meet the minimum standards. In addition, the initial warning describes any actions the institution plans to take to improve the program's performance. To the extent that the institution delivers the initial warning orally, it must maintain documentation of how that information was provided, including any materials the institution used to deliver that warning and any documentation of the student's presence at the time of the warning.

Under § 668.7(j)(2) of these final regulations, an institution that has a program that has failed the debt measures for two consecutive FYs or for two out of the three most recently completed FYs, must provide the debt warning containing the requirements in § 668.7(j)(1) in writing, together with a plain language explanation of what actions the institution plans to take in response to the second failure. If the institution plans to discontinue the program, it must provide the timeline for doing so, and the options available to the student. The second debt warning must also explain the risks associated with enrolling or continuing in the program, including the potential consequences for, and options available to, the student if the program becomes ineligible for title IV, HEA program funds. Additionally, the second debt warning must include a plain language explanation of the resources available, including *http://www.collegenavigator.gov*, that the student may use to research other educational options and compare program costs, and include a clear and conspicuous statement that a student who enrolls or continues in the program should expect to have difficulty repaying his or her student loans.

Under § 668.7(j)(4) of these final regulations, the institution must prominently display the second-year debt warning on the program home page of the institution's Web site and include the warning in all promotional materials it makes available to prospective students. We do not expect that the following requirements will be overly burdensome for institutions: (1) Providing a plain language explanation of the actions the institution plans to take in response to the second failure; the risks associated with enrolling or continuing in the program; and the resources available, including *http://www.collegenavigator.gov*; (2) providing a clear and conspicuous statement that a student who enrolls in or continues in the program should expect to have difficulty repaying their student loan debt; and (3) posting that information on the program home page of the institution's Web site and in its promotional materials.

We estimate that 493 programs at proprietary institutions will fail the debt measures issued for FY 2013 for the first time. We estimate that an additional 283 programs at proprietary institutions will fail the debt measures for the second time during the same period of time. We estimate that on average, it will take institutional staff 30 minutes (.5 hours) to prepare and distribute a first or second year warning as required for a total of 776 affected programs, resulting in an increase in burden of 388 hours under OMB Control Number 1845–0109.

We estimate that 16 programs at private non-profit institutions will fail the debt measures issued for FY 2013 for the first time. We estimate that an additional 6 programs at private non-profit institutions will fail the debt measures for the second time during the same period of time. We estimate that on average, it will take institutional staff 30 minutes (.5 hours) to prepare and distribute a first or second year warning as required for a total of 22 affected programs times, resulting in an increase in burden of 11 hours under OMB Control Number 1845–0109.

We estimate that 92 programs at public institutions will fail the debt measures issued for FY 2013 for the first time. We estimate that an additional 34 programs at public institutions will fail the debt measures for the second time during the same period of time. We estimate that on average, it will take institutional staff 30 minutes (.5 hours) to prepare and distribute a first or second year warning for a total of 126 affected programs times, resulting in an increase in burden of 63 hours under OMB Control Number 1845–0109.

Collectively, we estimate that the burden for meeting these disclosure requirements will increase burden for institutions by 462 hours under OMB Control Number 1845–0109.

Under § 668.7(j)(5) of these final regulations, if an institution voluntarily discontinues a failing program, it must notify enrolled students at the same time that it provides the written notice to the Secretary that it relinquishes the program's title IV, HEA program eligibility.

We estimate that for the period from July 1, 2012 through June 30, 2013 proprietary institutions will have 493 programs that have failed the debt measures once and 283 programs that have failed the debt measures twice, totaling 776 failing programs. We estimate that 70 percent of that total number of failing programs or 543 programs will be voluntarily discontinued. On average, it will take institutional staff 10 minutes (.17 hours) to provide written notice to the Secretary that it relinquishes the program's title IV, HEA program eligibility for a total of 92 hours of increased burden under OMB Control Number 1845–0109.

We estimate that for the period from July 1, 2012 through June 30, 2013

private non-profit institutions will have 16 programs that have failed the debt measures once and 6 programs that have failed the debt measures twice, totaling 22 failing programs. We estimate that 10 percent of that total number of failing programs or 2 programs will be voluntarily discontinued. On average, it will take institutional staff 10 minutes (.17 hours) to provide written notice to the Secretary that it relinquishes the program's title IV, HEA program eligibility for a total of 1 hour of increased burden under OMB Control Number 1845–0109.

We estimate that for the period from July 1, 2012 through June 30, 2013 public institutions will have 92 programs that have failed the debt measures once and 34 programs that have failed the debt measures twice, totaling 126 failing programs. We estimate that 20 percent of that total number of failing programs or 25 program will be voluntarily discontinued. On average, it will take institutional staff 10 minutes (.17 hours) to provide written notice to the Secretary that it relinquishes the program's title IV, HEA program eligibility for a total of 4 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(j)(5), we estimate the burden for institutions to notify the Secretary to relinquish the program's title IV, HEA program eligibility will increase burden by 97 hours under OMB Control Number 1845–0109.

We estimate that for FY 2013 there will be 8,736,711 students in 55,405 gainful employment programs which yields an average program size of 158 students per program.

We estimated above that there will be 543 proprietary programs that are voluntarily discontinued. Using the average of 158 students per program, proprietary institutions will be required to notify 85,794 students that the program is being discontinued. On average, we estimate that it will take a student 15 minutes (.25 hours) to read the notice provided by the institution and determine the impact on the completion of the program without title IV, HEA program assistance for a total of 21,449 hours of increased burden under OMB Control Number 1845–0109.

We estimated above that there will be 2 private non-profit programs that are voluntarily discontinued. Using the average of 158 students per program, private non-profit institutions will be required to notify 316 students that the program is being discontinued. On average, we estimate that it will take a student 15 minutes (.25 hours) to read the notice provided by the institution and determine the impact on the completion of the program without title IV, HEA program assistance for a total of 79 hours of increased burden under OMB Control Number 1845–0109.

We estimated above that 25 public programs will be voluntarily discontinued. Using the average of 158 students per program, public institutions will be required to notify 3,950 students that the program is being discontinued. On average, we estimate that it will take a student 15 minutes (.25 hours) to read the notice provided by the institution and determine the impact on the completion of the program without title IV, HEA program assistance for a total of 988 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 668.7(j)(5), we estimate that for students to read the notice provided by the institution about the institution's decision to voluntarily a failing program will increase burden by 22,516 hours under OMB 1845–0109.

Under § 688.7(j)(5) of these final regulations, we estimate that 85,794 students will be enrolled at proprietary institutions in failing programs that are voluntarily discontinued. On average, we estimate that it will take institutional staff 10 minutes (.17 hours) per student to prepare and mail a notice provided by the institution indicating that the failing gainful employment program is being voluntarily discontinued and the date that title IV, HEA program assistance will no longer be available for a total of 14,585 hours of increased burden under OMB Control Number 1845–0109.

Under § 688.7(j)(5) of these final regulations, we estimate that 316 students will be enrolled at private non-profit institutions in failing programs that are voluntarily discontinued. On average, we estimate that it will take institutional staff 10 minutes (.17 hours) per student to prepare and mail a notice provided by the institution indicating that the failing gainful employment program is being voluntarily discontinued and the date that title IV, HEA program assistance will no longer be available for a total of 54 hours of increased burden under OMB Control Number 1845–0109.

Under § 688.7(j)(5) of these final regulations, we estimate that 3,950 students will be enrolled at public institutions in failing programs that are voluntarily discontinued. On average, we estimate that it will take institutional staff 10 minutes (.17 hours) per student to prepare and mail a notice provided by the institution indicating that the failing gainful employment program is being voluntarily discontinued and the date that title IV, HEA program assistance will no longer be available for a total of 672 hours of increased burden under OMB Control Number 1845–0109.

Collectively, under § 688.7(j)(5) of these final regulations, we estimate that it will take institutional staff a total of 15,311 hours of increased burden under OMB Control Number 1845–0109 to prepare and mail a notice provided by the institution indicating that the failing gainful employment program is being voluntarily discontinued and the date that title IV, HEA program assistance will no longer be available.

COLLECTION OF INFORMATION

Regulatory section	Information collection	Collection
668.7	This section provides institutions the option to submit the tuition and fee amount charged a student in a gainful employment program. This section also provides for draft data challenges whereby institutions will have the opportunity to challenge the accuracy of the information used to calculate the debt measures in the event that student identifying information was erroneously included or excluded. Institutions with programs that fail the debt measures will have an opportunity to provide alternative earnings data from BLS data, State-sponsored earnings data, or the results of an institutional earnings survey as long as the survey meets NCES standards and an independent public accountant or independent governmental auditor, as appropriate, has attested that the survey was conducted in accordance with the specific NCES standards and procedures. This section also provides for institutions to notify the Secretary of the institution's intent to use alternative earnings data. This section provides that institutions must disclose debt warnings for first year failures and second year failures to each enrolled student and prospective student in a gainful employment program. Institutions that choose to voluntarily discontinue a failing program must do so in writing to the Secretary relinquishing the program's title IV, HEA program eligibility and by notice to the enrolled students.	OMB Control Number 1845–0109. This will be a new collection. The burden will increase by 284,028 hours.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating regulations that may result in 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. Please see the Regulatory Impact Analysis, attached as Appendix A, for a discussion of the budgetary impact of these final regulations.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, and based on our own review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Numbers: 84.007 FSEOG; 84.032 Federal Family Education Loan Program; 84.033 Federal Work-Study Program; 84.037 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 LEAP; 84.268 William D. Ford Federal Direct Loan Program; 84.376 ACG/SMART; 84.379 TEACH Grant Program)

List of Subjects in 34 CFR Part 668

Administrative practice and procedure, Aliens, Colleges and universities, Consumer protection, Grant programs—education, Incorporation by reference, Loan programs—education, Reporting and recordkeeping requirements, Selective Service System, Student aid, Vocational education.

Dated: June 1, 2011.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 668 of title 34 of the Code of Federal Regulations as follows:

PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

■ 1. The authority citation for part 668 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, and 1099c–1, unless otherwise noted.

■ 2. Section 668.7 is added to read as follows:

§ 668.7 Gainful employment in a recognized occupation.

(a) *Gainful employment.* (1) *Minimum standards.* A program is considered to provide training that leads to gainful employment in a recognized occupation if—

(i) As determined under paragraph (b) of this section, the program's annual loan repayment rate is at least 35 percent;

(ii) As determined under paragraph (c) of this section, the program's annual loan payment is less than or equal to—

(A) 30 percent of discretionary income (discretionary income threshold); or

(B) 12 percent of annual earnings (actual earnings threshold); or

(iii) The data needed to determine whether a program satisfies the minimum standards are not available to the Secretary.

(2) *General.* For the purposes of this section—

(i)(A) A *program* refers to an educational program offered by an institution under § 668.8(c)(3) or (d) that is identified by a combination of the institution's six-digit OPEID number, the program's six-digit CIP code as assigned by an institution or determined by the Secretary, and credential level;

(B) The Secretary determines whether an institution accurately assigns a CIP code for a program based on the classifications and program codes established by the National Center for Education Statistics (NCES); and

(C) The credential levels for identifying a program are undergraduate certificate, associate's degree, bachelor's degree, post-baccalaureate certificate, master's degree, doctoral degree, and first-professional degree;

(ii) *Debt measures* refers collectively to the loan repayment rate and debt-to-earnings ratios described in paragraphs (b) and (c) of this section;

(iii) A *fiscal year* (FY) is the 12-month period starting October 1 and ending September 30 that is designated by the calendar year in which it ends; for example FY 2013 is from October 1, 2012 to September 30, 2013. That designation also represents the FY for which the Secretary calculates the debt measures;

(iv) A *two-year period* is the period covering two consecutive FYs that occur on—

(A)(*1*) The third and fourth FYs (2YP) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2012, the 2YP is FYs 2008 and 2009; or

(*2*) For FYs 2012, 2013, and 2014, the first and second FYs (2YP–A) prior to the most recently completed FY for which the loan repayment rate is calculated under paragraph (b) of this section. For example, if the most recently completed FY is 2012, the 2YP–A is FYs 2010 and 2011; or

(B) For a program whose students are required to complete a medical or dental internship or residency, as identified by an institution, the sixth and seventh FYs (2YP–R) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2012, the 2YP–R is FYs 2005 and 2006. For this purpose, a required medical or dental internship or residency is a supervised training program that—

(*1*) Requires the student to hold a degree as a doctor of medicine or osteopathy, or a doctor of dental science;

(*2*) Leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers post-graduate training; and

(*3*) Must be completed before the borrower may be licensed by the State and board certified for professional practice or service;

(v) A *four-year period* is the period covering four consecutive FYs that occur on—

(A) The third, fourth, fifth, and sixth FYs (4YP) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2017, the 4YP is FYs 2011, 2012, 2013, and 2014; or

(B) For a program whose students are required to complete a medical or dental internship or residency, as identified by an institution, the sixth, seventh, eighth, and ninth FYs (4YP–R) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2017, the 4YP–R is FYs 2008, 2009, 2010, and 2011. For this purpose, a required medical or dental internship or residency is a supervised training program that—

(*1*) Requires the student to hold a degree as a doctor of medicine or osteopathy, or a doctor of dental science;

(*2*) Leads to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility that offers post-graduate training; and

(*3*) Must be completed before the borrower may be licensed by the State and board certified for professional practice or service; and

(vi) *Discretionary income* is the difference between the mean or median annual earnings and 150 percent of the most current Poverty Guideline for a single person in the continental U.S. The Poverty Guidelines are published annually by the U.S. Department of Health and Human Services (HHS) and are available at *http://aspe.hhs.gov/poverty.*

(b) *Loan repayment rate.* For the most recently completed FY, the Secretary calculates the loan repayment rate for a program using the following ratio:

$$\frac{\text{OOPB of LPF plus OOPB of PML}}{\text{OOPB}}$$

(1) *Original Outstanding Principal Balance (OOPB).* (i) The OOPB is the amount of the outstanding balance, including capitalized interest, on FFEL or Direct Loans owed by students for attendance in the program on the date those loans first entered repayment.

(ii) The OOPB includes FFEL and Direct Loans that first entered repayment during the 2YP, the 2YP–A, the 2YP–R, the 4YP, or the 4YP–R. The OOPB does not include PLUS loans made to parent borrowers or TEACH Grant-related unsubsidized loans.

(iii) For consolidation loans, the OOPB is the OOPB of the FFEL and Direct Loans attributable to a borrower's attendance in the program.

(iv) For FYs 2012, 2013, and 2014, the Secretary calculates two loan repayment rates for a program, one with the 2YP and the other with the 2YP–A, so long as the 2YP–A represents more than 30 borrowers whose loans entered repayment. Provided that both loan repayment rates are calculated, the Secretary determines whether the program meets the minimum standard under paragraph (a)(1)(i) of this section by using the higher of the 2YP rate or the 2YP–A rate.

(2) *Loans Paid in Full (LPF).* (i) LPF are loans that have never been in default or, in the case of a Federal Consolidation Loan or a Direct Consolidation Loan, neither the consolidation loan nor the underlying loan or loans have ever been in default and that have been paid in full by a borrower. A loan that is paid through a Federal Consolidation loan, a Direct Consolidation loan, or under another refinancing process provided for under the HEA, is not counted as paid-in-full for this purpose until the consolidation loan or other financial instrument is paid in full by the borrower.

(ii) The OOPB of LPF in the numerator of the ratio is the total amount of OOPB for these loans.

(3) *Payments-Made Loans (PML).* (i) PML are loans that have never been in default or, in the case of a Federal Consolidation Loan or a Direct Consolidation Loan, neither the consolidation loan nor the underlying loan or loans have ever been in default, where—

(A)(*1*) Payments made by a borrower during the most recently completed FY reduce the outstanding balance of a loan, including the outstanding balance of a Federal Consolidation Loan or Direct Consolidation Loan, to an amount that is less than the outstanding balance of the loan at the beginning of that FY. The outstanding balance of a loan includes any unpaid accrued interest that has not been capitalized; or

(*2*) If the program is a post-baccalaureate certificate, master's degree, doctoral degree, or first-professional degree program, the total outstanding balance of a Federal or Direct Consolidation Loan at the end of

the most recently completed FY is less than or equal to the total outstanding balance of the consolidation loan at the beginning of the FY. The outstanding balance of the consolidation loan includes any unpaid accrued interest that has not been capitalized;

(B) A borrower is in the process of qualifying for Public Service Loan Forgiveness under 34 CFR 685.219(c) and submits an employment certification to the Secretary that demonstrates the borrower is engaged in qualifying employment and the borrower made qualifying payments on the loan during the most recently completed FY; or

(C)(*1*) Except as provided under paragraph (b)(3)(i)(C)(*2*) of this section, a borrower in the income-based repayment plan (IBR), income contingent repayment plan (ICR), or any other repayment plan makes scheduled payments on the loan during the most recently completed FY for an amount that is equal to or less than the interest that accrues on the loan during the FY. The Secretary limits the dollar amount of these interest-only or negative amortization loans in the numerator of the ratio to no more than 3 percent of the total amount of OOPB in the denominator of the ratio, based on available data on a program's borrowers who are making scheduled payments under these repayment plans.

(*2*) Until the Secretary determines that there is sufficiently complete data on which of the program's borrowers have scheduled payments that are equal to or less than accruing interest, the Secretary will include in the numerator 3 percent of the OOPB in the denominator.

(*3*) Notwithstanding paragraph (b)(3)(i)(C)(*1*) of this section, with regard to applying the percent limitation on the dollar amount of the interest-only or negative amortization loans, the Secretary may adjust the limitation by publishing a notice in the **Federal Register.** The adjusted limitation may not be lower than the percent limitation specified in paragraph (b)(3)(i)(C)(*1*) of this section or higher than the estimated percentage of all outstanding Federal student loan dollars that are interest-only or negative amortization loans.

(ii) The OOPB of PML in the numerator of the ratio is the total amount of OOPB for the loans described in paragraph (b)(3)(i) of this section.

(4) *Exclusions.* For the most recently completed FY, the OOPB of the following loans is excluded from both the numerator and the denominator of the ratio:

(i) Loans that were in an in-school deferment status during any part of the FY.

(ii) Loans that were in a military-related deferment status during any part of the FY.

(iii) Loans that were discharged as a result of the death of the borrower under 34 CFR 682.402(b) or 34 CFR 685.212(a).

(iv) Loans that were assigned or transferred to the Secretary that are being considered for discharge as a result of the total and permanent disability of the borrower, or were discharged by the Secretary on that basis under 34 CFR 682.402(c) or 34 CFR 685.212(b).

(c) *Debt-to-earnings ratios.* (1) *General.* For each FY, the Secretary calculates the debt-to-earnings ratios using the following formulas:

(i) Discretionary income rate = Annual loan payment/(Mean or Median Annual Earnings $-(1.5 \times$ Poverty Guideline)).

(ii) Earnings rate = Annual loan payment/Mean or Median Annual Earnings.

(2) *Annual loan payment.* The Secretary determines the annual loan payment for a program by—

(i) Calculating the median loan debt of the program by—

(A) For each student who completed the program during the 2YP, the 2YP–R, the 4YP, or the 4YP–R, determining the lesser of—

(*1*) The amount of loan debt the student incurred, as determined under paragraph (c)(4) of this section; or

(*2*) If tuition and fee information is provided by the institution, the total amount of tuition and fees the institution charged the student for enrollment in all programs at the institution; and

(B) Using the lower amount obtained under paragraph (c)(2)(i)(A) of this section for each student in the calculation of the median loan debt for the program; and

(ii) Using the median loan debt for the program and the current annual interest rate on Federal Direct Unsubsidized Loans to calculate the annual loan payment based on—

(A) A 10-year repayment schedule for a program that leads to an undergraduate or post-baccalaureate certificate or to an associate's degree;

(B) A 15-year repayment schedule for a program that leads to a bachelor's or master's degree; or

(C) A 20-year repayment schedule for a program that leads to a doctoral or first-professional degree.

(3) *Annual earnings.* The Secretary obtains from the Social Security Administration (SSA), or another Federal agency, the most currently available mean and median annual earnings of the students who completed the program during the 2YP, the 2YP–R, the 4YP, or the 4YP–R. The Secretary calculates the debt-to-earnings ratios using the higher of the mean or median annual earnings.

(4) *Loan debt.* In determining the loan debt for a student, the Secretary—

(i) Includes FFEL and Direct loans (except for parent PLUS or TEACH Grant-related loans) owed by the student for attendance in a program, and as reported under § 668.6(a)(1)(i)(C)(*2*), any private education loans or debt obligations arising from institutional financing plans;

(ii) Attributes all the loan debt incurred by the student for attendance in programs at the institution to the highest credentialed program subsequently completed by the student at the institution; and

(iii) Does not include any loan debt incurred by the student for attendance in programs at other institutions. However, the Secretary may include loan debt incurred by the student for attending other institutions if the institution and the other institutions are under common ownership or control, as determined by the Secretary in accordance with 34 CFR 600.31.

(5) *Exclusions.* For the FY the Secretary calculates the debt-to-earnings ratios for a program, a student in the applicable two- or four-year period that completed the program is excluded from the ratio calculations if the Secretary determines that—

(i) One or more of the student's loans were in a military-related deferment status at any time during the calendar year for which the Secretary obtains earnings information under paragraph (c)(3) of this section;

(ii) The student died;

(iii) One or more of the student's loans were assigned or transferred to the Secretary and are being considered for discharge as a result of the total and permanent disability of the student, or were discharged by the Secretary on that basis under 34 CFR 682.402(c) or 34 CFR 685.212(b); or

(iv) The student was enrolled in any other eligible program at the institution or at another institution during the calendar year for which the Secretary obtains earnings information under paragraph (c)(3) of this section.

(d) *Small numbers.* (1) The Secretary calculates the debt measures for a program with a small number of borrowers or completers by using the 4YP or the 4YP–R, as applicable, if—

(i) For the loan repayment rate, the corresponding 2YP or the 2YP–R represents 30 or fewer borrowers whose loans entered repayment after any of

those loans are excluded under paragraph (b)(4) of this section; or

(ii) For the debt-to-earnings ratios, the corresponding 2YP or the 2YP–R represents 30 or fewer students who completed the program after any of those students are excluded under paragraph (c)(5) of this section.

(2) In lieu of the minimum standards in paragraph (a)(1) of this section, the program satisfies the debt measures if—

(i)(A) The 4YP or the 4YP–R represents, after any exclusions under paragraph (b)(4) or (c)(5) of this section, 30 or fewer borrowers whose loans entered repayment or 30 or fewer students who completed the program; or

(B) SSA did not provide the mean and median earnings for the program as provided under paragraph (c)(3) of this section; or

(ii) The median loan debt calculated under paragraph (c)(2)(i) of this section is zero.

(e) *Draft debt measures and data corrections.* For each FY beginning with FY 2012, the Secretary issues draft results of the debt measures for each program offered by an institution. As provided under this paragraph, the institution may correct the data used to calculate the draft results before the Secretary issues final debt measures under paragraph (f) of this section.

(1) *Pre-draft corrections process for the debt-to-earnings ratios.* (i) Before issuing the draft results of the debt-to-earnings ratios for a program, the Secretary provides to an institution a list of the students who will be included in the applicable two- or four-year period for calculating the ratios. No later than 30 days after the date the Secretary provides the list to the institution, in accordance with procedures established by the Secretary, the institution may—

(A) Provide evidence showing that a student should be included on or removed from the list; or

(B) Correct or update the identity information provided for a student on the list, such as name, social security number, or date of birth.

(ii) After the 30 day correction period, the institution may no longer challenge whether students should be included on the list or update the identity information of those students.

(iii) If the information provided by the institution under paragraph (e)(1)(i) of this section is accurate, the updated information is used to create a final list of students that the Secretary submits to SSA. The Secretary calculates the draft debt-to-earnings ratios based on the mean and median earnings provided by SSA for the students on the final list.

(iv) An institution may not challenge the accuracy of the mean or median annual earnings the Secretary obtained from SSA to calculate the draft debt-to-earnings ratios for the program.

(2) *Post-draft corrections process for the debt measures.* No later than 45 days after the Secretary issues the draft results of the debt-to-earnings ratios for a program and no later than 45 days after the Secretary issues the draft results of the loan repayment rate for a program, respectively, in accordance with procedures established by the Secretary, an institution—

(i) May challenge the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, or the median loan debt for the program that was used for the numerator of the draft debt-to-earnings ratios, by submitting evidence showing that the borrower loan data or the program median loan debt is inaccurate; and

(ii) May challenge the accuracy of the list of borrowers included in the applicable two- or four-year period used to calculate the draft loan repayment rate by—

(A) Submitting evidence showing that a borrower should be included on or removed from the list; or

(B) Correcting or updating the identity information provided for a borrower on the list, such as name, social security number, or date of birth.

(3) *Recalculated results.* (i) *Debt measures.* In general, if the information provided by an institution under paragraph (e)(2) of this section is accurate, the Secretary uses the corrected information to recalculate the debt measures for the program.

(ii) *Debt-to-earnings ratios.* For a failing program, if SSA is unable to include in its calculation of the mean and median earnings for the program one or more students on the list finalized under paragraph (e)(1)(iii) of this section, the Secretary adjusts the median loan debt by removing the highest loan debt associated with the number of students SSA is unable to include in its calculation. For example, if SSA is unable to include three students in its calculation, the Secretary removes the loan debt for the same number of students on the list that had the highest loan debt. The Secretary recalculates the debt-to-earnings ratios for the program based on the adjusted median loan debt.

(f) *Final debt measures.* The Secretary notifies an institution of any draft results that are not challenged, or are recalculated or unsuccessfully challenged under paragraph (e) of this section. These results become the final debt measures for the program.

(g) *Alternative earnings.* (1) *General.* An institution may demonstrate that a failing program, as defined under paragraph (h) of this section, would meet a debt-to-earnings standard by recalculating the debt-to-earnings ratios using the median loan debt for the program as determined under paragraph (c) of this section, and alternative earnings from: a State-sponsored data system; an institutional survey conducted in accordance with NCES standards; or, for FYs 2012, 2013, and 2014, the Bureau of Labor Statistics (BLS).

(2) *State data.* For final debt-to-earnings ratios calculated by the Secretary for FY 2012 and any subsequent FY, an institution may use State data to recalculate those ratios for a failing program only if the institution—

(i) Obtains earnings data from State-sponsored data systems for more than 50 percent of the students in the applicable two- or four-year period, or a comparable two- or four-year period, and that number of students is more than 30;

(ii) Uses the actual, State-derived mean or median earnings of the students in the applicable two- or four-year period under paragraph (g)(2)(i) of this section; and

(iii) Demonstrates that it accurately used the actual State-derived data to recalculate the ratios.

(3) *Survey data.* For final debt-to-earnings ratios calculated by the Secretary for FY 2012 and any subsequent FY, an institution may use survey data to recalculate those ratios for a failing program only if the institution—

(i) Uses reported earnings obtained from an institutional survey conducted of the students in the applicable two- or four-year period, or a comparable two- or four-year period, and the survey data is for more than 30 students. The institution may use the mean or median annual earnings derived from the survey data;

(ii) Submits a copy of the survey and certifies that it was conducted in accordance with the statistical standards and procedures established by NCES and available at *http://nces.ed.gov;* and

(iii) Submits an examination-level attestation by an independent public accountant or independent governmental auditor, as appropriate, that the survey was conducted in accordance with the specified NCES standards and procedures. The attestation must be conducted in accordance with the general, field work, and reporting standards for attestation engagements contained in the GAO's

Government Auditing Standards, and with procedures for attestations contained in guides developed by and available from the Department of Education's Office of Inspector General.

(4) *BLS data.* For the final debt-to-earnings ratios calculated by the Secretary for FYs 2012, 2013, and 2014, an institution may use BLS earnings data to recalculate those ratios for a failing program only if the institution—

(i) Identifies and provides documentation of the occupation by SOC code, or combination of SOC codes, in which more than 50 percent of the students in the 2YP or 4YP were placed or found employment, and that number of students is more than 30. The institution may use placement records it maintains to satisfy accrediting agency or State requirements if those records indicate the occupation in which the student was placed. Otherwise, the institution must submit employment records or other documentation showing the SOC code or codes in which the students typically found employment;

(ii) Uses the most current BLS earnings data for the identified SOC code to calculate the debt-to-earnings ratio. If more than one SOC code is identified under paragraph (g)(4)(i) of this section, the institution must calculate the weighted average earnings of those SOC codes based on BLS employment data or institutional placement data. In either case, the institution must use BLS earnings at no higher than the 25th percentile; and

(iii) Submits, upon request, all the placement, employment, and other records maintained by the institution for the program under paragraph (g)(4)(i) of this section that the institution examined to determine whether those records identified the SOC codes for the students who were placed or found employment.

(5) *Alternative earnings process.* (i) In accordance with procedures established by the Secretary, the institution must—

(A) Notify the Secretary of its intent to use alternative earnings no later than 14 days after the date the institution is notified of its final debt measures under paragraph (f) of this section; and

(B) Submit all supporting documentation related to recalculating the debt-to-earnings ratios using alternative earnings no later than 60 days after the date the institution is notified of its final debt measures under paragraph (f) of this section.

(ii) Pending the Secretary's review of the institution's submission, the institution is not subject to the requirements arising from the program's failure to satisfy the debt measures, provided the submission was complete, timely, and accurate.

(iii)(A) If the Secretary denies the institution's submission, the Secretary notifies the institution of the reasons for the denial and the debt measures under paragraph (f) of this section become the final measures for the FY; or

(B) If the Secretary approves the institution's submission, the recalculated debt-to-earnings ratios become final for that FY.

(6) *Dissemination.* After the Secretary calculates the final debt measures, including the recalculated debt-to-earnings ratios under this section, and provides those debt measures to an institution—

(i) In accordance with § 668.6(b)(1)(v), the institution must disclose for each of its programs, the final loan repayment rate under paragraph (b) of this section, and final debt-to-earnings ratio under paragraph (c)(1)(ii) of this section; and

(ii) The Secretary may disseminate the final debt measures and information about, or related to, the debt measures to the public in any time, manner, and form, including publishing information that will allow the public to ascertain how well programs perform under the debt measures and other appropriate objective metrics.

(h) *Failing program.* Except for the small numbers provisions under paragraph (d) of this section, starting with the debt measures calculated for FY 2012, a program fails for a FY if its final debt measures do not meet any of the minimum standards in paragraph (a)(1)(i) or (ii) of this section.

(i) *Ineligible program.* Except as provided under paragraph (k) of this section, starting with the debt measures calculated for FY 2012, a failing program becomes ineligible if it does not meet any of the minimum standards in paragraph (a)(1) of this section for three out of the four most recent FYs. The Secretary notifies the institution that the program is ineligible on this basis, and the institution may no longer disburse title IV, HEA program funds to students enrolled in that program except as permitted using the procedures in § 668.26(d).

(j) *Debt warnings.* Whenever the Secretary notifies an institution under paragraph (h) of this section of a failing program, the institution must warn in a timely manner currently enrolled and prospective students of the consequences of that failure.

(1) *First year failure.* (i) For a failing program that does not meet the minimum standards in paragraph (a)(1) of this section for a single FY, the institution must provide to each enrolled and prospective student a warning prepared in plain language and presented in an easy to understand format that—

(A) Explains the debt measures and shows the amount by which the program did not meet the minimum standards; and

(B) Describes any actions the institution plans to take to improve the program's performance under the debt measures.

(ii) The warning must be delivered orally or in writing directly to the student in accordance with the procedures established by the institution. Delivering the debt warning directly to the student includes communicating with the student face-to-face or telephonically, communicating with the student along with other affected students as part of a group presentation, and sending the warning to the student's e-mail address.

(iii) If an institution opts to deliver the warning orally to a student, it must maintain documentation of how that information was provided, including any materials the institution used to deliver that warning and any documentation of the student's presence at the time of the warning.

(iv) An institution must continue to provide the debt warning until it is notified by the Secretary that the failing program now satisfies one of the minimum standards in paragraph (a)(1) of this section.

(2) *Second year failure.* (i) For a failing program that does not meet the minimum standards in paragraph (a)(1) of this section for two consecutive FYs or for two out of the three most recently completed FYs, the institution must provide the debt warning under paragraph (j)(1) of this section in writing in an easy to understand format and include in that warning—

(A) A plain language explanation of the actions the institution plans to take in response to the second failure. If the institution plans to discontinue the program, it must provide the timeline for doing so, and the options available to the student;

(B) A plain language explanation of the risks associated with enrolling or continuing in the program, including the potential consequences for, and options available to, the student if the program becomes ineligible for title IV, HEA program funds;

(C) A plain language explanation of the resources available, including *http://www.collegenavigator.gov,* that the student may use to research other educational options and compare program costs; and

(D) A clear and conspicuous statement that a student who enrolls or

continues in the program should expect to have difficulty repaying his or her student loans.

(ii) An institution must continue to provide this warning to enrolled and prospective students until the program has met one of the minimum standards for two of the last three FYs.

(3) *Timely warnings.* An institution must provide the warnings described in this paragraph to—

(i) An enrolled student, as soon as administratively feasible but no later than 30 days after the date the Secretary notifies the institution that the program failed; and

(ii) A prospective student at the time the student first contacts the institution requesting information about the program. If the prospective student intends to use title IV, HEA program funds to attend the program—

(A) The institution may not enroll the student until three days after the debt warnings are first provided to the student under this paragraph; and

(B) If more than 30 days pass from the date the debt warnings are first provided to the student under this paragraph and the date the student seeks to enroll in the program, the institution must provide the debt warnings again and may not enroll the student until three days after the debt warnings are most recently provided to the student under this paragraph.

(4) *Web site and promotional materials.* For the second-year debt warning in paragraph (j)(2) of this section, an institution must prominently display the debt warning on the program home page of its Web site and include the debt warning in all promotional materials it makes available to prospective students. These debt warnings may be provided in conjunction with the disclosures required under § 668.6(b)(2).

(5) *Voluntarily discontinued failing program.* An institution that voluntarily discontinues a failing program under paragraph (l)(1) of this section, must notify enrolled students at the same time that it provides the written notice to the Secretary that it relinquishes the program's title IV, HEA program eligibility.

(6) *Alternative language.* To the extent practicable, the institution must provide alternatives to English-language warnings for those students for whom English is not their first language.

(k) *Transition year.* For programs that become ineligible under paragraph (i) of this section based on final debt measures for FYs 2012, 2013, and 2014, the Secretary caps the number of those ineligible programs by—

(1) Sorting all programs by category of institution (public, private nonprofit, and proprietary) and then by loan repayment rate, from the lowest rate to the highest rate; and

(2) For each category of institution, beginning with the ineligible program with the lowest loan repayment rate, identifying the ineligible programs that account for a combined number of students who completed the programs during FY 2014 that do not exceed 5 percent of the total number of students who completed programs in that category. For example, the Secretary does not designate as ineligible a program, or two or more programs that have the same loan repayment rate, if the total number of students who completed that program or programs would exceed the 5 percent cap for an institutional category.

(l) *Restrictions for ineligible and voluntarily discontinued failing programs.* (1) *General.* An ineligible program, or a failing program that an institution voluntarily discontinues, remains ineligible until the institution reestablishes the eligibility of that program under the provisions in 34 CFR 600.20(d). For this purpose, an institution voluntarily discontinues a failing program on the date the institution provides written notice to the Secretary that it relinquishes the title IV, HEA program eligibility of that program.

(2) *Periods of ineligibility.*

(i) *Voluntarily discontinued failing programs.* An institution may not seek under 34 CFR 600.20(d) to reestablish the eligibility of a failing program that it voluntarily discontinued until—

(A) The end of the second FY following the FY the program was voluntarily discontinued if the institution voluntarily discontinued the program at any time after the program is determined to be a failing program, but no later than 90 days after the date the Secretary notified the institution that it must provide the second year debt warnings under paragraph (j)(2) of this section; or

(B) The end of the third FY following the FY the program was voluntarily discontinued if the institution voluntarily discontinued the program more than 90 days after the date the Secretary notified the institution that it must provide the second year debt warnings under paragraph (j)(2) of this section.

(ii) *Ineligible programs.* An institution may not seek under 34 CFR 600.20(d) to reestablish the eligibility of an ineligible program, or to establish the eligibility of a program that is substantially similar to the ineligible program, until the end of the third FY following the FY the program became ineligible. A program is substantially similar to the ineligible program if it has the same credential level and the same first four digits of the CIP code as that of the ineligible program.

(Approved by the Office of Management and Budget under control number 1845–0109)

(Authority: 20 U.S.C. 1001(b), 1002(b) and (c))

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Regulatory Impact Analysis

Introduction

Institutions providing gainful employment programs offer important opportunities to Americans seeking to expand their skills and earn postsecondary degrees and certificates. In too many instances, however, programs leave large numbers of students with unaffordable debts and poor employment prospects. The Department of Education (the Department) has a particularly strong interest in ensuring that institutions that are heavily reliant on Federal funding promote successful student academic and career opportunities. When colleges earn profits, they should do so in the process of helping their students achieve success.

These final gainful employment regulations include a number of changes from the proposed regulations published on July 26, 2010, reflecting the extensive public input received by the Department. The changes are intended to give failing programs an opportunity to improve, rather than immediately removing their eligibility, and to identify accurately the worst-performing gainful employment programs. However, the final regulations require that all federally funded gainful employment programs meet minimal standards because students and taxpayers have too much at stake.

This Regulatory Impact Analysis is divided into nine sections. In *Need for Regulatory Action,* the Department discusses the problems of high debt and poor employment prospects at some postsecondary programs. This information complements the analysis presented in the notice of proposed rulemaking (NPRM) and the preamble to these final regulations. This section also provides an overview of the Department's efforts to improve the functioning of the market for postsecondary training by informing student choices, collecting new information and setting minimum performance standards.

The section titled *Summary of Changes From the NPRM* summarizes the most important revisions the Department made in these final regulations. These changes were informed by the Department's consideration of over 90,000 public comments. The changes are intended to give failing programs an opportunity to improve, target the worst performing programs, improve the repayment rate and debt-to-earnings measurements, and improve the information available to students. At the time the Department

released the NPRM, it estimated that approximately 5 percent of programs would lose student aid eligibility. Because the final regulations give programs an opportunity to improve, only 2 percent of programs are expected to lose eligibility (based upon the revised model described in this document and excluding programs that are too small to measure accurately). Under the final regulations, 8 percent of programs subject to the debt measures would fail them at least once.

Under *NPRM Comment Review,* the Department presents its statistical analysis of one claim heard frequently in the comments: That the NPRM would have threatened access to education for low-income students and members of racial and ethnic minorities. The Department does not believe that enrolling large numbers of disadvantaged students justifies leaving those students with debts they cannot afford. We also present data demonstrating that student body characteristics explain a small amount of the variation in performance on the debt measures, and many programs perform well even if a large percentage of their students come from disadvantaged backgrounds—suggesting that certain programs do a better job than others of working with these populations. Under this section, the Department also discusses two economic analyses submitted as comments on the NPRM.

In *Analysis of Final Regulations,* the Department first describes the data and analytic tools it developed to estimate the impact of these regulations. It then presents the estimated impact on programs, students, and revenues under two sets of assumptions.

The *Discussion of Costs and Benefits* section considers the implications of these estimates for students, businesses, the Federal Government, and State and local governments. In some cases, these costs and benefits are difficult to quantify. The benefits of the final regulations for students that are discussed in this section include:

- Improved market information and development of measures linking programs to labor market outcomes;
- Improved retention, graduation and default rates; and
- Better return on money spent on education.

The overall costs of the rule fall into three categories: An increase in educational expenses when students transfer from failing programs to succeeding programs, paperwork costs associated with complying with the regulations, and other compliance costs that may be incurred by institutions as they attempt to improve their programs to avoid losing their eligibility for title iv Higher Education Act funds.

We also looked at distributional issues associated with the impact of this regulation. For institutions, the impact of the final regulations is mixed. Institutions with failing programs, including programs that lose eligibility, are likely to see lower revenues. On the other hand, institutions with high-performing programs are likely to see growing enrollment and revenue and to benefit from additional market information that permits institutions to demonstrate the value of their programs.

The impact of the regulations on Federal, State, and local tax revenue is difficult to estimate reliably. Tax revenues could fall to the extent that companies that provide postsecondary education and training pay less in corporate taxes and lay off employees and fewer students earn credentials. On the other hand, tax revenues could rise due to growth in programs with higher completion rates that offer credentials that carry greater economic benefits. Overall, however, as discussed further in the Net Budget Impacts section, we estimate that the final regulations will save the Federal Government between $23 million and $51 million on an annualized basis.

Under *Paperwork Burden Costs,* the Department estimates the paperwork burden of these regulations on institutions and students.

Under *Net Budget Impacts,* the Department presents its estimate that the final regulations will save the Federal Government between $23 million and $51 million per year. The largest factor in these savings is a reduced expenditure on Pell Grants.

The *Alternatives Considered* section describes different approaches for defining "gainful employment" proposed by commenters. Some of these approaches, including graduation and placement rates, a higher repayment rate threshold, an index, alternative debt measures, and default rates, were previously discussed by the Department in the negotiated rulemaking process, the NPRM, or both.

Finally, the *Final Regulatory Flexibility Analysis* considers issues relevant to small businesses and nonprofit institutions.

Pursuant to the terms of the Executive Order 12866, issued on September 30, 1993, we have determined that this regulatory action will have an annual effect on the economy of more than $100 million. Notwithstanding this determination, we have assessed the potential costs and benefits—both quantitative and qualitative—of this regulatory action. The agency believes that the benefits justify the costs.

The Department has also reviewed these regulations pursuant to Executive Order 13563, issued on January 18, 2011. Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

We emphasize as well that Executive Order 13563 requires agencies "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." In its February 2, 2011, memorandum (*M–11–10*) on Executive Order 13563, the Office of Information and Regulatory Affairs within the Office of Management and Budget emphasized that such techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these regulations only upon a reasoned determination that their benefits justify their costs and that we selected, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. Based on the analysis below, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

I. Need for Regulatory Action

Executive Order 12866 emphasizes that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." In this case, there is indeed a compelling public need for regulation. The Department's goal in regulating is to ensure that programs eligible for funding under title IV of the Higher Education Act of 1965, as amended (HEA), are preparing students for gainful employment, students seeking postsecondary training are not left with unaffordable debts and poor employment prospects, and the Federal investment of student aid dollars is well spent. Existing Federal law attempts to meet these aims through the required disclosure by institutions of information to prospective and current students on a range of issues including: cost of attendance, net price, graduation rates, and student financial aid (HEA Sec. 485 and Sec. 132). Nonetheless, there is evidence that students have significant misperceptions about the economic returns of pursuing a college education, tending to significantly overestimate their expected earnings as a college graduate.[1] Students and their families also lack access to critical information needed to navigate a nuanced higher education marketplace in order to make more optimal choices about where to pursue a postsecondary education.[2] Additionally,

[1] Christopher Avery and Thomas Kane, "Student Perceptions of College Opportunities," *http://www.nber.org/chapters/c10104.pdf.*

[2] C. Anthony Broh and Dana Ansel, "Planning for College: A Consumer Approach to the Higher Education Marketplace," Mass INC, February 2010,

limitations exist on the availability of comparison indicators for educational quality that help families balance the increased risks associated with financing college.

Though the HEA does not enumerate individual educational quality indicators that students and families would need in order to properly assess the value of college, it does stipulate that vocationally oriented programs must prepare students for "gainful employment in a recognized occupation." While institutions in all sectors offer programs that are subject to this requirement, for-profit institutions represent a disproportionately large share of programs that must meet this standard, as it appears in the HEA. According to the Department's analysis of data from the Integrated Postsecondary Education Data System (IPEDS), for-profit institutions represent 7 percent of higher education programs nationally and 12 percent of students enrolled in postsecondary education. But for-profit institutions account for 46 percent of students enrolled in programs that would be subject to the final debt measures and for 38 percent of programs that would be subject to the final debt measures. Moreover, data collected by the Department and other organizations, which are detailed below, highlight a number of issues that suggest many programs at for-profit institutions are not providing students with training leading to gainful employment in a recognized occupation, leaving them with debts they cannot afford and poor employment prospects. These issues include: Greater relative costs; high default rates that lead to significantly deleterious effects on borrowers; low completion and retention rates; and high-pressure sales and marketing tactics and a lack of access to information that deprive potential students of the opportunity to make thoughtful decisions.

Though for-profit institutions are a diverse, innovative, and fast-growing group of institutions that typically offer flexible course schedules and online programs that serve nontraditional students, they generally charge higher tuitions than their public and private nonprofit counterparts. According to the College Board's 2010 Trends in College Pricing report, students attending for-profit institutions faced an average tuition and fee charge of $13,935—more than $6,300 higher than the average cost of tuition and fees at a public 4-year institution and over five times the cost of a public 2-year institution.[3] And even though for-profit institutions do not have to contend with the loss of tax revenue and growing budget deficits that have caused States to reduce support for public higher education and raise tuition, the average cost to attend a for-profit institution increased by $524 and $124 more than public 2- and 4-year institutions, respectively, from 2009–10 to 2010–11.

Not only do students attending for-profit institutions face higher tuition and fee charges, but on average they receive less grant assistance to lower their expenses. According to an analysis of the 2007–08 National Postsecondary Student Aid Study (NPSAS 2008) conducted by the National Center for Education Statistics (NCES), students attending for-profit institutions received on average just $3,200 in total grant aid, which includes Federal, State, local, institutional, and all other sources.[4] By contrast, students at 4-year public and private, nonprofit institutions on average received $5,200 and $10,200, respectively.

As a result of higher tuition and lower grant assistance, students are significantly more likely to assume debt in order to attend a for-profit institution than any other type of college or university. According to NPSAS, 91.6 percent of students at for-profit institutions borrowed to finance their education in 2007–08. By contrast, the sector with the next highest borrowing rate was at 4-year private nonprofit institutions, where 58.9 percent of students borrowed. At public 2- and 4-year institutions just 13.2 percent and 46.2 percent, respectively, of students borrowed. Not only do students at for-profit institutions borrow at a greater rate than their peers, on average, the amount they borrow is greater than all but one sector. Students at for-profit institutions on average borrowed $8,100 compared to $6,600 for students at public 4-year institutions and $4,100 for students at public 2-year institutions. That said, students attending private nonprofit 4-year institutions did borrow $1,000 more on average, but this fails to capture the fact that the most popular programs at proprietary institutions are typically closer in length to those offered at community colleges, rather than at 4-year universities.

Burdened with higher borrowing rates and larger debt levels, borrowers at for-profit institutions have worse repayment outcomes than their peers at other institutions. For the 2008 cohort year, 46 percent of the student loans (weighted in dollars) that are borrowed by students at 2-year for-profit institutions are expected to default over the life of the loan, compared to 16 percent across all types of institutions. Similarly, the Department's cohort default rate shows that for-profit institutions account for a disproportionate share of defaults. In the 2008 cohort, students at for-profit institutions represented just 12 percent of students, but they accounted for 26 percent of borrowers and over 46 percent of students who defaulted within three years of leaving school.[5] In fact, for-profit institutions produced a larger share of students who defaulted on their loans than the entire public sector of higher education combined.

Former students who cannot afford to repay their loans face very serious challenges. Discharging Federal student loans in bankruptcy is very rare, and the common consequences of default include large fees and interest charges; struggles to rent or buy a home, buy a car, or get a job; aggressive actions by collection agencies, including lawsuits and garnishment of wages; and the loss of tax refunds and even Social Security benefits. Collection costs can add 25 percent to the outstanding loan balance, borrowers are no longer entitled to any deferments or forbearances, and students may be ineligible for any additional student aid until they have reestablished a good repayment history.

Retention and graduation rates vary considerably among institutions and types of institutions. According to NPSAS data, just 27.8 percent of students at for-profit institutions who entered a bachelor's degree program in the 2003–04 academic year attained that credential by 2009; the figures at public and private nonprofit institutions were 62.3 percent and 69.0 percent, respectively.[6] Though students entering associate's degree programs at for-profit institutions earned that credential at a rate slightly above their peers at public sector institutions, even then, for every student who began at an associate's degree program at a for-profit institution and earned that credential, there were almost two others who had left with no degree to show for their time. As discussed more fully under the *Discussion of Costs and Benefits* heading, institutions with low repayment rates also have lower retention and graduation rates and higher default rates. These results are not surprising, as multiple research studies have demonstrated that program completion is one of the most predictive factors of whether or not a student will default on his or her loans.[7] This finding suggests that students who enrolled but did not graduate have lower income prospects than those who do. There are also a number of studies that have also found that borrowers with lower incomes are more likely to default than those with higher incomes.[8]

There is also evidence that for-profit institutions have engaged in high-pressure or deceptive sales tactics. In recent years, evidence surfaced about some for-profit institutions illegally paying their representatives bonuses or commissions based upon the number of students they recruit or enroll. The Government Accountability Office and other investigators have also found evidence of high-pressure

http://www.massinc.org/~/media/Files/Mass%20Inc/Research/Executive%20Summary%20PDF%20files/report_ES.ashx.

[3] College Board, "Tuition and Fee and Room and Board Charges, 2010–11," available at *http://trends.collegeboard.org/college_pricing/report_findings/indicator/Tuition_and_Fee_and_Room_and_Board_Charges_2010_11.*

[4] National Center for Education Statistics, "Trends in Student Financing of Undergraduate Education: Selected Years, 1995–96 to 2007–08," available at *http://nces.ed.gov/pubs2011/2011218.pdf,* Page 17.

[5] Department analysis of unduplicated headcount data from IPEDS and three-year cohort default rate information from the Office of Federal Student Aid.

[6] Analysis of NPSAS data using the PowerStats data analysis tool at *http://nces.ed.gov/datalab/powerstats/output.aspx.*

[7] For a review of research on the connection between program completion and default, see Jacob P.K. Gross, Osman Cekic, Don Hossler, and Nick Hillman, "What Matters in Student Loan Default: A Review of the Research Literature," Journal of Student Aid, Volume 39, No. 1, *http://www.nasfaa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=1312,* Page 7.

[8] Lance Lochner & Alexander Monge-Naranjo, Education and Default Incentives with Government Student Loan Programs, 2002; Robin McMillion, "Student Loan Default Literature Review," Texas Guaranty Agency, 2004.

and deceptive recruiting practices at for-profit institutions.[9]

Students enrolling in a postsecondary program often have limited information, little or no experience choosing among postsecondary programs, and asymmetric information relative to the educational institution. Studies indicate that these gaps in information sometimes lead to students and their families making suboptimal choices in their educational pursuits, including what institution to attend, how to weigh the costs and benefits of attending, and how to finance their postsecondary education.[10] The complexity of the choice structure falls short of allowing students and their families to appropriately weigh the costs and benefits of their educational decisions. In this environment, straightforward measures of a student's educational pursuits in relation to their educational outcomes would promote more optimal choices.

Executive Order 13563, Section 4, notes that "Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible." Consistent with this section of the Executive Order the Department is enhancing the information available to prospective and enrolled students through both these final regulations and earlier regulations released last year. The Department began with efforts to help students make good choices, including disclosure requirements, the provision of information, and warnings. On October 29, 2010, the Department published regulations (75 FR 66832) (Program Integrity Issues final regulations) requiring institutions with programs that prepare students for gainful employment in a recognized occupation to disclose key performance information on their Web site and in promotional materials to prospective students. The required elements include the on-time completion rate, placement rate, median loan debt, program cost, and other information. The Department is developing a disclosure form with the benefit of public comment.

In addition, subject to § 668.7(g)(6) as established by these regulations, the Secretary may disseminate the final debt measures calculated under these regulations at any time and in any manner and form. The information provided in the repayment rate, graduate earnings, and the debt-to-earnings ratio is currently unavailable to most students from any source. The Department is considering steps to provide these metrics and other key indicators to facilitate access to the information and the comparison of programs.

Another strategy to improve decision-making is the requirement that failing programs provide debt warnings to prospective and enrolled students under § 668.7(j) of these final regulations. After a program fails the minimum standards one time, the institution must alert prospective and enrolled students that the program has failed, explain the debt measures, show the amount by which the program did not meet the minimum standards, and describe any steps the institution plans to take to improve the program's performance under the debt measures. After a program fails the minimum standards in two consecutive fiscal years (FY) or in two of the three most recent FYs—and thus is one year away from a potential loss of eligibility—the institution must provide prospective and enrolled students with the same information as well as its plans in response to the second failure, including any plans to discontinue the program, the risks for students if the program loses title IV, HEA eligibility, the resources available to students to research other educational options, and a clear and conspicuous statement that a student who enrolls or continues to enroll in the program should expect to have difficulty repaying his or her student loans.

Despite the efforts described above, the Department recognizes that information alone is insufficient to ensure that students are well served by their educational programs. Exacerbating these challenges is a failure to align institutional incentives with student success because the amount of aid students receive is based upon their enrollment. While loan defaults cost students and taxpayers, generally there are no consequences for institutions (except in the rare instances where at least 25 percent of their students default within two years of entering repayment for three consecutive years).[11] Recognizing students' challenges in choosing among available programs and the poor alignment of incentives, the Department is setting minimum performance standards for gainful employment programs receiving Federal funding.

To provide an additional layer of protection for students and taxpayers and ensure that institutions consider the affordability of the loans provided to their students, the Department is defining a set of measures that identifies the lowest performing programs in terms of the ability of students to repay their student loan debt. The repayment rate threshold and the debt-to-earnings ratios set minimum standards and are designed to allow programs an opportunity to improve before losing title IV, HEA eligibility.

II. Summary of Changes From the NPRM

Definition of a Program

In response to uncertainty concerning the definition of a program, the Department has clarified that a program would be defined by the combination of the six-digit Office of Postsecondary Education ID (OPEID), six-digit Classification of Instructional Programs (CIP) code, and credential level. A program offered at multiple locations reporting under the same six-digit OPEID would be evaluated as one program, and the credential levels to be considered are undergraduate certificate, associate's degree, bachelor's degree, post-baccalaureate certificate, master's degree, doctoral degree, and first-professional degree.

To estimate the number of programs for this analysis, the Department identified the six-digit CIP code and credential combinations for which awards were granted at each institution in the IPEDS data set generated for the final regulations. For the approximately 92 institutions that did not have program information available, the average number of regulated programs per institution for their sector was applied.

Small Numbers Provision

The small numbers provision finalized in § 668.7(d) requires at least 30 completers in the evaluation pool for the debt-to-earnings measure and at least 30 borrowers entering repayment in the evaluation period for calculation of the repayment rate in order to determine whether a program satisfies the debt measures. Under the NPRM, the treatment of programs with a small number of completers was not fully determined. Under the final regulations, programs that do not meet the minimum threshold of 30 completers in the 2YP or the 2YP–R will be evaluated for a four-year period consisting of years three to six in repayment (4YP) or years six to nine in repayment (4YP–R). Programs that do not meet the 30 completer or borrower requirement in the 4YP or 4YP–R will not be evaluated for ineligibility. Ultimately, if there are insufficient observations, we will not assess an institution's performance against the debt measures. Table 1 summarizes the estimated number of total and regulated programs by sector and the application of the small numbers provision.

[9] U.S. Government Accountability Office, "For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices," GAO–10–948T, available at *http://www.gao.gov/products/GAO-10-948T.*

[10] Bridget Terry Long, "Grading Higher Education," Center for American Progress, December 2010, *http://www.americanprogress.org/issues/2010/12/pdf/longpaper.pdf.*

[11] In 2014, the two-year cohort default rate will be replaced with a three-year cohort default rate.

Table 1: Gainful Employment Programs by Sector and Size

	Total Programs	Gainful Employment Programs	Gainful Employment Programs Exempted by Small Numbers Provision*	Gainful Employment Programs Subject to Debt Measures**		
				Number of Programs	Number of Students	Share of Enrollment in All Gainful Employment Programs
4-year Institutions						
Public	59,367	4,943	3,644	1,299	271,126	84%
Private Nonprofit	60,123	4,400	3,548	851	142,716	85%
Private For-profit	4,246	4,243	1,902	2,341	2,441,217	98%
2-year Institutions						
Public	59,922	30,232	20,684	9,548	3,367,772	87%
Private Nonprofit	903	394	187	207	26,913	94%
Private For-profit	4,762	4,754	1,929	2,825	677,823	97%
Less-than-2-year Institutions						
Public	2,061	2,043	1,013	1,030	108,619	95%
Private Nonprofit	305	279	101	177	35,233	98%
Private For-profit	4,126	4,117	1,347	2,770	643,925	99%
Total	195,816	55,405	34,356	21,049	7,715,344	

*Defined as programs with 30 or fewer completers or students entering repayment in a four-year period.
**Programs that had more than 30 completers and students entering repayment in a four-year period.
Source: National Student Loan Data System (NSLDS) and the Integrated Postsecondary Education Data System (IPEDS).

This small numbers provision is designed to address the greater risk of statistical fluctuation in measuring the performance of programs with small numbers of borrowers or completers, the reduced risk to students or taxpayers posed by these programs, and the need to protect the privacy of individual student borrowers. While the 30 completer and borrower standards remove a number of programs from possible ineligibility under the debt measures, they reduce the chance that the performance of one or two borrowers could result in large variability in a program's performance on the debt measures from year to year. Additionally, while the percentage of programs affected by the small numbers provision is high, especially at 4-year institutions, the remaining regulated programs still represent approximately 92 percent of all students enrolled in gainful employment programs.

Program Eligibility for Continued Funding

Under § 668.7(i), a failing program becomes ineligible after failing the minimum standards for three out of the last four most recently completed FYs—a change from the proposed regulations in which a program became ineligible after failing the minimum standards in one year. Whenever that occurs, the Department notifies the institution that the program is ineligible and that the institution may no longer disburse title IV, HEA program funds to students enrolled in or attending that program for any payment period that begins after the date of the Department's notice, except as permitted using the procedures in 34 CFR 668.26(d). This is a change from the proposed regulations, which allowed institutions to disburse title IV, HEA program funds to students already enrolled in programs for an additional year beyond the payment period in which the notice was received.

Repayment Rate Thresholds

Instead of the three-tiered approach proposed in the NPRM that would have established a restricted zone for programs with repayment rates of at least 35 percent but less than 45 percent, the regulations establish a single, 35 percent repayment rate threshold for eligibility.

Repayment Rate Evaluated Cohorts

The repayment rate calculated for the NPRM evaluated borrowers one to four years into repayment. For most programs, the final regulations will evaluate borrowers three to four years into repayment, so the rate calculated with FY 2012 data and released in 2013 will be based on borrowers who entered repayment in FYs 2008 and 2009. For a program whose students are required to complete a medical or dental internship or residency, a two-year period is the sixth and seventh FYs (2YP–R) prior to the most recently completed FY for which the repayment rates are calculated. For example, if the most recently completed FY is 2012, the 2YP–R is FYs 2005 and 2006. Finally, to provide an alternative for institutions that take immediate steps to improve a program's loan repayment rate, we will calculate the repayment rate based on a two-year period (2YP–A) that includes loans for borrowers who entered repayment during the first and second FYs prior to the current FY. These programs will be evaluated based on the repayment rate from the 2YP or 2YP–A, whichever is higher.

Repayment Rate Balance Comparison

The total balance (principal plus interest) of a borrower's loans associated with a program will be evaluated for the borrower's inclusion in the numerator of the repayment rate calculation instead of the approach described in the NPRM of using only the principal balance.

Borrowers in Alternative Repayment Plans

The final regulations limit the dollar amount of loans in negative amortization or for which the borrower is paying accrued interest only that will be included in the numerator as Original Outstanding Principal Balance (OOPB) of Payments-Made Loans (PML) to no more than 3 percent of the total

amount of OOPB in the denominator of the ratio, instead of the approach described in the NPRM. For the loans associated with a particular program at an institution for which the Department has actual data on borrower repayment plans and scheduled payment amounts, that data will be used to calculate the amount to be included in the OOPB of PML. For programs at institutions for which the Department does not yet have sufficient actual institutional data on a program's borrowers because the loans are not held and serviced by the Department, 3 percent of the OOPB of PML will be included in the numerator. The Department may increase the 3 percent limitation through a notice published in the **Federal Register** if borrowers increase their reliance on interest-only or negative amortization loans over time, except that the limitation may not exceed the estimated percent of all outstanding Federal student loan dollars that are interest-only or negative amortization loans.

Consolidation Loans of Students at Post-Baccalaureate Programs

When calculating the repayment rate for post-baccalaureate programs, we will consider a borrower with a consolidation loan to be successfully repaying his or her loans if the outstanding balance does not increase over the course of the most recently completed FY.

Data Corrections for Repayment Rates

No later than 45 days after the Secretary issues the draft loan repayment rate for a program, in accordance with procedures established by the Secretary, an institution may challenge the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate by submitting evidence showing that the borrower loan data is inaccurate. An institution may also challenge the accuracy of the list of borrowers included in the applicable two- or four-year period used to calculate the draft loan prepayment rate by submitting evidence showing that a borrower should be included on or removed from the list or correcting or updating the identity information provided for a borrower on the list, such as name, Social Security Number, or date of birth. If the information provided by the institution through the data correction process is accurate, the Secretary will use the corrected information to recalculate the repayment rate for the program. The Secretary notifies an institution of any draft results that are not challenged, are recalculated, or are unsuccessfully challenged under the data correction process described above. These results become the final repayment rates for the program.

Debt-to-Earnings Ratios Evaluated Cohorts

The debt-to-earnings ratios will now be calculated based on program completers three to four years after completion. For example, if the most recently completed FY is 2012, the 2YP is FYs 2008 and 2009. For a program whose students are required to complete a medical or dental internship or residency, a two-year period is the sixth and seventh FYs (2YP–R) prior to the most recently completed FY for which the debt measures are calculated. For example, if the most recently completed FY is 2012, the 2YP–R is FYs 2005 and 2006.

Payment Amortization

Under the proposed regulations, a 10-year amortization schedule would be used to calculate the payment associated with the program's median debt. Under the final regulations, the amortization schedule will be 10 years for certificates and associate's degrees, 15 years for bachelor's and master's degrees, and 20 years for first-professional and doctoral degrees.

Mean or Median Earnings

Both measures will be obtained for programs' pools of completers and the higher figure will be used in evaluation of the program.

Debt Limited to Tuition and Fees

Institutions will have the option to submit the tuition and fees charged for each student in a gainful employment program. Student debt included in the calculation of the program's median debt will be limited to that used to pay tuition and fees.

Data Corrections and Challenges for Debt-to-Earnings Ratios

Before issuing the draft results of the debt-to-earnings ratios for a program, the Secretary provides a list to an institution of the students that will be included in the applicable two- or four-year period for calculating the ratios. No later than 30 days after the date the Secretary provides the list to the institution, in accordance with procedures established by the Secretary, the institution may provide evidence showing that a student should be included on or removed from the list, or correct or update the identity information provided for a student on the list, such as name, Social Security Number, or date of birth. After the 30-day correction period, the institution may no longer challenge the accuracy of the students included on the list or update the identity information of those students. If the updated information is accurate, it is used to create a final list of students that the Secretary submits to SSA. The Secretary calculates the draft debt-to-earnings ratios based on the mean and median earnings provided by SSA for the students on the final list.

No later than 45 days after the draft debt-to-earnings results have been issued, an institution may challenge the accuracy of the median loan debt for the program that was used for the numerator of the draft debt-to-earnings ratios by submitting evidence showing the program's median loan debt is inaccurate. An institution may not challenge the accuracy of the mean or median annual earnings the Secretary obtained from SSA to calculate the draft debt-to-earnings ratios for the program. This limitation is a practical implication of using privacy-protected SSA data, as the Department will not receive individual student earnings data. But institutions will have the ability to challenge the list of students sent over to SSA for earnings information and may also use alternative reliable earnings information, including use of state data, survey data, or, during a transition period, Bureau of Labor Statistics (BLS) data so long as the measures chosen meet the requirements outlined in § 668.7(g).

In general, the Secretary uses the corrected information obtained through the challenges to the draft results to recalculate the debt-to-earnings ratios for the program. For a failing program, if SSA is unable to include in its calculation of the mean and median earnings for the program one or more students on the list finalized under the 30-day data correction process, the Secretary adjusts the median loan debt by removing the highest loan debt associated with the corresponding number of students on the list. For example, if SSA is unable to include three students in its calculations, the Secretary removes the loan debt for the same number of students on the list that had the highest loan debt. The Secretary recalculates the debt-to-earnings ratios for the program based on the adjusted median loan debt.

The Secretary notifies an institution of any draft results that are not challenged, are recalculated, or are unsuccessfully challenged under the challenge process described above. These results become the final debt-to-earnings ratios for the program.

Proprietary Institutions Under Common Ownership or Control

Loan debt does not include any loan debt incurred by the student for attendance in programs at other institutions, except if the current institution and the other institutions share common ownership or control. For these final regulations, we clarify that the exception is limited to proprietary institutions, which have different ownership structures than either private nonprofit institutions or public institutions. We generally do not include educational loan debt from institutions students previously attended because those students made individual decisions to enroll at other institutions where they completed a program. Companies that own more than one institution offering similar programs might have an incentive under these regulations to shift students between those institutions to shield some portion of the educational loan debt from the debt included in the debt measures under these final regulations. This provision will negate that incentive by permitting the Department to include debt from institutions under common ownership in the analysis. These regulations provide that a determination of common ownership or control will be made using the definitions and concepts that the Department routinely uses to review changes of ownership, financial responsibility determinations, and identifying past performance liabilities at institutions.

Summary of Results for the Final Regulations

Table 2 represents estimated changes to the number of ineligible programs and the number of students in ineligible programs. Under the final regulations, we allow institutions an opportunity to improve after initially failing both measures. As a result, when combined with the small numbers provision, results in approximately 8 percent of programs initially failing both measures,

but not losing Title IV, HEA eligibility. Ultimately, under the final regulations we estimate that approximately 2 percent of programs will be deemed ineligible and approximately 1.3 percent of students will be in those ineligible programs. The information presented below for the final regulations represents the results at the end of a four-year period and the percent of students in ineligible programs described below are net of those who dropped out or transferred the first two times the program failed the debt measures.

Table 2: Summary of Estimated Effects of the Final Regulations, 2012-2015*

	Final Regulations, Excluding Small Programs	Final Regulations, All Programs	NRPM
Percentage of Programs:			
Failing at least Once	8%	3%	5%
Losing Eligibility	2%	1%	5%
Percentage of Students**			
In a Program that Fails at least once	8%	7%	8%
In a Program that loses eligibility	1%***	1%***	8%

*Percentages calculated at end of four-year cycle.

** Estimate based on 12month headcount.

*** Based on 2015 enrollments. Does not include those who dropped out or transferred from programs after the first two failures.

Source: NSLDS, IPEDS, Beginning Postsecondary Student Longitudinal Study 2004/09 (BPS: 04/09), National Postsecondary Student Aid Study: 2008 (NPSAS: 2008), and the Missouri Department of Higher Education (MDHE).

III. NPRM Comment Review

Student Demographics

Several commenters discussed the potential effect of the regulations on low-income, minority, female, and first-generation students. As indicated in the NPRM and the submitted comments, the average share of Pell Grant recipients and minority students is higher in the for-profit sector than the public and private nonprofit sectors. Many supporters of the regulations point to the high concentration of disadvantaged students in gainful employment programs in certain sectors as a reason the regulations are needed to protect disadvantaged students. Conversely, many opponents of the regulations believe access to education for disadvantaged students would be threatened by the loss of eligibility of programs serving them.

Several commenters observed a link between the demographics of an institution's student population and either its repayment rate or debt-to-earnings ratios. Some commenters believed that the debt measures are primarily determined by the characteristics of a program's student body, rather than the program's performance. Others said the debt-to-earnings ratio penalizes programs serving disadvantaged students because these individuals—particularly minority and female students—earn less than their white and male counterparts. They argued that access would be negatively affected because the proposed thresholds would act as a disincentive to admitting disadvantaged students. Other commenters acknowledged that other factors contribute to institutions' repayment rate performance, but urged the Department to review the effect of the regulations on low-income, first-generation, and minority students.

The Department does not believe that enrolling large numbers of students from disadvantaged backgrounds legitimizes leaving those students with unaffordable debts and poor employment prospects. As described in the preamble, the debt measures identify programs where (1) typical student debt service exceeds recommended levels by more than 50 percent, and (2) fewer than 35 percent of students are paying down the balance of their loans (with consideration given to the variation in amounts borrowed). Programs that help disadvantaged students earn credentials and well-paying jobs are performing a valuable service, but programs that routinely leave their students with debts they cannot afford to repay are not.

Moreover, many programs across the country succeed in serving students from the most challenging backgrounds. As explained in further detail below, student body characteristics explain a small share of the variation in repayment rates among institutions. Even among programs serving the highest proportions of disadvantaged students, many have repayment rates above 35 percent. As a result, all students have choices among many programs that are capable of serving them well. The following paragraphs provide greater detail on the interaction between demographics and institutions' repayment rates and debt-to-earnings ratios.

Repayment Rates and Demographics

Some commenters described very high correlations between student body demographics and repayment rates. In particular, several commenters cited one analysis of the NPRM, which suggested that the repayment rate specified in the NPRM was highly correlated with the percentage of students receiving Pell Grants.

This analysis, which used a regression model based on the repayment rate specified in the NPRM, demonstrated a nearly linear relationship between the make-up of an institution's student body and its repayment rate. However, because this analysis reduces the data for thousands of institutions into quintiles, it failed to capture the amount of variation in repayment rates among institutions serving a similar group of students. As described below, when this variation is taken into account, the data

reveal a much lower correlation between an institution's concentration of students receiving Pell Grants and its repayment rate. Moreover, Table 3 demonstrates that most institutions have repayment rates that exceed 35 percent, including many serving large numbers of Pell Grant recipients.

Table 3: Share of Institutions Passing or Failing Repayment Rate Test, by Pell Grant Quintile

	Pell Concentration Quintile				
	Lowest	Second Lowest	Middle	Second Highest	Highest
Share Passing	**79%**	**82%**	**82%**	**75%**	**48%**
Share Failing	**21%**	**18%**	**18%**	**25%**	**52%**
Max Pell Concentration	14%	22%	31%	48%	80%

Source: NSLDS and IPEDS.

To examine the relationship between repayment rates and student body demographics more carefully, the Department performed a series of multivariate regression analyses, analyzing each institutional sector separately. The dependent (predicted) variable in each analysis was repayment rate. The independent (predictive) variables in each analysis were informed by comments received through the rule-making process, and included:

Student Body Characteristics

(1) Percent of student body identified as racial/ethnic minorities,
(2) Percent of student body receiving Pell Grants,
(3) Percent of student body identified as female,
(4) Percent of student body identified as being under 25 years of age.

Institutional Characteristics—Resources

(5) Per capita instructional expenses,
(6) Per capital core expenses,
(7) Growth rate, 2006 to 2009.

Institutional Characteristics—Graduation Rate

(8) Graduation rate.

Because of the variables selected, only institutions identified as enrolling undergraduate students were included in the regression analyses. Other factors, such as missing data on predictors, also excluded some institutions from analysis.

Summary of Results of Regression

As noted above nine separate, sector-wise models were run to explore the relationship between repayment rates and student- and institution-level factors. Models ran from being wholly non-predictive (i.e., less-than-2-year public institutions) to explaining more than half of the potential variance in repayment rates (i.e., 72 percent for 4-year public institutions; 57 percent for 2-year nonprofit institutions; and 56 percent for 4-year nonprofit institutions). The modeling is summarized below. For each sector, three facets of the modeling is detailed: (1) Whether the full model was statistically significant overall and the proportion of variance in repayment rate the model could explain; (2) the proportion of variance explained by the percent of an institution's student body receiving Pell Grants when that variable was the sole predictor in the model; and (3) the proportion of variance explained by the percent of an institution's student body identified as a racial/ethnic minority, when that variable was the sole predictor in the model.

Table 4: Summary of Multivariate Regression Analyses

	Full Model		Pell Only		Race/Ethnicity Only	
	Predictive?	Percent of Total Variance Explained	Predictive?	Percent of Total Variance Explained	Predictive?	Percent of Total Variance Explained
4-year Institutions						
Public	Yes	72	Yes	49	No	
Private Nonprofit	Yes	56	Yes	41	Yes	1
Private For-profit	Yes	22	Yes	7	No	
2-year Institutions						
Public	Yes	13	Yes	3	Yes	1
Private Nonprofit	Yes	57	No	39	Yes	13
Private For-profit	Yes	44	Yes	26	No	
Less-than-2-year Institutions						
Public	No		No		Yes	4
Private Nonprofit	Yes	39	Yes	29	No	
Private For-profit	Yes	27	Yes	16	No	
Overall						
All Institutions	Yes	46	Yes	23	Yes	1

Source: NSLDS and IPEDS.

For the nine models, the findings suggest that the relationship between repayment, racial/ethnic composition, and Pell Grant receipt varies considerably from sector to sector. For example, the predictive power of Pell Grants varied widely when entered as the sole variable in the model, from 3.3 percent (2-year public institutions) to 49.2 percent (4-year public institutions). Similarly, in four of the nine models, the proportion of an institution's student body that was represented by students identified as racial/ethnic minorities was a statistically significant predictor. However, in no case did it explain more than approximately 13 percent of variance in repayment rates.

Additional context for the results detailed below comes from considering the "scope" of the proposed regulations, in particular the types of institutions likely to offer gainful employment programs. For example, although Pell Grant receipt explained approximately 26 percent of the variance in repayment rates at 2-year private for-profit institutions, that sector enrolled only 3 percent of all students in postsecondary education in 2008–09.[12] Student indebtedness at exit, another key component to the proposed regulation, is discussed in more detail in the next section of this filing (see *Debt-to-Earnings Ratios and Demographics*).

Results for 4-Year Public Institutions

In academic year 2008–09, four-year public institutions enrolled 9.0 million students, approximately 33 percent of all students enrolled in postsecondary education (46 percent of all students enrolled in public institutions). The full regression model explained 72 percent of the variance in repayment rate, with the strongest single predictor being the percentage of students enrolled who received a Pell Grant.[13] When used as a sole predictor, the percentage of Pell Grant recipients explained 49 percent of the variance in repayment rate. However, when used as a sole predictor, the percentage of Pell Grant recipients was not a statistically significant predictor.

Results for 4-Year Private Nonprofit Institutions

In academic year 2008–09, 4-year private nonprofit institutions enrolled 4.5 million students, approximately 16 percent of all students enrolled in postsecondary education (98 percent of all students enrolled in private nonprofit institutions). The full regression model explained 56 percent of the variance in repayment rate, and, as was the case among 4-year public institutions, the strongest single predictor in the model was the percentage of students who received a Pell Grant (which explained 41 percent of the variance in repayment rates when used as a standalone predictor). Similarly, the racial/ethnic composition of an institution's student body was predictive of repayment rates for 4-year nonprofit institutions, but as a sole predictor it explained less than 2 percent of variance in repayment rates.

Results for 4-Year Private For-Profit Institutions

In academic year 2008–09, 4-year private for-profit institutions enrolled 2.1 million students, approximately 8 percent of all students enrolled in postsecondary education (82 percent of all students enrolled in for-profit institutions). Approximately 22 percent of the variance in repayment rates among 4-year private for-profit institutions was explained by the full regression model. Unlike other 4-year institutions, the most predictive variable in the model was the percentage of undergraduate enrollees who were under 25 years of age. The racial/ethnic composition of an institution's student body was not a statistically significant predictor when used alone to model repayment rates, and, although the percentage of students receiving Pell Grants was predictive, it explained only 7 percent of the variance in repayment rates.

Results for 2-Year Public Institutions

In academic year 2008–09, 2-year public institutions enrolled 10.5 million students, approximately 38 percent of all students enrolled in postsecondary education. Our model predicted 13 percent of the variance in repayment rates found at 2-year public institutions. While the share of racial/ethnic minority enrollment and Pell Grant receipt were both predictive when entered in their own models, both explained relatively little variance (around 1 percent and 3 percent, respectively).

[12] Enrollment figures here and in the following sections describing the model can be found in See Table 10 in Knapp, L. (2010). Postsecondary Institutions and Price of Attendance in the United States: Fall 2009 and Degrees and Other Awards Conferred: 2008–09, and 12–Month Enrollment 2008–09 (NCES 2010–161). Washington, DC: U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics.

[13] Based upon the standardized metric (i.e., beta) regression coefficient.

Results for 2-year private nonprofit institutions

In academic year 2008–09, 2-year private nonprofit institutions enrolled 59,000 students, less than 1 percent of all students enrolled in postsecondary education. About 57 percent of the variance in repayment rates at 2-year private nonprofit institutions was explained by our model. Net of other variables in the model, the percentage of students receiving Pell Grants was the strongest single predictor of repayment rates. When used as the only predictor of repayment rates, racial/ethnic minority share of enrollment predicted approximately 13 percent of the potential variance. The percentage of the student body receiving Pell Grants explained 39 percent of the variance in repayment rates when used as the sole predictor.

Results for 2-year private for-profit institutions

In academic year 2008–09, 2-year private for-profit institutions enrolled 674,000 students, approximately 3 percent of all students enrolled in postsecondary education. Our regression model explained 44 percent of the variance found in repayment rates at 2-year private for-profit institutions. Pell Grant receipt was the single strongest predictor in the full model and, when used as a sole predictor, explained 26 percent of the variance in repayment rates. Share of racial/ethnic minority enrollment was not a statistically significant predictor when used in its own model to predict repayment rates.

Results for less-than-2-year public institutions

In academic year 2008–09, less-than-2-year public institutions enrolled 107,000 students, less than 1 percent of all students enrolled in postsecondary education. Overall, our regression model was not statistically significant for less-than-2-year public institutions. When used as the only predictor of repayment rates, share of racial/ethnic minority enrollment was statistically significant, explaining approximately 4 percent of the potential variance. The share of students receiving Pell grants was not statistically significant in its stand alone model.

Results for less-than-2-year private nonprofit institutions

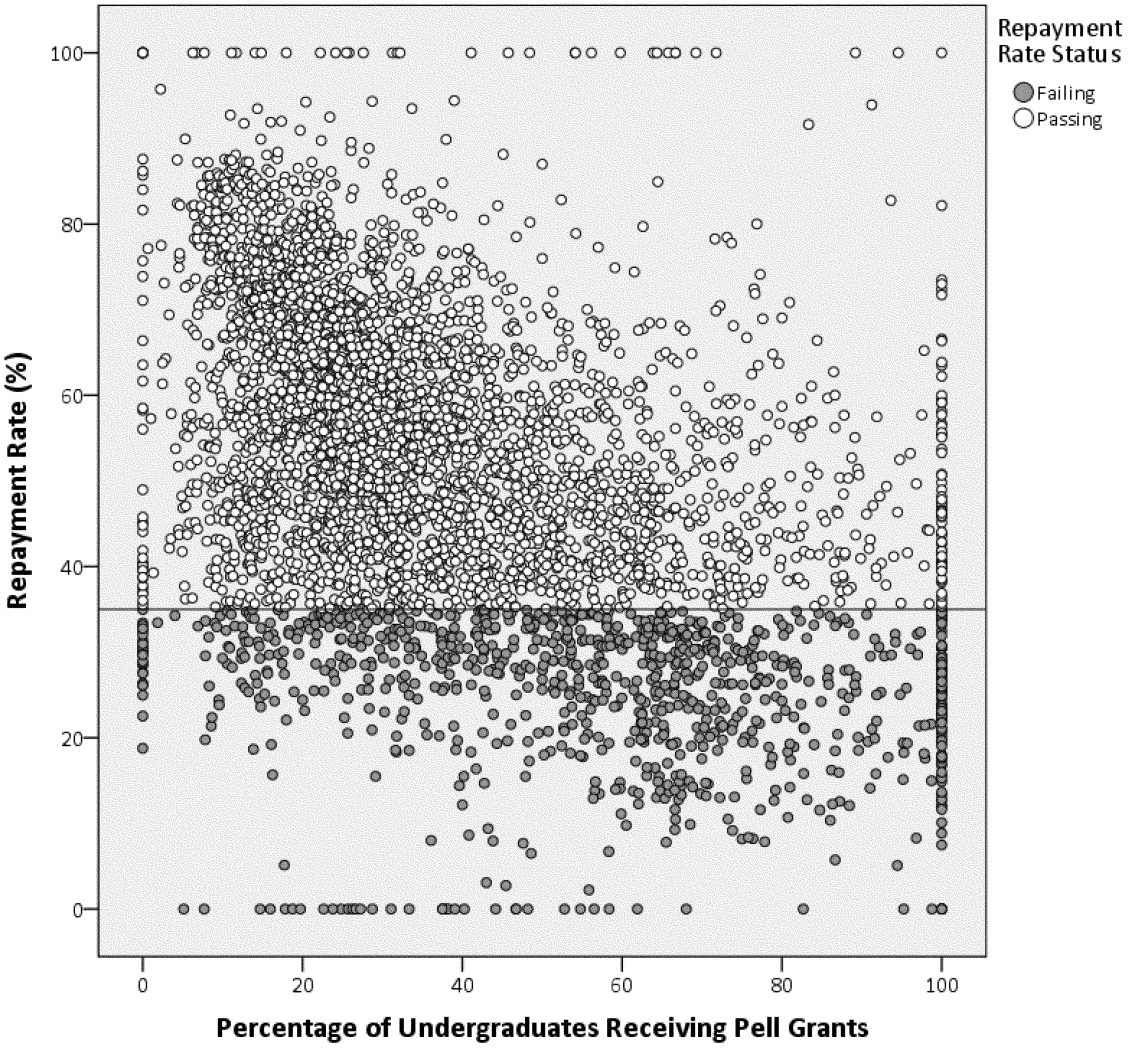
In academic year 2008–09, *less-than-2-year private nonprofit* institutions enrolled 24,000 students, less than 1 percent of all students enrolled in postsecondary education.[2] Our regression model explained 39 percent of the variance in repayment rates, with the share of students receiving Pell Grants being the single strongest predictor in the full model. When used as the sole predictor of repayment rates, the percentage of students receiving Pell Grants explained approximately 29 percent of the potential variance. Share of racial/ethnic minority enrollment was not a statistically significant predictor.

Results for Less-Than-2-Year Private For-Profit Institutions

In academic year 2008–09, *less-than-2-year private for-profit* institutions enrolled 466,000 students, approximately 2 percent of all students enrolled in postsecondary education. Approximately 27 percent of the variance noted in the repayment rates of less-than-2-year private for-profit institutions could be explained by our model. The strongest single predictor was the percentage of students receiving Pell Grants. In its stand alone model, the percentage of students receiving Pell Grants predicted 16 percent of the variability in repayment rates among these institutions. The percentage of students identified as racial/ethnic minorities was not statistically significant.

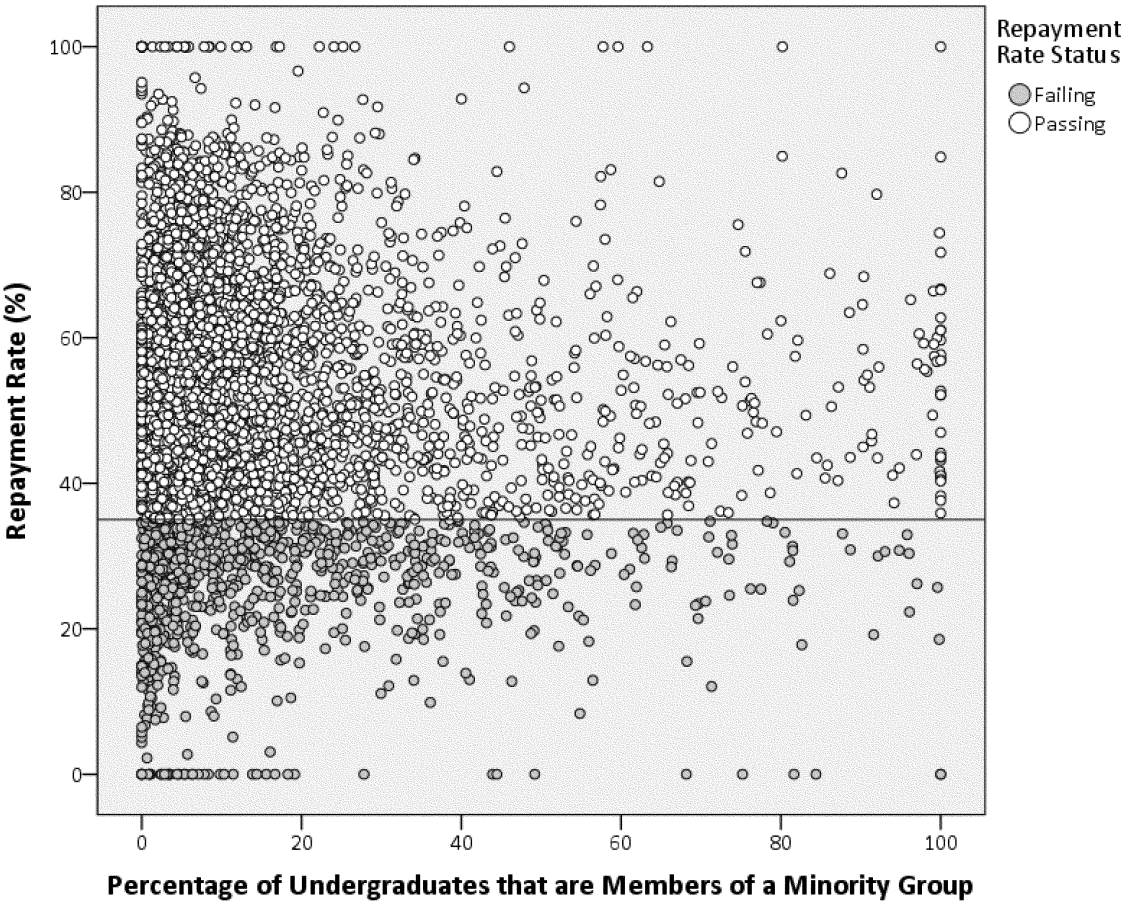
A visual representation, as seen in Chart A, more clearly illustrates that there is only a modest relationship between repayment rates and an institution's student demographics. As noted above, the percentage of students receiving Pell Grants explains 23 percent of the total variance in repayment rates. Chart B presents similar data on the relationship between the percentage of the students that are members of a minority group at an institution and its repayment rate. The percentage of the students that are members of a minority group explains 1 percent of the total variance in repayment rates.

Chart A: Repayment Rates by Pell Grant Recipient Concentration



Source: NSLDS and IPEDS.

Chart B: Repayment Rates by Minority Student Concentration



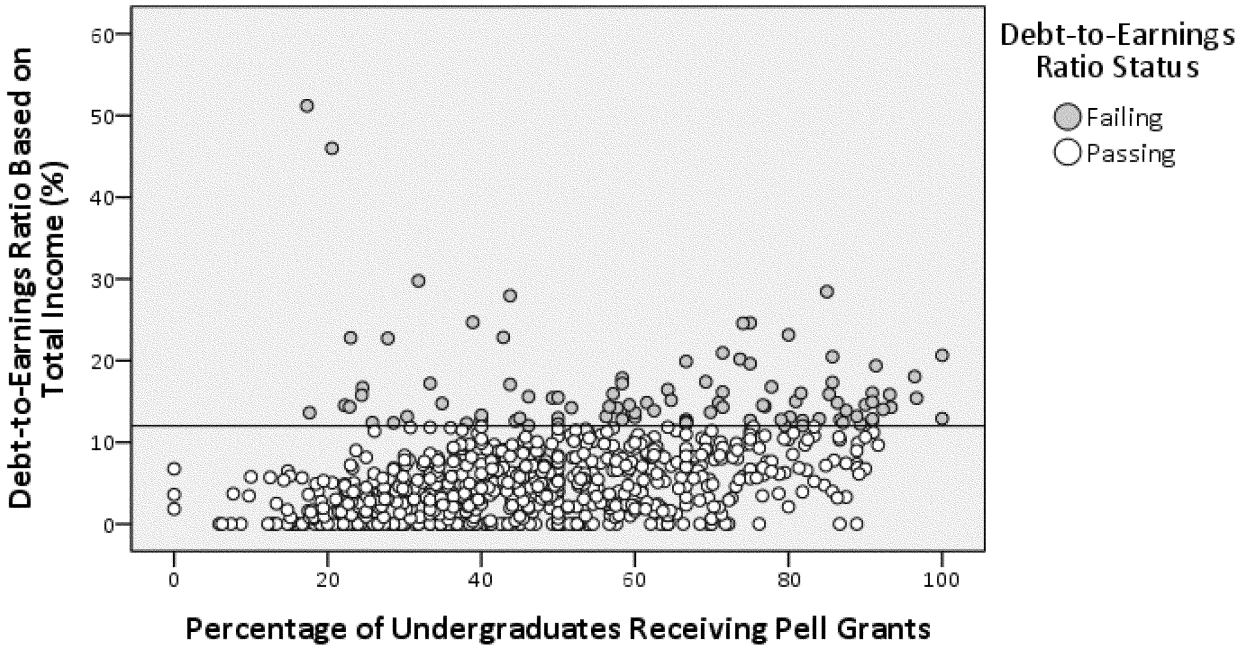
Source: NSLDS and IPEDS.

Debt-to-Earnings Ratios and Demographics

The Department also examined the implications of the debt-to-earnings ratio on students. Programs fail the debt-to-earnings ratio if the debts for the majority of students exceed both measures of affordability by at least 50 percent. While the Department recognizes that some groups may face greater obstacles in the labor market than others, we do not agree that the appropriate response to those obstacles is to accept that disadvantaged students will bear even higher debt burdens.

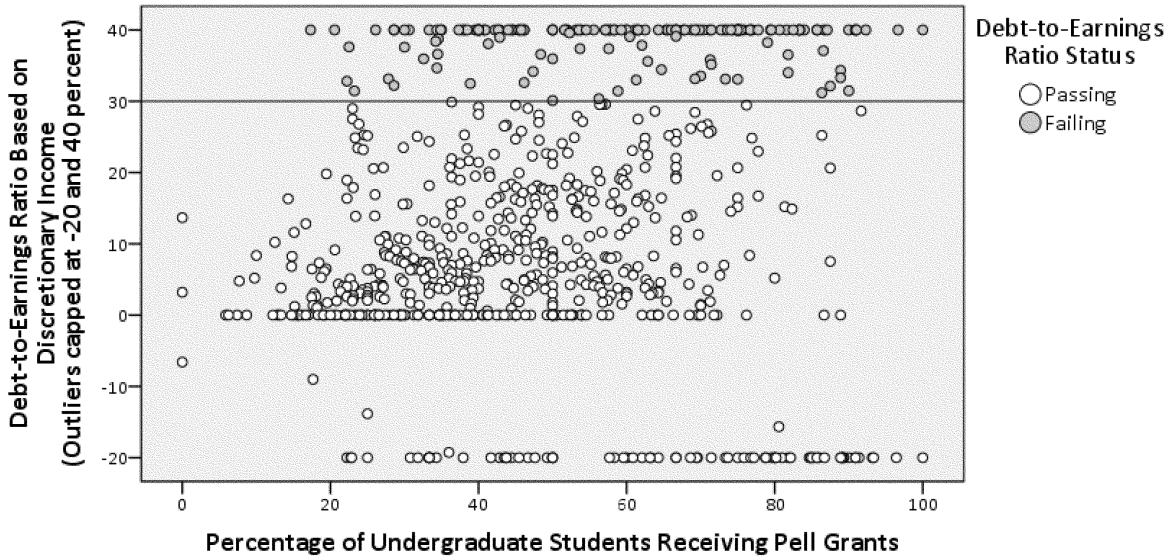
Moreover, similar to the repayment rate, earnings and debt data from the Missouri Department of Higher Education reveal a wide variation in performance on the debt-to-earnings ratio among programs serving similar groups of students. As shown in Chart C, many programs serving large numbers of Pell Grant recipients have debt-to-earnings ratios below 12 percent of total income or 30 percent of discretionary income. Each circle in the chart represents a program.

Chart C-1: Debt-to-earnings Ratios Based on Total Earnings, by Percentage of Students Receiving a Pell Grant



Source: MDHE and NSLDS.

Chart C-2: Debt-to-earnings Ratios Based on Discretionary Earnings, by Percentage of Students Receiving a Pell Grant



Source: MDHE and NSLDS.

Nor is it true that all low-income students will face higher debt-to-earnings ratios after graduation. While low-income students are more likely to borrow money for college, the amount of those loans is similar to those borrowed by their higher-income peers. As shown in Table 5, students who received a Pell Grant and those who did not typically graduate with similar levels of debt.

Table 5: Average Cumulative Student Loan Debt for 2007-08 Graduating Undergraduates, by Pell Grant Receipt and Sector

	Received Pell		Did Not Receive Pell	
	Average Debt	Percent of Students Who Borrow	Average Debt	Percent of Students Who Borrow
4-year Institutions				
Public	21,741	84	17,475	46
Nonprofit	28,435	90	26,277	58
For-Profit	24,735	99	24,346	93
2-year Institutions				
Public	11,253	56	9,164	24
Nonprofit	15,484	63	13,839	66
For-Profit	17,145	98	17,911	96
Less-than-2-year Institutitons				
Public	11,198	52	8,442	22
For-Profit	10,089	90	10,235	75

Source: NPSAS 2008.

Review of Submitted Analyses

Two comments written by economists included detailed alternative estimates of the impact of the regulations proposed in the NPRM. The first, submitted by Jonathan Guryan and Matthew Thompson of Charles River Associates, questioned whether the proposed regulations properly addressed problems they are attempting to solve and presented other ways to measure the returns to education.[14] The report also critiqued the cost estimates proposed in the NPRM, provided alternative numbers of the number of students and programs that would be affected, and provided some suggestions for how the regulations should be changed.

The Charles River Associates report argued that an analysis of earnings should focus on income gains over a longer time period because students take this into consideration when making cost/benefit decisions about whether to enroll in postsecondary education and whether to use loans to finance its cost. The report argues that it is appropriate to use longer periods to measure the benefits from schooling because research shows that the annual earnings benefit for each year of schooling is between 7 and 15 percent, meaning that a student could recapture the value of his or her education debt over time because of the greater earning power associated with each year of higher education. These alternative measurements are discussed in the *Alternatives Considered* section of this RIA.

The Charles River Associates report included its own estimate of the effects of the NPRM using data from member institutions from the Association of Private Sector Colleges and Universities (then known as the Career College Association), representing 308 institutions, 450 campuses, 10,000 programs, and 600,000 students. Student and loan level information was available based on the population included in the 2006, 2007, and 2008 Cohort Default Rate calculations. Adjustments were made based on IPEDS and data from the 2008 NPSAS, both conducted by the NCES, for students who did not take out any loans and for students who borrowed private loans in addition to Federal loans. The Charles River Associates report approximated the debt-to-earnings tests by using information on specific occupations from the Current Population Survey. It calculated repayment rates by using information about loans in repayment from the cohort default rate files provided by surveyed institutions.

The report's initial results found that 7.1 percent of the programs for which data were available would be ineligible under the proposed regulations, a designation that would affect 7.5 percent of students in the report's sample. After making some adjustments to estimated repayment rates so that they conformed more to the repayment rates released by the Department, the report revised its estimate to say that 8.8 percent of programs in its sample would be ineligible, affecting 13.0 percent of students. These findings are similar to the Department's estimates that under the proposed regulations 16 percent of for-profit programs would lose eligibility.

The report questioned the Department's estimates of the number of students that would leave postsecondary education altogether as a result of the regulations, without providing any data that would support alternative assumptions. Using different assumptions about the percentage of students that would drop out and whether any programs in the then-proposed restricted category would shut down, the report estimated that between 1.1 million and 2.4 million students would be impacted by the regulations over a 10-year period. The Department carefully considered the likely behavior of students enrolled in failing and ineligible program and is confident that it has adopted a reasonable set of assumptions. We have described the data and analysis we relied upon in the section of this RIA titled *Estimation of Effects on Students* under *Analysis of Final Regulations.*

Finally, the Charles River Associates report discussed the implications of "restricted" status, the regulations' impact on new programs, the regulations' potential impact on low-income students and members of racial and ethnic minorities, and several concerns about the implementation of the regulations. These comments are discussed in the *Analysis of Comments and Changes* section of the preamble and the section of this RIA titled *Student Demographics.*

In a second analysis, Roger Brinner of the Parthenon Group argued that the Department should have adjusted the Missouri sample data to account for debt level, income level, and repayment rate.[15] Using those adjustments, the study estimates that 30 percent of all students enrolled in programs subject to gainful employment regulations would be in ineligible programs, compared to the Department's estimate of 8 percent. The Parthenon Group study attributed the difference between its estimate and the Department's estimate to the Parthenon Group's inclusion of private student loan debt and students without any earnings in the debt-to-earnings calculation. The study relied upon a BLS estimate that 17 percent of students were out of the workforce the whole year and therefore had zero income, apparently based on the assumption that

[14] The Charles River Associates report may be found at: *http://www.regulations.gov/#!documentDetail;D=ED-2010-OPE-0012-13610.1.*

[15] Roger Brinner, The Parthenon Group, *Assessment of Missouri Estimate of Impact,* September 9, 2010, available at *http://www.regulations.gov/#!documentDetail;D=ED–2010–OPE–0012–12859.1.*

students completing career education programs were no more likely to be employed than other young adults.

In its analysis of the final regulations, the Department revised its estimation methodology to account for private student loan debt and graduates without earnings. The Federal debt in the data was adjusted to an estimated total debt for a program, including private loans, using NPSAS information by institutional sector for the 2007–08 year. The earnings amounts were adjusted to include 25 percent of exiters with zero earnings and to represent earnings three to four years into employment. These adjustments are also described in the section of this RIA titled *Analysis of Final Regulations.*

The Parthenon Group study also questioned the Department's estimates of the number of students who would decide to transfer or drop out after their program lost eligibility, asserting that for-profit and public institutions would face capacity constraints that would prevent more than about 60 percent (or 600,000) of the 1 million displaced students from reenrolling elsewhere. The Department does not agree with these pessimistic projections. For-profit institutions are capable of rapid growth. The sector has recently grown by hundreds of thousands of students a year, and its total enrollment continued to grow in the mid-1990s, even as hundreds of institutions lost student aid eligibility due to their cohort default rates. The Parthenon Group's conclusion that access would be constrained is dependent on its belief that a large number of students will leave their current program. Its estimate that existing programs could accommodate 600,000 additional students in a year, for example, would appear to support a conclusion that large numbers of students could switch programs before limits are reached.

Finally, the Parthenon Group study estimated that these 400,000 students would experience 15 percent lower income levels due to not having a postsecondary education, which would decrease government tax revenues by $400 million. Looking at student-to-employee ratios and economic modeling multipliers, the study further estimated that 95,000 employees would lose their jobs due to the 400,000 students leaving postsecondary education, and that those lost jobs would decrease government tax revenues by $2.9 billion. For students who would continue their educations at public and nonprofit schools, the study argued that it costs taxpayers more for students to attend public and private nonprofit schools than for-profit institutions. The study estimated that students transferring to the public and private nonprofit sectors would cost taxpayers $2 billion based upon other projected adjustments. While the final regulations differ in a number of significant respects from the proposal analyzed by the Parthenon Group, the Department has considered the approach and estimates in the study when formulating its own estimates of the impact of the final regulations on the number of college graduates, jobs, and government budgets. The economic consequences outlined in the analysis are dependent on the Parthenon Group's estimates of the number of programs that will lose eligibility and the number of students who will leave postsecondary education. Moreover, the analysis fails to consider the benefits to students, taxpayers, and the economy as a whole from better performing programs that are tied more closely to labor market demands, lead to lower debt levels, and typically achieve higher retention and graduation rates. The Department presents its view of the costs and benefits of the final regulations in the *Discussion of Costs and Benefits* section of this RIA.

IV. Analysis of Final Regulations

Data and Methodological Changes

The Department developed a set of data analysis tools to assist in developing the debt measures used in these regulations to define compliance with the gainful employment requirements for covered postsecondary education and training programs. Briefly, the Department examined two internal data sets that it controls— NSLDS, maintained by the Office of Federal Student Aid (FSA), and IPEDS, maintained by NCES. Additionally, the Department entered into a data sharing agreement with the Missouri Department of Higher Education (MDHE) that provided us with critical information aggregated at the program level—including work income—for certain persons who participated in identified postsecondary education and training programs in public and for-profit institutions in Missouri between 2006 and 2008.

The Department obtained from NSLDS the total number of borrowers who attended a particular institution and entered repayment in FY 2006 or 2007, and identified the borrowers in each group who had paid their loans in full or had made payments sufficient to reduce the outstanding balance on their loans through FY 2010.[16] We retrieved, for these borrowers, the school-level total loan balance upon entering repayment, and the school-level total balance of loans upon entering repayment for borrowers who paid their loans in full or made payments sufficient to reduce principal. We also retrieved information regarding borrowers who were repaying their loans under one of the income-sensitive repayment plans (e.g., income-contingent repayment (ICR), income-based repayment (IBR), and graduated plans). The Department conducted further analysis of the consolidation loans taken by those borrowers to attribute the loans that were consolidated to the respective institutions the borrower attended when the loans were made.

The Department extracted a series of data elements from IPEDS for use in the gainful employment analysis. Owing to the nature of IPEDS, all information was developed at the institutional level from data reported by the institutions themselves. The institution-specific information included enrollment, the number of Pell Grant recipients, identification of institutions that offered a single program of study (mono-line institutions), certain programmatic (based on CIP code) information, revenues, expenses, and graduation rates. The Department merged these two data sets to produce a single, institution-by-institution analysis file comprised of the data elements described in the preceding paragraph.

The MDHE provided information on individuals who exited education and training programs at public and private for-profit postsecondary institutions in the State between 2006 and 2008. These data were aggregated by program of study within institutions and include both education-related and wage data. Additional education-related data—provided by the Department from NSLDS—include the number of program exiters who had Federal student loan debt, were in repayment or default, and were Pell Grant recipients. These data also included mean and median student loan debt and Pell Grant amount for program exiters. Wage data included the number of exiters captured in the Missouri Department of Labor and Industrial Relations' Unemployment Insurance program (UI) database, and average annual wage and quartile distribution of annual wages for these exiters. In constructing this analysis file for the Department's use, MDHE employed a protocol that appropriately shielded personally identifiable information.

The characteristics of the individuals represented in the MDHE-developed database were generally comparable to the same characteristics of the U.S. population across several dimensions, including population demographics such as age; race/ethnicity; and enrollment in elementary, secondary, and postsecondary education; as well as income and race/ethnicity of persons attending public and for-profit postsecondary institutions. These comparisons can be found in Table F of the Regulatory Impact Analysis published with the NPRM. The comparisons, as well as other details regarding the MDHE-provided data set, can also be found in the document entitled, "Gainful Employment Analysis—Missouri Methodological Notes" available on the Department's Web site.[17]

The primary data set used to analyze the regulations consists of 5,474 institutions defined by a six-digit OPEID taken from IPEDS and available at the gainful employment Web site.[18] Key information available in this file includes enrollment, revenues, expenses, graduation rates, percentage of undergraduates with a Pell Grant, and other characteristics. Repayment rate information calculated from NSLDS was added to the IPEDS information through the OPEID and allowed institutions to be classified according to an initial year of repayment rate performance.

In matching the data sets, there were approximately 710 institutions where no repayment rate was generated, of which a little over 30 percent came from the private

[16] For an explanation of the NSLDS repayment rate query, please see the repayment rate calculation file available on the Department's gainful employment Web site, *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.*

[17] *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html*

[18] *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.*

for-profit less-than-2-year sector and another 29 percent came from public 2-year institutions. Many of these institutions did not participate in the loan programs during the period covered for this repayment rate calculation, and others may represent newer institutions in the IPEDS data or branches whose information has been captured under an aggregated OPEID. For the analysis, institutions with no repayment rate have been treated as eligible as they will not fail under the regulations. A second set of approximately 1,115 institutions appeared in the repayment rate file but not in the IPEDS data set. After accounting for foreign institutions, closed schools, and schools with changes in affiliation, approximately 145 institutions remained, of which 78 percent would have a repayment rate borrower count too small to be evaluated and thus could not fail under the regulations. The matching of repayment rates and IPEDS data was necessary for this analysis, but will not be required when program-level data is available as the regulations are implemented.

Adjustments to Missouri Data

In response to comments and changes in the regulations, the Department made some adjustments to the Missouri data that was used to provide some information on the relationship between a program's debt-to-earnings performance and the school's repayment rate performance. Specific adjustments were made to the data to better represent the regulations and are included in the data file available on the Department's gainful employment Web site.[19] The earnings amounts were adjusted to include 25 percent of exiters with zero earnings and to represent earnings three to four years into employment. The Federal debt in the data was adjusted to an estimated total debt for a program, including private loans, using sector-level information from NPSAS 2008. Data from NPSAS 2008 were also used to limit the debt to tuition and fees only. Finally, depending upon the award level associated with the program, a 10-, 15-, or 20-year amortization period was applied to calculate the payment to be evaluated. The relationship between repayment rates and debt performance in the Missouri data provides guidelines for the debt performance distribution described under the heading *Summary of the Model* of this RIA. The model, however, assigned a greater share of schools, programs, and students to the failing debt categories to take into account the unavailability of data for some sectors and possible differences in performance between programs in Missouri and elsewhere.

Estimated Number of Affected Students

In the analysis for the NPRM, the number of students subject to the regulations was estimated using the applicable percentage for each sector, with the percentage of certificates awarded providing a guideline for the public and private nonprofit sectors. For the NPRM analysis, the estimated 3.2 million students affected was based on the 12-month full-time equivalent (FTE) enrollment, and in this analysis those data have been updated to the 12-month headcount enrollment to better represent the number of students potentially subject to the regulations. In the base data set with IPEDS information for 2008–09, the total 12-month enrollment is approximately 27.4 million students, of whom 7.3 million are estimated to attend programs subject to the regulations. When inflated by the estimated enrollment growth specified in the RIA Appendix for each scenario (RIA Appendix A–1, RIA Appendix A–2, and RIA Appendix A–3) to represent the first calculation in FY 2012, the number of students subject to the regulations is approximately 8.4 million. As observed by some of the analysts that commented on the data used to estimate the effect of the proposed regulation, the change to head count enrollment better describes the potential impact of the final regulation. This number is derived from the percentage of credentials granted in regulated programs compared to the total credentials granted at an institution. If program information was not available for an institution, the average percentage for that sector was used.

Summary of the Model

Significant changes were made to the analysis done for the NPRM to estimate the effects of the requirement that a program fail three out of four FYs to be ineligible. These changes are described below. The assumptions and results related to each scenario are presented in the RIA Appendix A–1, RIA Appendix A–2, and RIA Appendix A–3.

Data and Model Limitations

NSLDS has sufficient data to support the calculation of a repayment rate for each school participating in the Federal student loan programs. NSLDS does not currently collect enough data to allow this calculation by program at an institution. The model starts with school-level data, aggregates to the sector level, and tracks numbers of schools, programs, and students. The Department has estimated debt-to-earnings ratios for programs from the Missouri data set. The model combines the Missouri debt-to-earnings data with the national repayment rate data with assumptions about the relationship between the two measures grounded in data from Missouri, where available. Repayment rate data are available for a single year. The model calculates transitions from year to year based on rates specified by the user that are informed by the distribution of available repayment rate data. Detailed tables of the assumptions for each scenario are available in the Appendix for each scenario.

There are several aspects of the regulations that could not be incorporated into the analysis. In particular, while the model does allow students to transfer from failing programs and separately allows programs to shift between repayment categories, it does not model an interaction between those transitions and does not attempt to predict the effect of the transferring students on the receiving programs' performance on the gainful employment measures in subsequent years. Other items that cannot be fully analyzed should only improve a program's performance and reduce the effects estimated in this RIA. One item is the option to calculate the repayment rate for FYs 2012, 2013, and 2014 using borrowers one to two years in repayment. This option would allow institutions to demonstrate program improvements more quickly. In general, our data suggest that the repayment rates calculated with borrowers three to four years into repayment are higher, but under this option, the Department would calculate the rate using both sets of borrowers and use the higher one, which could only help programs. The Department does not have any repayment rate data for borrowers in the first two years of repayment that reflects any potential improvements in performance as a result of the regulations and decided to describe this factor that may reduce the effects of the regulations instead of quantifying it. Additionally, the repayment rates used for modeling the effects of these regulations do not include in the numerator of the repayment rate the consolidation loans with a balance that remained the same in the most recent fiscal year of borrowers in a post-baccalaureate degree or certificate program.

The results presented below also do not take into account the 5 percent cap on ineligibility for the first year programs could lose eligibility. The Secretary will cap the number of ineligible programs by first sorting institutions by category of institutions (public, private nonprofit, and for-profit), then by loan repayment rate within that category, and finally, starting with the lowest repayment rate, by determining ineligible programs accounting for a combined number of program completers during FY 2014 that does not exceed 5 percent of the total number of program completers in that category. Finally, the limited availability of data related to repayment plans did not allow us to determine the effect of the provision treating all borrowers eligible for Public Service Loan Forgiveness as successfully in repayment or the revised policy allowing the OOPB of up to 3 percent of borrowers' balances in alternative repayment plans and not paying down principal to be included in the numerator of the repayment rate calculation. To account for the treatment of loans in interest-only and negative amortization repayment plans, graduate student consolidation loans with a balance that remains the same, the loans eligible for Public Service Loan Forgiveness, and the ability of schools to take action to increase their repayment rates before the first official calculation with FY 2012 data, the model boosts the rates calculated from NSLDS by 5 percentage points. We believe this adjustment is conservative in light of the fact that up to 3 percent of OOPB will receive adjustments for interest-only or negative amortization status, the potentially large numbers of borrowers eligible for Public Service Loan Forgiveness, and a published estimate that improved debt counseling could boost repayment rates by 2 to 5 percentage points.[20]

[19] *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.*

[20] Paul Ginocchio and Adrienne Colby, Deutsche Bank, "Post 3Q Update on PE Drivers and Gainful Employment," November 12, 2010.

Initial Model State

The model starts with data for schools that have programs subject to the gainful employment regulations. These data include the repayment rate calculated from NSLDS, the estimated number of programs subject to the regulations, and the number of students enrolled in these programs. The repayment rate is classified into three levels: Passing, Near Failing, and Failing based on the 35 percent and 45 percent thresholds used in the NPRM. School, program, and student counts are then grouped by school sector and repayment rate category.

Year One School Assessment

The outcome for each year depends upon both repayment rate and debt-to-earnings ratios. The latter is imputed using a specified relationship between the two measures. This relationship is assumed to vary by sector, and to be static across years. The specification is informed by schools from the Missouri data for which both measures are available.

The imputation process returns the debt-to-earnings ratios classified into three levels, similar to the repayment rate. The relationship is specified by loading rates into a three-dimensional array indexed by sector, repayment category, and debt category. These rates indicate the relative likelihood that a school in a given sector with a given repayment category will exhibit a debt ratio falling into each of the three categories. The model allocates schools, programs, and students to the debt categories according to the specified rates.

Schools for which both measures are in the third (Failing) category are classified as failing to provide gainful employment. The others are classified as passing.

Baseline Enrollment Growth Year One to Year Two

The user specifies baseline enrollment growth factors for each sector. These are stored in a one-dimensional array indexed by sector. The model applies the appropriate factor to the student counts recorded for the end of Year One to yield projected enrollment by sector for Year Two. These projections do not consider behavioral changes associated with the students' reactions to the Year One outcomes.

Year Two Student Reaction to Year One Assessment

The user specifies transition rates for Year Two students who would have attended failing schools, but transfer to passing schools or forego enrollment in reaction to the Year One outcome. The rates are stored in a two-dimensional array indexed by starting school sector and student choice. The students who would have attended a school with a history of failure are assumed to choose among 11 different options. The assumed choices consist of enrolling in a school with no prior failures in one of the nine sectors, foregoing enrollment, or ignoring the prior year outcomes and enrolling in a school in the same sector and with the same outcomes. The model re-allocates Year Two students to new sectors and Year One outcomes according to the specified rates.

School Transition and Year Two Assessment

The user specifies transition rates among repayment categories for Year Two schools. The rates are stored in a two-dimensional array indexed by Year One repayment category and projected Year Two repayment category. The model re-allocates schools, programs, and students among new repayment categories according to the specified rates.

The model then invokes a user-specified debt imputation array to assign a debt category for Year Four according to the school's sector, repayment category, and prior year's performance on the debt-to-earnings ratios. The model allocates schools, programs, and students to the Year Two debt categories according to the specified rates. Schools for which both measures are in the third (Failing) category are classified as failing for Year Two, and the others are classified as passing for Year Two.

Baseline Enrollment Growth Year Two to Year Three

The user specifies baseline enrollment growth factors for each sector. These are stored in a one-dimensional array indexed by sector. The model applies the appropriate factor to the student counts recorded for the end of Year Two to yield projected enrollment by sector for Year Three. These projections do not consider behavioral changes associated with the students' reactions to the prior year outcomes.

School Transition and Year Three Assessment

The user specifies transition rates among repayment categories for Year Three schools. The rates are stored in a three-dimensional array indexed by Year One repayment category, imputed Year Two repayment category, and projected Year Three repayment category. The model re-allocates schools, programs, and students among new repayment categories according to the specified rates.

The model then invokes a user-specified debt imputation array to assign a debt category for Year Four according to the school's sector, repayment category, and prior year's performance on the debt-to-earnings tests. The model allocates schools, programs, and students to the Year Three debt categories according to the specified rates. Schools for which both measures are in the third (Failing) category are classified as failing for Year Three, and the others are classified as passing for Year Three. Schools that failed in each of the three years are classified as ineligible after Year Three.

Baseline Enrollment Growth Year Three to Year Four

The user specifies baseline enrollment growth factors for each sector. These are stored in a one dimensional array indexed by sector. The model applies the appropriate factor to the student counts recorded for the end of Year Three to yield projected enrollment by sector for Year Four. These projections do not consider behavioral changes associated with the students' reactions to the prior year outcomes.

Year Four Student Reaction to Prior Year's Assessment

The user specifies transition rates for Year Four students who would have attended failing schools, but transfer to better-performing schools or forego enrollment in reaction to the Year One, Year Two, and Year Three outcomes. The rates are stored in a three-dimensional array indexed by the school's prior year outcomes (failed once, twice, or three times), starting sector, and student choice. The students who would have attended a school with a history of failure are assumed to choose among 20 different options. The assumed choices consist of enrolling in a school with no prior failures in one of the nine sectors, foregoing enrollment, enrolling in a school with one prior failure in one of the nine sectors, or ignoring the prior year outcomes and enrolling in a school in the same sector and with the same outcomes. The model re-allocates Year Four students to new sectors and prior year outcomes according to the specified rates.

School Transition and Year Four Assessment

The user specifies transition rates among repayment categories for Year Four schools. The rates are stored in a four-dimensional array indexed by Year One repayment category, imputed Year Two repayment category, imputed Year Three repayment category, and projected Year Three repayment category. The model re-allocates schools, programs, and students among new repayment categories according to the specified rates.

The model then invokes a user-specified debt imputation array to assign a debt category for Year Four according to the school's sector, repayment category, and prior year's performance on the debt-to-earnings tests. The model allocates schools, programs, and students to the Year Four debt categories according to the specified rates. Schools for which both measures are in the third (Failing) category are classified as failing for Year Four, and the others are classified as passing for Year Four. Schools that failed in Years One, Two, and Four are classified as ineligible after Year Four.

Baseline Enrollment Growth Year Four to Year Five

The user specifies baseline enrollment growth factors for each sector. These are stored in a one-dimensional array indexed by sector. The model applies the appropriate factor to the student counts recorded for the end of Year Four to yield projected enrollment by sector for Year Five. These projections do not consider behavioral changes associated with the students' reactions to the prior year outcomes.

Year Five Student Reaction to Prior Year's Assessment

The user specifies transition rates for Year Five students who would have attended failing schools, but transfer to better-performing schools or forego enrollment in reaction to the Year One, Year Two, Year Three, and Year Four outcomes. The rates are stored in a three-dimensional array indexed by the school's prior year outcomes (failed

once, failed twice, ineligible after Year Three, and ineligible after Year Four), starting sector and student choice. The students who would have attended a school with a history of failure are assumed to choose among 20 different options. The assumed choices consist of enrolling in a school with no prior failures in one of the nine sectors, foregoing enrollment, enrolling in a school with one prior failure in one of the nine sectors, or ignoring the prior year outcomes and enrolling in a school in the same sector and with the same outcomes. The model re-allocates Year Five students to new sectors and prior year outcomes according to the specified rates.

Estimation of Effects on Students

In developing the gainful employment regulations, we established a model to estimate the number of programs and students that would be affected. As part of that analysis, we considered whether students enrolled at programs that were failing or lost eligibility would transfer to another institution, leave postsecondary education entirely, or (if the program was failing but remained eligible) remain enrolled.

Before we could estimate these responses, we first had to account for the high degree of turnover that already occurs within the various higher education sectors. For example, data from the latest BPS show that over 36 percent of students who begin at 2-year for-profit institutions leave without completing or transferring within one year. An additional 13.6 percent of students at those institutions transfer within one year. Applying our estimates of student behavior before accounting for this significant egress from institutions would overstate the effects of the regulations and obscure some of the very problems that they target.

Therefore, our estimates of the effects of the regulations in terms of student transfer, retention, and drop out are applied after taking into account the movement that would have occurred anyway. In other words, we sought to ascertain what effect our regulations would have on students who would not have transferred out, already completed, or dropped out. Below we discuss some of the ways we modeled this initial student movement.

We used BPS data to estimate the number of students who would have transferred regardless of the regulations. BPS is the best data source for this purpose because it is student-based, allowing us to track individuals across multiple types of institutions. As a result, we can better see the movement of transfer students within and between sectors. By contrast, information reported in other databases like IPEDS come from institutions and provide selective information on the rate at which students transfer out, but contain no data on the type of institution at which they end up. The BPS survey also considers a more expansive set of students, including those who attend part time or enroll at times other than the fall semester, that are excluded from other national databases.

To create our estimate for transfer rates, we first looked at the percentage of students who first enrolled in 2003–04, stayed for at least four months, and had transferred by the 2004–05 academic year, broken down by institution control. This information gave us an estimate for what percentage of students would have transferred regardless of our regulations and was used for contextualizing our transfer rates for one year of failure. The rates of those who entered in 2003–04 and transferred by 2005–06 and 2006–07 were used to contextualize our estimates of those who transferred after two failures and ineligibility, respectively.

These data also provided guidance for our estimates of how students would transfer between and within sectors in response to the regulations. To do this, we selected only those students who had stayed for at least four months and had transferred by July 2004 to determine their first institution type and the type of institution they transferred in to. These results, which are depicted in Table 6, showed us the dispersion pattern of students who did transfer and demonstrated the importance of public institutions as receiving entities. However, we expect for-profit institutions to have the flexibility to respond to demand created by the closure of ineligible programs. Therefore, we assigned a higher share of transfers attributed to these regulations to stay within the for-profit sectors than is seen in the baseline data.

Table 6: Percentage Distribution of Students who Entered Higher Education in 2003-04 and Transferred by 2004-05, by Initial Institution Control and Receiving Institution Control

		Receiving Institution Control			
		Public	Private Nonprofit	Private For-profit	Total
First Institution Control	Public	81	8	11	100%
	Private Nonprofit	79	19	2[a]	100%
	Private For-profit	45[a]	3[b]	52	100%

[a]Interpret data with caution. Estimate is unstable because the standard error represents more than 30 percent of the estimate.

[b] Interpret data with caution. Estimate is unstable because the standard error represents more than 50 percent of the estimate.

Source: BPS 04/09.

Estimates for the percentage of students that would have dropped out within their first year regardless of the regulations also came from BPS data. We looked at students' one-year retention and attainment rate at their initial institution, broken down by their first institution's sector. This information allowed us to see, for example, that 33 percent of students who enter a for-profit institution of two years or less had dropped out within one year. The results of this analysis for all sectors can be seen in Table 7.

This information on the dropout rate by sector also contributed to our estimates of the percent of students that would drop out due to the gainful employment regulations. The dropout rate assumptions in the high dropout and low dropout scenarios described in RIA Appendix A–1 and RIA Appendix A–2 are specified as the percentage of students who drop out or new students who do not enroll as a percentage of those remaining after the baseline level of dropouts found in the BPS data described above. The dropouts included in the model represent the potential response of students who would otherwise have continued or started their education to a program's performance on the debt measures. The Department does not have specific data on student responsiveness to disclosure of program performance on the debt measures and the other information available under these regulations and those published on October 29, 2010 (75 FR 66832) (Program

Integrity Issues final regulations). Therefore, the high dropout and low dropout scenarios described in RIA Appendix A–1 and RIA Appendix A–2 established a range of outcomes based on the Department's expertise and review of comments received after the publication of the NPRM. Comments received led to an increased dropout rate in the high dropout scenario and increased transfers to the for-profit sector because of the ability of those institutions to absorb students. The low dropout scenario started with a 5 percent dropout rate for a first failure of the debt measures to a 22 percent dropout rate of those remaining when a program becomes ineligible. This escalation is repeated in the high dropout scenario, which starts with a 15 percent dropout rate for a first failure and escalates up to 42 percent for ineligible programs in the for-profit less-than-2-year sector. For each status (fail once, fail twice, ineligible), the for-profit sectors had a dropout rate 2 percentage points higher than the public sector and private nonprofit sectors, to reflect a potential increased emphasis on program performance in those sectors. While there was some variation by sector, a program's status was the key determinant of the dropout rate assigned to students.

Table 7: Cumulative Retention and Attainment at First Institution in 2004-05 for Students entering Postsecondary Education in 2003-04, by First Institution Sector, Control, and Level

	Attained Credential	Still Enrolled	Transferred	Not Enrolled or Left Without Return	Total
4-year Institutions					
Public	1	70	20	10	100%
Private Nonprofit	2[a]	70	20	8	100%
Private For-profit	5[b]	52	17	26	100%
2-year Institutions					
Public	6	43	21	29	100%
Private Nonprofit	15[a]	27	29	29	100%
Private For-profit	22	29	14	36	100%
Less-than-2-year Institutions					
Public	60	7[a]	8	25	100%
Private Nonprofit	33[a]	18[b]	11[b]	39	100%
Private For-profit	47	9	11	33	100%
Total	8	51	20	21	100%

[a] Interpret data with caution. Estimate is unstable because the standard error represents more than 30 percent of the estimate.

[b] Interpret data with caution. Estimate is unstable because the standard error represents more than 50 percent of the estimate.

Source: BPS 04/09.

Establishing rates of transfer and dropout within each sector allowed us to determine what percentage of students should be removed from the model before estimating the effects of our regulations. Running our estimates of the effect of the regulations after subtracting the students who would have left an institution anyway contextualizes the outcome of our regulations and acknowledges the significant existing levels of student movement that already occur in many programs. For example, only 29 percent of students at 2-year for-profit institutions who entered in 2003–04 were still enrolled in 2004–05. The rate of transfers and drops after one year was used to adjust the transfer and dropout rates used in the model after one year of failure while rates after two and three years were used to contextualize the model rates for two failures and ineligibility. If we estimate that these final regulations would cause 18 percent of those remaining students to drop out, the high existing dropout and transfer rate means that 9 percent of the student body would actually be affected. In this case, that result would mean the effect on students from the gainful employment regulations is approximately half as large as our estimated dropout effect and is roughly one-fifth as large as student exit without completion.

Summary of Results

While stepping through the events described above, the model records the state of the system at specific points in the process. These snapshots of data are combined, so that student shifts to different schools and to passing or failing programs can be displayed, across the modeled years. The model can be run under different scenarios by changing selected user-specified input and saving the results. The results of various scenarios may then be considered in the analysis of the effects of the gainful employment regulations on schools, programs, and students. The Department's review of the effects of these regulations is consistent with the principles of the Executive Orders 13563 and 12866 and represents a reasoned determination that the benefits of the regulatory approach justify its costs.

Tables 9 to 12 summarize the estimated results for programs, students, and revenues for the scenarios evaluated. As shown in Table 9, an estimated 1 percent of all programs and 3 percent of all programs at for-profit institutions will lose eligibility by 2015. The Department also estimates that 7 percent of programs at 4-year for-profit institutions and 6 percent of programs at 2-year for-profit institutions will lose eligibility.

Though a program must fail the debt measures for three years in a four-year period, we expect that students likely will exhibit some degree of reaction to a program failing once or twice, possibly by transferring out of the program or stopping out altogether. To reflect these behavioral considerations in our analysis, we established two different estimates of student movement in reaction to debt measure performance—the high dropout scenario and the low dropout scenario. In each case, we created tables that lay out the estimated percentage of students that will drop out or transfer, with different results assigned depending on a program's sector and performance on the debt measures. And

the extent to which students respond increases with the extent of the negative result—meaning the transfer and dropout rate is higher at a program that failed twice than one in the same sector that has only failed once. As a result, the extent to which students react to the policy by switching programs or dropping out will vary by scenario, sector, and debt measure performance.

In the high dropout scenario, we estimate that students are more likely to respond to poor debt measure performance by ceasing their education. In this scenario, dropout rates as a percent of remaining students range from 15 percent at programs in the public 4-year and private nonprofit 4-year sectors where only one failure occurred to 42 percent at programs in the for-profit less-than 2-year sector that are ineligible. Transfer rates as a percent of remaining students range from 20 percent at programs in the public 4-year and private nonprofit 4-year sectors where only one failure occurred to 40 percent at programs in the for-profit less-than 2-year sector that are ineligible. By contrast, the low dropout scenario assumes that instead of stopping out, students in programs that fare poorly on the debt measures are more likely to seek out another program for their education or stay enrolled at their current offering. In that instance, the rate of student dropout is lower relative to our other scenario, but the rate of student transfer is higher. As a result of these different assumptions, the rate of student dropouts in the low dropout scenario ranges from 5 percent at programs in the public 4-year and private nonprofit 4-year sectors where only one failure occurred to 22 at programs in the for-profit less-than 2-year sector that are ineligible. Transfer rates as a percent of remaining students range from 25 percent at programs in the public 4-year and private nonprofit 4-year sectors where only one failure occurred to 50 percent at programs in the for-profit less-than 2-year sector that are ineligible. The appendix to this RIA contains more detailed charts displaying our assumptions around student transfer and dropout, both in terms of the share of total students in gainful employment programs and as a share of the total student body after removing the baseline dropout and transfers that would have occurred without this regulation.

As noted earlier, BPS provides information regarding students' first-to-second-year persistence behaviors. We used these data to inform our "steady-state" estimate for the probability of dropping out. Using this baseline, we established the drop-out rate benchmarks for the various scenarios as noted above. The school and program assumptions for debt performance and repayment category transitions vary slightly as shown in RIA Appendix A–1 and RIA Appendix A–2. The estimated drop-outs related to the regulations over the five years ranged from 80,153 in the low dropout scenario to 181,933 in the high dropout scenario. The percentage of programs subject to ineligibility ranges from 0.1 percent in the public less-than-2-year sector to 3.9 percent in the for-profit 4-year sector when the total number of regulated programs, including small programs, is used as the denominator. If the denominator excludes programs with a small number of borrowers or completers, the percentage of programs that are ineligible ranges from 0.2 percent to 7.1 percent. The percentage of programs that have failed the measures at least once in a four-year cycle ranges from 1.1 percent for the public less-than-2-year sector to 24.5 percent for the 4-year for-profit sector.

When students transfer out of a sector or drop out of education, revenues and expenses associated with those students shift among sectors or leave higher education. Table 8 contains per enrollee revenue and expense information used to estimate the costs per sector of the student transfers set out in Tables 10–A to 10–C and in the RIA Appendices. These estimated direct costs are set out in Tables 12–A to 12–C. Results for programs are set out in Tables 11–A to 11–C. We estimate the effects on revenue under a scenario in which the maximum dropout rate is 22 percent and a scenario in which the maximum dropout rate is 42 percent.

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Table 8: Sector Average Revenues and Expenses per Enrollee

		4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
		Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Institutions with Passing Repayment Rates	**Revenues**									
	Total	32,241	15,476	11,982	6,077	9,867	8,679	14,338	8,474	8,254
	Tuition and Fee	4,575	11,227	10,487	1,122	6,445	6,866	4,803	4,415	6,132
	Core*	23,381	9,637	11,605	5,801	9,378	8,570	14,338	8,261	8,253
	Expenses									
	Total	32,190	30,669	10,772	5,719	27,067	7,703	11,209	9,805	7,549
	Instructional	7,711	9,363	2,884	2,339	7,233	2,959	6,868	5,273	2,997
	Core**	23,368	25,548	10,385	5,395	26,601	7,568	11,209	9,804	7,546
Institutions with Failing Repayment Rates	**Revenues**									
	Total	21,981	20,234	9,001	5,293	9,146	8,004	7,286	5,305	6,594
	Tuition and Fee	3,582	8,150	7,734	717	4,991	6,428	3,567	2,456	4,980
	Core*	17,998	14,817	8,779	5,091	8,543	7,905	7,286	5,305	6,591
	Expenses									
	Total	20,807	23,847	7,833	4,915	9,792	7,221	5,915	5,654	5,529
	Instructional	6,832	5,580	2,080	1,871	2,592	2,497	4,345	3,290	2,283
	Core**	16,376	19,053	7,685	4,636	9,110	7,122	5,915	5,654	5,458

Note: Revenue and expense figures are not additive

*Total revenues for the essential education activities of the institution. Core revenues for public institutions (using the Governmental Accounting Standards Board (GASB) standards) include tuition and fees; government appropriations (federal, state, and local); government grants and contracts; private gifts, grants, and contracts; investment income; other operating and nonoperating sources; and other revenues and additions. Core revenues for private, not-for-profit and public institutions reporting under the Financial Accounting Standards Board (FASB) standards include tuition and fees; government appropriations (federal, state, and local); government grants and contracts; private gifts, grants, and contracts; investment return; sales and services of educational activities; and other sources. Core revenues for private, for-profit institutions reporting under FASB standards include tuition and fees; government appropriations (federal, state, and local); government grants and contracts; private grants and contracts; net investment income; sales and services of educational activities; and other sources. In general, core revenues exclude revenues from auxiliary enterprises (e.g., bookstores, dormitories), hospitals, and independent operations.

**Total expenses for the essential education activities of the institution. Core expenses for public institutions reporting under GASB standards include expenses for instruction, research, public service, academic support, student services, institutional support, operation and maintenance of plant, depreciation, scholarships and fellowships, interest and other operating and nonoperating expenses. Core expenses for FASB (primarily private, not-for-profit and for-profit) institutions include expenses on instruction, research, public service, academic support, student services, institutional support, net grant aid to students, and other expenses. For both FASB and GASB institutions, core expenses exclude expenses for auxiliary enterprises (e.g., bookstores, dormitories), hospitals, and independent operations.

Source: IPEDS.

Table 9: Summary of Impact of the Regulations From 2012 to 2015

Table 9-A: Impact of the Regulations on Programs

	Total	Public	Private Nonprofit	Private For-profit
Institutions with Regulated Programs	4,467	1,664	911	1,892
Regulated Programs Offered	21,049	11,877	1,236	7,936
High Drop Scenario				
Programs that Fail Once	817	162	30	625
Percent	4%	1%	2%	8%
Programs that Fail Twice	531	85	16	430
Percent	3%	1%	1%	5%
Programs that Lose Eligibility	475	67	11	397
Percent	2%	1%	1%	5%
Programs that Fail At Least Once	1,823	314	57	1,452
Percent	9%	3%	5%	18%
Programs that Never Fail	19,226	11,563	1,179	6,484
Percent	91%	97%	95%	82%
Low Drop Scenario				
Programs that Fail Once	785	155	29	601
Percent	4%	1%	2%	8%
Programs that Fail Twice	501	82	15	404
Percent	2%	1%	1%	5%
Programs that Lose Eligibility	467	66	11	390
Percent	2%	1%	1%	5%
Programs that Fail At Least Once	1,753	303	55	1,395
Percent	8%	3%	4%	18%
Programs that Never Fail	19,296	11,574	1,181	6,541
Percent	92%	97%	96%	82%

***Excludes programs with 30 or fewer completers or borrowers entering repayment subject to the small numbers provision.**

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Table 9-B: Impact of the Regulations on Students, High Dropout Scenario

		Program Result				Percent in Programs that Only Fail Once or Twice	Percent in Ineligible Programs	Percent in Programs that Never Fail
	Enrolled	Fail Once	Fail Twice	Ineligible	Never Fail			
After Year 1								
Public	4,302,174	18,584			4,283,590	0%	0%	100%
Private Nonprofit	231,611	1,054			230,557	0%	0%	100%
Private For-profit	3,833,506	136,221			3,697,285	4%	0%	96%
Total	8,367,291	155,859			8,211,432	2%	0%	98%
After Year 2								
Public	4,425,666	37,320	11,939		4,376,407	1%	0%	99%
Private Nonprofit	241,978	3,458	1,112		237,408	2%	0%	98%
Private For-profit	4,064,595	218,608	83,277		3,762,710	7%	0%	93%
Total	8,732,239	259,386	96,328		8,376,525	4%	0%	96%
After Year 3								
Public	4,551,720	47,546	22,372	7,133	4,474,669	2%	0%	98%
Private Nonprofit	256,488	4,834	2,225	559	248,870	3%	0%	97%
Private For-profit	4,309,054	265,366	128,513	47,345	3,867,830	9%	1%	90%
Total	9,117,262	317,746	153,110	55,037	8,591,369	5%	1%	94%
After Year 4								
Public	4,678,687	60,907	27,646	17,610	4,572,524	2%	0%	98%
Private Nonprofit	275,995	6,769	3,195	1,375	264,656	4%	0%	96%
Private For-profit	4,549,312	295,701	155,116	101,823	3,996,672	10%	2%	88%
Total	9,503,994	363,377	185,957	120,808	8,833,852	6%	1%	93%

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Table 9-C: Impact of the Regulations on Students, Low Dropout Scenario

		Program Result				Percent in Programs that Only Fail Once or Twice	Percent in Ineligible Programs	Percent in Programs that Never Fail
	Enrolled	Fail Once	Fail Twice	Ineligible	Never Fail			
After Year 1								
Public	4,302,174	18,584			4,283,590	0%	0%	100%
Private Nonprofit	232,398	1,841			230,557	1%	0%	99%
Private For-profit	3,833,506	136,221			3,697,285	4%	0%	96%
Total	8,368,078	156,646			8,211,432	2%	0%	98%
After Year 2								
Public	4,426,986	36,919	12,224		4,377,843	1%	0%	99%
Private Nonprofit	243,432	3,450	1,151		238,831	2%	0%	98%
Private For-profit	4,070,765	216,685	85,250		3,768,830	7%	0%	93%
Total	8,741,183	257,054	98,625		8,385,504	4%	0%	96%
After Year 3								
Public	4,555,832	46,068	22,644	7,617	4,479,503	2%	0%	98%
Private Nonprofit	261,277	4,869	2,362	624	253,422	3%	0%	97%
Private For-profit	4,316,036	258,692	129,663	50,492	3,877,189	9%	1%	90%
Total	9,133,145	309,629	154,669	58,733	8,610,114	5%	1%	94%
After Year 4								
Public	4,687,001	58,754	27,582	19,016	4,581,649	2%	0%	98%
Private Nonprofit	285,844	7,107	3,492	1,608	273,637	4%	1%	96%
Private For-profit	4,564,256	290,532	153,723	109,201	4,010,800	10%	2%	88%
Total	9,537,101	356,393	184,797	129,825	8,866,086	6%	1%	93%

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Tables 10: Student Distribution by Sector and Debt Measure Status

Table 10-A: 4-year Institutions

		Year 2	Year 3	Year 4	Year 5
Public 4-year	**High Dropout Scenario**				
	No Fail	327,060	330,420	333,954	340,714
	Transfer Out of Sector	186	585	970	1355
	Transfer Into Sector from Out	125	479	918	1379
	Transfer within Sector	29	95	160	226
	Remain in Sector and Status*	1151	3307	5012	6698
	Drop Out	162	525	892	1256
	Low Dropout Scenario				
	No Fail	327,060	330,513	334,498	341,952
	Transfer Out of Sector	226	714	1,192	1,688
	Transfer Into Sector from Out	161	728	1,336	1,930
	Transfer within Sector	44	133	219	310
	Remain in Sector and Status*	1,204	3,495	5,327	7,192
	Drop Out	53	185	330	482
Private Nonprofit 4-year	**High Dropout Scenario**				
	No Fail	171,637	176,033	182,377	190,347
	Transfer Out of Sector	164	438	767	1133
	Transfer Into Sector from Out	1433	3808	6018	8074
	Transfer within Sector	30	73	123	179
	Remain in Sector and Status*	1015	2397	3809	5389
	Drop Out	145	398	707	1051
	Low Dropout Scenario				
	No Fail	171,637	175,933	182,350	190,671
	Transfer Out of Sector	218	570	1004	1518
	Transfer Into Sector from Out	1293	3809	6340	8783
	Transfer within Sector	24	66	119	182
	Remain in Sector and Status*	1063	2526	4063	5876
	Drop Out	49	143	268	415
Private For-profit 4-year	**High Dropout Scenario**				
	No Fail	2,568,184	2,621,422	2,692,559	2,773,370
	Transfer Out of Sector	4,520	12,154	19,083	25,144
	Transfer Into Sector from Out	1,407	3,086	4,919	6,509
	Transfer within Sector	5,118	10,674	14,691	18,302
	Remain in Sector and Status*	67,466	163,182	238,471	302,278
	Drop Out	8,188	19,696	29,447	38,087
	Low Dropout Scenario				
	No Fail	2,568,184	2,625,280	2,706,729	2,799,614
	Transfer Out of Sector	5,544	14,489	22,604	30,068
	Transfer Into Sector from Out	1,864	4,041	6,334	8,407
	Transfer within Sector	6,567	14,008	19,457	24,608
	Remain in Sector and Status*	69,769	169,495	248,208	318,288
	Drop Out	3,412	8,362	12,722	16,802

Table 10-B: 2-year Institutions

		Year 2	Year 3	Year 4	Year 5
Public 2-year	**High Dropout Scenario**				
	No Fail	3,964,029	4,053,618	4,146,656	4,279,736
	Transfer Out of Sector	1,349	3,625	5,846	8,289
	Transfer Into Sector from Out	1,298	3,248	4,583	5,600
	Transfer within Sector	386	908	1,367	1,911
	Remain in Sector and Status*	14,408	37,700	58,521	81,151
	Drop Out	1,385	3,672	5,947	8,488
	Low Dropout Scenario				
	No Fail	3,964,029	4,054,896	4,151,204	4,288,503
	Transfer Out of Sector	1,683	4,442	7,100	10,115
	Transfer Into Sector from Out	1,877	4,377	5,990	7,275
	Transfer within Sector	491	1,141	1,710	2,403
	Remain in Sector and Status*	14,829	38,754	59,762	82,966
	Drop Out	526	1431	2366	3428
Private Nonprofit 2-year	**High Dropout Scenario**				
	No Fail	29,129	30,732	33,995	39,629
	Transfer Out of Sector	21	57	111	198
	Transfer Into Sector from Out	1,169	2,923	5,198	7,208
	Transfer within Sector	4	11	19	34
	Remain in Sector and Status*	255	617	1,076	1,839
	Drop Out	20	56	112	198
	Low Dropout Scenario				
	No Fail	29,129	32,202	38,334	47,803
	Transfer Out of Sector	26	74	152	289
	Transfer Into Sector from Out	2,622	5,755	8,930	11,827
	Transfer within Sector	5	14	27	47
	Remain in Sector and Status*	261	664	1,231	2,227
	Drop Out	7	23	49	94
Private For-profit 2-year	**High Dropout Scenario**				
	No Fail	696,362	700,059	704,303	721,865
	Transfer Out of Sector	3,324	6,699	10,304	12,735
	Transfer Into Sector from Out	2,267	6,015	9,552	12,826
	Transfer within Sector	1,230	2,297	3,699	4,644
	Remain in Sector and Status*	36,889	71,007	102,621	122,080
	Drop Out	4,099	8,257	13,007	16,268
	Low Dropout Scenario				
	No Fail	696,362	695,333	697,946	713,706
	Transfer Out of Sector	4,190	8,279	12,662	15,721
	Transfer Into Sector from Out	2,295	6,472	10,559	14,477
	Transfer within Sector	1,548	2,876	4,557	5,730
	Remain in Sector and Status*	37,982	72,302	102,637	122,182
	Drop Out	1,822	3,688	5,797	7,306

***Students stay at an institution that had the same result--either failing or passing--the gainful employment test. It is assumed that students who transfer within a sector do not attend an institution that has failed these tests.**

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Table 10-C: Less-than-2-year Institutions

		Year 2	Year 3	Year 4	Year 5
Public Less-than-2-year	**High Dropout Scenario**				
	No Fail	116,658	120,421	125,025	131,667
	Transfer Out of Sector	8	34	80	137
	Transfer Into Sector from Out	473	1,321	2,077	2,701
	Transfer within Sector	1	5	10	16
	Remain in Sector and Status*	51	198	398	640
	Drop Out	9	39	90	152
	Low Dropout Scenario				
	No Fail	116,658	120,529	124,907	131,141
	Transfer Out of Sector	10	43	91	157
	Transfer Into Sector from Out	578	1,048	1,634	2,216
	Transfer within Sector	1	5	11	18
	Remain in Sector and Status*	54	212	399	642
	Drop Out	5	20	42	72
Private Nonprofit Less-than-2-year	**High Dropout Scenario**				
	No Fail	36,707	38,132	40,352	43,000
	Transfer Out of Sector	22	63	117	178
	Transfer Into Sector from Out	401	1,232	2,138	2,891
	Transfer within Sector	3	8	15	24
	Remain in Sector and Status*	194	522	873	1,274
	Drop Out	25	71	132	201
	Low Dropout Scenario				
	No Fail	36,707	38,230	40,733	43,832
	Transfer Out of Sector	28	78	148	254
	Transfer Into Sector from Out	488	1,523	2,747	3,795
	Transfer within Sector	3	10	19	33
	Remain in Sector and Status*	200	543	949	1,548
	Drop Out	12	36	70	118
Private For-profit Less-than-2-year	**High Dropout Scenario**				
	No Fail	672,177	704,618	741,717	781,205
	Transfer Out of Sector	1,208	2,765	4,142	5,365
	Transfer Into Sector from Out	2,231	4,309	6,008	7,333
	Transfer within Sector	356	768	1,209	1,596
	Remain in Sector and Status*	10,909	21,616	29,563	37,198
	Drop Out	1,749	3,902	5,874	7,629
	Low Dropout Scenario				
	No Fail	672,177	698,883	730,442	764,292
	Transfer Out of Sector	1,579	3,511	5,195	6,698
	Transfer Into Sector from Out	2,326	4,440	6,267	7,797
	Transfer within Sector	412	980	1,533	2,018
	Remain in Sector and Status*	11,278	21,928	29,581	36,936
	Drop Out	953	2,063	3,055	3,950

***Students stay at an institution that had the same result--either failing or passing--the gainful employment test. It is assumed that students who transfer within a sector do not attend an institution that has failed these tests.**

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS and MDHE.

Tables 11: Program Distribution by Sector and Debt Measure Status

Table 11-A: 4-year Institutions

		Year 2	Year 3	Year 4
Public 4-year	**High Dropout Scenario**			
	Pass	4,926	4,913	4,897
	Fail Once	13	19	25
	Fail Twice	4	9	12
	Ineligible Year 3	0	3	3
	Ineligible Year 4	0	0	6
	Low Dropout Scenario			
	Pass	4,926	4,913	4,898
	Fail Once	13	18	24
	Fail Twice	4	9	12
	Ineligible Year 3	0	3	3
	Ineligible Year 4	0	0	6
Private Nonprofit 4-year	**High Dropout Scenario**			
	Pass	4,384	4,371	4,358
	Fail Once	12	17	22
	Fail Twice	4	8	11
	Ineligible Year 3	0	3	3
	Ineligible Year 4	0	0	5
	Low Dropout Scenario			
	Pass	4,384	4,372	4,359
	Fail Once	12	17	22
	Fail Twice	4	8	11
	Ineligible Year 3	0	3	3
	Ineligible Year 4	0	0	5
Private For-profit 4-year	**High Dropout Scenario**			
	Pass	3,915	3,783	3,668
	Fail Once	209	227	239
	Fail Twice	118	153	168
	Ineligible Year 3	0	80	80
	Ineligible Year 4	0	0	87
	Low Dropout Scenario			
	Pass	3,920	3,796	3,688
	Fail Once	205	219	233
	Fail Twice	118	147	158
	Ineligible Year 3	0	80	80
	Ineligible Year 4	0	0	84

Table 11-B: 2-year Institutions

		Year 2	Year 3	Year 4
Public 2-year	**High Dropout Scenario**			
	Pass	30,125	30,056	29,976
	Fail Once	77	100	130
	Fail Twice	30	55	69
	Ineligible Year 3	0	21	21
	Ineligible Year 4	0	0	35
	Low Dropout Scenario			
	Pass	30,127	30,061	29,986
	Fail Once	76	96	124
	Fail Twice	29	54	67
	Ineligible Year 3	0	21	21
	Ineligible Year 4	0	0	35
Private Nonprofit 2-year	**High Dropout Scenario**			
	Pass	391	389	386
	Fail Once	2	3	4
	Fail Twice	1	2	2
	Ineligible Year 3	0	1	1
	Ineligible Year 4	0	0	1
	Low Dropout Scenario			
	Pass	391	389	386
	Fail Once	2	3	4
	Fail Twice	1	2	2
	Ineligible Year 3	0	1	1
	Ineligible Year 4	0	0	1
Private For-profit 2-year	**High Dropout Scenario**			
	Pass	4,396	4,220	4,084
	Fail Once	225	279	284
	Fail Twice	133	165	204
	Ineligible Year 3	0	90	90
	Ineligible Year 4	0	0	91
	Low Dropout Scenario			
	Pass	4,402	4,239	4,113
	Fail Once	220	266	272
	Fail Twice	133	159	191
	Ineligible Year 3	0	90	90
	Ineligible Year 4	0	0	88

Note: Figures are cumulative year to year.

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Table 11-C: Less-than-2-year Institutions

		Year 2	Year 3	Year 4
Public 2-Year	**High Dropout Scenario**			
	Pass	2,039	2,035	2,031
	Fail Once	3	5	7
	Fail Twice	1	2	3
	Ineligible Year 3	0	1	1
	Ineligible Year 4	0	0	1
	Low Dropout Scenario			
	Pass	2,039	2,035	2,031
	Fail Once	3	5	7
	Fail Twice	1	2	3
	Ineligible Year 3	0	1	1
	Ineligible Year 4	0	0	1
Private Nonprofit 2-Year	**High Dropout Scenario**			
	Pass	275	273	271
	Fail Once	2	3	4
	Fail Twice	1	2	2
	Ineligible Year 3	0	1	1
	Ineligible Year 4	0	0	1
	Low Dropout Scenario			
	Pass	275	274	271
	Fail Once	2	3	4
	Fail Twice	1	2	2
	Ineligible Year 3	0	1	1
	Ineligible Year 4	0	0	1
Private, For-profit 2-Year	**High Dropout Scenario**			
	Pass	4,016	3,964	3,909
	Fail Once	68	83	101
	Fail Twice	34	48	58
	Ineligible Year 3	0	23	23
	Ineligible Year 4	0	0	26
	Low Dropout Scenario			
	Pass	4,018	3,970	3,919
	Fail Once	68	80	97
	Fail Twice	32	46	54
	Ineligible Year 3	0	22	22
	Ineligible Year 4	0	0	26

Note: Figures are cumulative year to year.

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Tables 12: Estimated Direct Revenue and Expense Effects (Dollars in Millions)

Table 12-A: 4-year Institutions

			Year 2	Year 3	Year 4	Year 5
Public 4-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.6	1.9	3.2	4.5
		Loss From Transfers Out	0.7	2.1	3.5	4.9
		Gain From Transfers In	0.6	2.2	4.2	6.3
	Expenses	Reduction from Drop Outs	2.7	8.7	14.8	20.9
		Reduction from Transfers Out	3.1	9.7	16.1	22.6
		Increase from Transfers In	3.2	12.3	23.6	35.5
	Net Change in Revenues for Sector		**1.9**	**4.4**	**4.9**	**4.9**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.2	0.7	1.2	1.7
		Loss From Transfers Out	0.8	2.6	4.3	6.0
		Gain From Transfers In	0.7	3.3	6.1	8.8
	Expenses	Reduction from Drop Outs	0.9	3.1	5.5	8.0
		Reduction from Transfers Out	3.8	11.9	19.8	28.1
		Increase from Transfers In	4.1	18.7	34.4	49.7
	Net Change in Revenues for Sector		**0.2**	**-3.7**	**-8.4**	**-12.5**
Private Nonprofit 4-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	1.2	3.2	5.8	8.6
		Loss From Transfers Out	1.3	3.6	6.3	9.2
		Gain From Transfers In	16.1	42.8	67.6	90.6
	Expenses	Reduction from Drop Outs	2.8	7.6	13.5	20.1
		Reduction from Transfers Out	3.1	8.4	14.6	21.6
		Increase from Transfers In	35.2	93.4	147.7	198.1
	Net Change in Revenues for Sector		**-15.7**	**-41.5**	**-64.0**	**-83.6**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.4	1.2	2.2	3.4
		Loss From Transfers Out	1.8	4.6	8.2	12.4
		Gain From Transfers In	14.5	42.8	71.2	98.6
	Expenses	Reduction from Drop Outs	0.9	2.7	5.1	7.9
		Reduction from Transfers Out	4.2	10.9	19.2	29.0
		Increase from Transfers In	31.7	93.5	155.6	215.5
	Net Change in Revenues for Sector		**-14.3**	**-42.9**	**-70.5**	**-95.8**
Private For-profit 4-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	63.3	152.3	227.7	294.6
		Loss From Transfers Out	35.0	94.0	147.6	194.5
		Gain From Transfers In	14.8	32.4	51.6	68.3
	Expenses	Reduction from Drop Outs	51.3	123.4	184.5	238.7
		Reduction from Transfers Out	28.3	76.2	119.6	157.6
		Increase from Transfers In	12.1	26.6	42.4	56.1
	Net Change in Revenues for Sector		**-16.0**	**-41.0**	**-62.0**	**-80.6**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	26.4	64.7	98.4	129.9
		Loss From Transfers Out	42.9	112.1	174.8	232.5
		Gain From Transfers In	19.5	42.4	66.4	88.2
	Expenses	Reduction from Drop Outs	21.4	52.4	79.7	105.3
		Reduction from Transfers Out	34.7	90.8	141.6	188.4
		Increase from Transfers In	16.1	34.8	54.6	72.4
	Net Change in Revenues for Sector		**-9.7**	**-26.0**	**-40.0**	**-53.1**

Table 12-B: 2-year Institutions

			Year 2	Year 3	Year 4	Year 5
Public 2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	1.0	2.6	4.3	6.1
		Loss From Transfers Out	1.0	2.6	4.2	5.9
		Gain From Transfers In	1.5	3.6	5.1	6.3
	Expenses	Reduction from Drop Outs	5.4	14.4	23.4	33.4
		Reduction from Transfers Out	5.3	14.3	23.0	32.6
		Increase from Transfers In	5.9	14.9	21.0	25.6
	Net Change in Revenues for Sector		**4.3**	**12.2**	**22.1**	**34.6**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.4	1.0	1.7	2.5
		Loss From Transfers Out	1.2	3.2	5.1	7.3
		Gain From Transfers In	2.1	4.9	6.7	8.2
	Expenses	Reduction from Drop Outs	2.1	5.6	9.3	13.5
		Reduction from Transfers Out	6.6	17.5	27.9	39.8
		Increase from Transfers In	8.6	20.0	27.4	33.3
	Net Change in Revenues for Sector		**0.6**	**3.8**	**9.7**	**18.4**
Private Nonprofit 2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.1	0.3	0.6	1.0
		Loss From Transfers Out	0.1	0.3	0.6	1.0
		Gain From Transfers In	7.5	18.8	33.5	46.5
	Expenses	Reduction from Drop Outs	0.2	0.4	0.9	1.6
		Reduction from Transfers Out	0.2	0.4	0.9	1.6
		Increase from Transfers In	25.3	63.3	112.6	156.1
	Net Change in Revenues for Sector		**-17.7**	**-44.1**	**-78.4**	**-108.5**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.2	0.5
		Loss From Transfers Out	0.1	0.4	0.8	1.4
		Gain From Transfers In	16.9	37.1	57.6	76.2
	Expenses	Reduction from Drop Outs	0.1	0.2	0.4	0.7
		Reduction from Transfers Out	0.2	0.6	1.2	2.3
		Increase from Transfers In	56.8	124.6	193.4	256.1
	Net Change in Revenues for Sector		**-39.8**	**-87.2**	**-135.2**	**-178.8**
Private For-profit 2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	26.3	53.1	83.6	104.6
		Loss From Transfers Out	21.4	43.1	66.2	81.9
		Gain From Transfers In	15.6	41.3	65.6	88.1
	Expenses	Reduction from Drop Outs	23.7	47.7	75.1	94.0
		Reduction from Transfers Out	19.2	38.7	59.5	73.6
		Increase from Transfers In	14.0	37.1	58.9	79.0
	Net Change in Revenues for Sector		**-3.2**	**-5.5**	**-8.5**	**-9.9**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	11.7	23.7	37.3	47.0
		Loss From Transfers Out	26.9	53.2	81.4	101.1
		Gain From Transfers In	15.8	44.4	72.5	99.4
	Expenses	Reduction from Drop Outs	10.5	21.3	33.5	42.2
		Reduction from Transfers Out	24.2	47.8	73.1	90.8
		Increase from Transfers In	14.1	39.9	65.1	89.2
	Net Change in Revenues for Sector		**-2.3**	**-3.2**	**-4.6**	**-4.8**

Note: Figures based on estimated marginal expense of 80 percent of total expenses. The equivalent table for the marginal expense of 40 percent of total expenses is available in RIA Appendix B.

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

Table 12-C: Less-than-2-year Institutions

			Year 2	Year 3	Year 4	Year 5
Public Less-than-2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.3	0.5
		Loss From Transfers Out	0.0	0.1	0.3	0.5
		Gain From Transfers In	2.3	6.3	10.0	13.0
	Expenses	Reduction from Drop Outs	0.0	0.2	0.4	0.7
		Reduction from Transfers Out	0.0	0.2	0.4	0.6
		Increase from Transfers In	4.2	11.8	18.6	24.2
	Net Change in Revenues for Sector		**-1.9**	**-5.4**	**-8.5**	**-10.9**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.1	0.3
		Loss From Transfers Out	0.0	0.2	0.3	0.6
		Gain From Transfers In	2.8	5.0	7.8	10.6
	Expenses	Reduction from Drop Outs	0.0	0.1	0.2	0.3
		Reduction from Transfers Out	0.0	0.2	0.4	0.7
		Increase from Transfers In	5.2	9.4	14.7	19.9
	Net Change in Revenues for Sector		**-2.4**	**-4.3**	**-6.6**	**-9.0**
Private Nonprofit Less-than-2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.1	0.2	0.3	0.5
		Loss From Transfers Out	0.1	0.2	0.3	0.4
		Gain From Transfers In	1.8	5.4	9.4	12.8
	Expenses	Reduction from Drop Outs	0.1	0.3	0.6	0.9
		Reduction from Transfers Out	0.1	0.3	0.5	0.8
		Increase from Transfers In	3.1	9.7	16.8	22.7
	Net Change in Revenues for Sector		**-1.3**	**-3.9**	**-6.8**	**-9.1**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.2	0.3
		Loss From Transfers Out	0.1	0.2	0.4	0.6
		Gain From Transfers In	2.2	6.7	12.1	16.8
	Expenses	Reduction from Drop Outs	0.1	0.2	0.3	0.5
		Reduction from Transfers Out	0.1	0.4	0.7	1.1
		Increase from Transfers In	3.8	11.9	21.5	29.8
	Net Change in Revenues for Sector		**-1.6**	**-5.0**	**-9.0**	**-12.2**
Private For-profit Less-than-2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	8.7	19.4	29.3	38.0
		Loss From Transfers Out	6.0	13.8	20.6	26.7
		Gain From Transfers In	13.7	26.4	36.8	45.0
	Expenses	Reduction from Drop Outs	7.7	17.3	26.0	33.7
		Reduction from Transfers Out	5.3	12.2	18.3	23.7
		Increase from Transfers In	13.5	26.0	36.3	44.3
	Net Change in Revenues for Sector		**-1.4**	**-3.3**	**-5.0**	**-6.6**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	4.7	10.3	15.2	19.7
		Loss From Transfers Out	7.9	17.5	25.9	33.4
		Gain From Transfers In	14.3	27.2	38.4	47.8
	Expenses	Reduction from Drop Outs	4.2	9.1	13.5	17.5
		Reduction from Transfers Out	7.0	15.5	23.0	29.6
		Increase from Transfers In	14.0	26.8	37.8	47.1
	Net Change in Revenues for Sector		**-1.2**	**-2.7**	**-4.0**	**-5.2**

Source: NSLDS, IPEDS, BPS: 04/09, NPSAS, and MDHE.

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Data Sensitivity

The data used in this model are limited by the fact that we are using data that were not collected for this purpose. There is also uncertainty in our assumptions because predicting student behavior and employment trends is well beyond what we are able to model. The revenue and expense effects presented in Table 12 represent the Department's best estimate of the net effects of these final regulations for the scenarios presented in this RIA. However, we recognize that elements in the analysis are sensitive to the cost structure of programs and innovations in the delivery of postsecondary education. In particular, the marginal cost of

a student attending a program through online delivery or a mix of online and in-person classes could vary significantly from the traditional model. Income statements for publicly traded for-profit institutions show that as the number of enrolled students grows at an institution expenses grow at almost the same rate as revenues. Accordingly, we assume that when students transfer or drop out the change in expenses is equal to 80 percent of the average existing cost per student. However, given the data limitations and the sensitivity of the net costs to the assumptions made about the percent of revenues lost and expenses saved when students leave a program or the revenues gained and expenses increased as students enter programs, the Department ran an alternative scenario featuring a reduction or increase in expenses for student transfers of 40 percent of total expenses. RIA Appendix B contains the equivalent of Table 12 for that scenario.

While the Department has some data on the prevalence of online delivery in gainful employment programs, we have very limited information on the cost structures of such programs. In 2007–08, 58 percent of undergraduate students at for-profit institutions were enrolled in programs delivered entirely through distance education. At public and private non-profit institutions, 24 percent and 37 percent of students enrolled in certificate programs, which also would be subject to the gainful employment rule, were enrolled in programs delivered entirely through distance learning. However, these data do not help describe the cost structure of such programs. It is possible that the marginal savings from a student leaving such a program or the marginal cost of a student transferring into an online program would be a significant portion of the total expense associated with the program.

As can be seen in Table 13, the annualized net losses from dropouts and inter-sector transfers in the high dropout scenario range from $112 million to $122 million, depending on the composition of program delivery and the expense reduction and increases associated with different types of program delivery. For the low dropout scenario, this range runs from $108 million to $160 million.

Consistent with Executive Order 13563's call to "measure, and seek to improve, the actual results of regulatory requirements," the Department will continue to analyze the effects of this regulation as the Department gains more and better data. As noted in the preamble to the final regulation, we will begin to provide institutions with the results of the debt calculation in 2012. These data, along with data from subsequent years, will enable the Department to determine whether the final regulation addresses the issues that prompted this regulatory action.

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Table 13: Range of Net Costs by Dropout Scenario and Marginal Expense Assumption

	High Dropout Scenario; 80% Reduction in Total Expenses (dollars in millions)				
All Sectors	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Cycle Total**
Effects of students leaving postsecondary education:					
Reductions in Tuition and Fee Revenues	101	233	355	458	1,148
Reductions in Total Expenses (decrease of 80%)	94	220	339	444	1,097
Effects of students transferring from poorly performing programs to better performing ones:					
Reduction in Tuition and Fee Revenues at sending programs	65	160	249	325	800
Reduction in Total Expenses at sending programs	65	160	253	335	813
Increase in Tuition and Fee Revenue at receiving programs	74	179	284	377	914
Increase in Total Expenses at receiving programs (80%)	117	295	478	642	1,531
Net effect of student dropouts and inter-sector transfers	**(51)**	**(128)**	**(206)**	**(270)**	**(655)**

	High Dropout Scenario; 40% Reduction in Total Expenses (dollars in millions)				
All Sectors	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Cycle Total**
Effects of students leaving postsecondary education:					
Reductions in Tuition and Fee Revenues	101	233	355	458	1,148
Reductions in Total Expenses (decrease of 40%)	75	180	276	362	893
Effects of students transferring from poorly performing programs to better					
Reduction in Tuition and Fee Revenues at sending programs	65	160	249	325	800
Reduction in Total Expenses at sending programs	50	127	202	268	647
Increase in Tuition and Fee Revenue at receiving programs	74	179	284	377	914
Increase in Total Expenses at receiving programs (40%)	84	214	346	466	1,109
Net effect of student dropouts and inter-sector transfers	**(52)**	**(120)**	**(189)**	**(242)**	**(603)**

	Low Dropout Scenario; 80% Reduction in Total Expenses (dollars in millions)				
All Sectors	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Cycle Total**
Effects of students leaving postsecondary education:					
Reductions in Tuition and Fee Revenues	44	102	156	205	507
Reductions in Total Expenses (decrease of 80%)	40	95	148	196	478
Effects of students transferring from poorly performing programs to better					
Reduction in Tuition and Fee Revenues at sending programs	82	194	301	395	972
Reduction in Total Expenses at sending programs	81	196	307	410	993
Increase in Tuition and Fee Revenue at receiving programs	89	214	339	455	1,096
Increase in Total Expenses at receiving programs (80%)	154	380	604	813	1,952
Net effect of student dropouts and inter-sector transfers	**(70)**	**(171)**	**(269)**	**(353)**	**(863)**

	Low Dropout Scenario; 40% Reduction in Total Expenses (dollars in millions)				
All Sectors	**Year 2**	**Year 3**	**Year 4**	**Year 5**	**Cycle Total**
Effects of students leaving postsecondary education:					
Reductions in Tuition and Fee Revenues	44	102	156	205	507
Reductions in Total Expenses (decrease of 40%)	32	76	119	159	386
Effects of students transferring from poorly performing programs to better					
Reduction in Tuition and Fee Revenues at sending programs	82	194	301	395	972
Reduction in Total Expenses at sending programs	62	155	244	328	788
Increase in Tuition and Fee Revenue at receiving programs	89	214	339	455	1,096
Increase in Total Expenses at receiving programs (40%)	103	263	424	575	1,366
Net effect of student dropouts and inter-sector transfers	**(47)**	**(114)**	**(180)**	**(235)**	**(576)**

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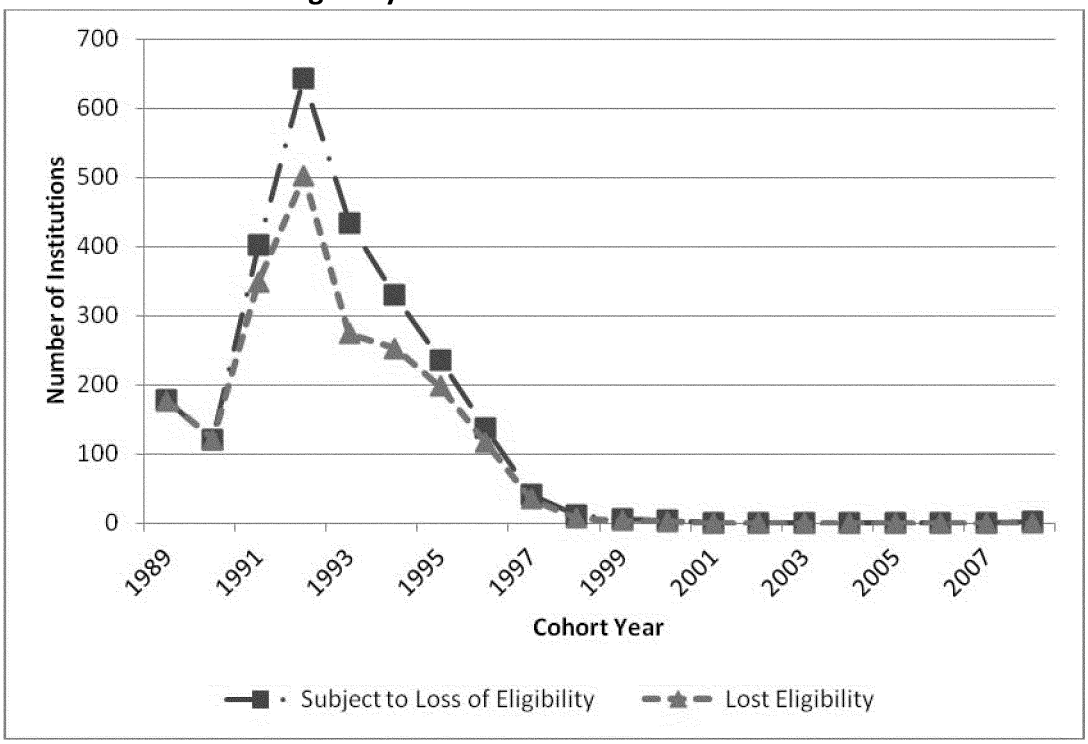
The effects described above represent the estimated effects of the regulations during the first four-year cycle leading to ineligibility, an initial transition period as the regulations come into effect. While the debt measures will remain in place, we would expect the effect to decline over time as programs that could not comply are eliminated and institutions have more data about program performance and are familiar with complying with the gainful employment debt measures. We expect the pattern of program failure to that which occurred when cohort default rates were introduced in 1989 with an initial elimination of the worst-performing programs followed by a new equilibrium in which programs comply with the minimum standards set out in the regulations, as shown in Chart D.

Chart D: Loss of Eligibility after Introduction of Cohort Default Rates



Source: Federal Student Aid.

V. Discussion of Costs, Benefits and Transfers

Consistent with the principles of Executive Orders 12866 and 13563, the Department has analyzed the impact of these regulations on students, businesses, the Federal Government, and State and local governments. The analysis rests on the projected impact of the regulations. The benefits and costs discussed below include the following:

- Private Benefits to Students and Borrowers
  - Development of measures linking programs to labor market outcomes
  - Improved retention rates
  - Increased graduation rates
  - Improved default rates
- Social Benefits
  - Improved market information
  - Better return on money spent on education
- Costs
  - Additional expense of educating transfer students at programs doing well on the debt measures
  - Cost of paperwork burden
  - Additional compliance costs as programs take efforts to meet debt measures
- Distributional Effects (Transfers)
  - Transfers affecting institutional revenues
  - Transfers affecting Federal, State, and local governments
  - Federal revenues
  - State and local government costs

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in Table 14, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these regulations. This table provides our best estimate of the changes in Federal student aid payments as a result of these regulations. Expenditures are classified as transfers from the Federal Government to student loan borrowers and from low-performing programs to performing programs. Transfers are neither costs nor benefits, but rather the reallocation of resources from one party to another.

Table 14 also presents estimates of the costs, benefits, and transfers associated with students who switch programs or withdraw. Because more students are projected to transfer into lower-cost institutions, overall educational expenditures are expected to slightly decrease.

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Table 14: Accounting Statement: Classification of Estimated Expenditures (in millions)

	Low Dropout Scenario	High Dropout Scenario
Category	**Benefits**	
Improved market information and development of measures linking programs to labor market outcomes	Not Quantified	
Improved retention, graduation and default rates	Not Quantified	
Better return on money spent on education	Not Quantified	
Category	**Costs**	
Additional expense of educating transfer students at programs doing well on the debt measures	$178	$133
Cost of paperwork burden	$5	$5
Additional compliance costs as programs take efforts to meet debt measures	Not Quantified	

Category	**Transfers**	
Transfer of tuition and fee revenues from failing programs to other programs when students change schools	$181	$148
Transfer of additional tuition and fee revenues (from various sources) to programs into which students transfer	$23	$21
Transfer of Federal student aid money from failing programs to the Federal government when students drop out of programs	$23	$51
Transfer of loan and cash tuition payments from failing programs to students when students drop out of programs	$71	$163

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Private Benefits to Students and Borrowers

The regulations are primarily intended to provide opportunities for better employment and loan affordability outcomes for students, particularly for those participating in the Federal student aid programs. The final regulations provide significant opportunities for institutions to improve failing programs against the debt measures.

Development of Measures Linking Programs to Labor Market Outcomes

One improvement will result from strengthening the connection between training programs and the labor market. As described under the heading, *Need for Regulatory Action,* market mechanisms may not operate properly in the case of educational markets where students have incomplete information and educational institutions are effectively insulated from the effects of an excess supply of graduates in a particular field.

By tying the state of the labor market to the ability of for-profit institutions to generate revenue, the final regulations compensate for

this disconnect between student demand and employer demand. First, earnings and repayment information will provide a clear indication to institutions about whether or not their students are successful in securing stable and well-paying positions. This information will help institutions determine when it would be prudent to expand some programs or pare back others. Second, meeting the debt-to-earnings ratio and repayment rate thresholds will encourage institutions to prepare students for jobs in well-paying and in-demand fields. This effect creates an incentive to move programs up-market so that they prepare students for jobs with better salaries and employment prospects.

The health care industry is an example of how the gainful employment regulations could encourage institutions, particularly those in the for-profit sectors, to adjust their offerings to provide better opportunities to students and to eliminate oversupply in the job market. A report by the Center for American Progress released in January found that for-profit institutions currently supply a significant percentage of health care credentials annually.[21] But many of these programs prepare students for low-paying entry-level jobs in support occupations, such as medical assistants, massage therapists, and medical insurance coders. Though most of those jobs have some labor market demand, projections of future openings indicate there is an oversupply of graduates for these positions, while more highly compensated occupations, such as registered nurses, are facing significant shortages. Not only are programs preparing students for these lower-paying occupations creating an oversupply of graduates, but this oversupply is almost entirely produced by the for-profit sector. The Center for American Progress report found that of the 10 most popular health care programs offered at for-profit institutions, eight of them are in programs for which the for-profit sector accounted for four-fifths or more of the completions each year. In other words, the for-profit sector was providing the vast majority of the oversupply in these health care fields with lesser earnings and growth potential.

An analysis of national completion data shows that the health care industry is not the only area in which for-profit institutions are providing a significant supply of completions in areas where earnings and growth are low. Table 15 shows the 15 most popular instructional programs at for-profit institutions, as measured by the number of completions at any level. In nine of these program types, for-profit institutions accounted for over 60 percent of the annual completions. In all but one of these programs—registered nursing—for-profit institutions represented a disproportionately large share of the completions. As Table 15 demonstrates, the programs in which for-profit institutions are providing the vast majority of completions tend to have lower median wages, as measured by BLS data, than the programs in which they have a lower share of completions. This information suggests that increasing programs in these better paying areas—such as graduating more registered nurses instead of medical assistants—would help students obtain better jobs, while also allowing programs to perform better on the debt measures.

Table 15: Number of Completions and Median Salary for the 15 Most Popular Programs at For-Profit Institutions

Instructional Program	Number of Completions	Percent of National Completions	Weighted Median Salary for Associated Occupations*
Medical/Clinical Assistant	77,350	88%	$28,678
Business Administration and Management, General	67,789	22%	$90,831
Cosmetology/Cosmetologist, General	53,357	84%	$23,265
Massage Therapy/Therapeutic Massage	25,380	90%	$35,230
Automobile/Automotive Mechanics Technology/Technician	15,791	47%	$35,450
Dental Assisting/Assistant	13,903	71%	$35,230
Culinary Arts/Chef Training	12,277	64%	$23,853
Licensed Practical/Vocational Nurse Training	11,695	20%	$39,820
Pharmacy Technician/Assistant	11,661	76%	$27,081
Medical Insurance Coding Specialist/Coder	11,045	80%	$29,326
Nursing/Registered Nurse	10,797	7%	$63,750
Aesthetician/Esthetician and Skin Care Specialist	10,069	94%	N/A
Criminal Justice/Law Enforcement Administration	8,974	36%	$76,500
Allied Health and Medical Assisting Services	8,598	86%	$31,148
Business Administration, Management and Operations, Other	7,872	41%	$92,600

*Excludes postsecondary educators

Source: IPEDS and BLS.

[21] Julie Margetta Morgan and Ellen-Marie Whelan, "Profiting from Health Care: The Role of For-Profit Schools in Training the Health Care Workforce," Center for American Progress, January 2011, *http://www.americanprogress.org/issues/2011/01/profiting_from_health_care.html*

Improved Retention Rates

Institutions can also improve their performance on the debt measures by improving their institutional retention and graduation rates. Data on institutional performance clearly show that improvements in these areas are possible because many institutions have significantly higher retention and graduation rates even though they serve low-income students.

Critical to a student's progress through any educational institution or program is retention. Data from BPS suggest that retention early in a program of study is particularly critical. Failure to return for the second year accounts for 23 percent of all unsuccessful departures from postsecondary education. Another 21 percent fail to return for the third year. For students who began in a bachelor's degree program, 13 percent left before the second year and an additional 15 percent left before the third year.[22]

Institutions that are currently passing the repayment rate threshold established under the final regulations have retention rates that are 27 percent higher than the rate for institutions that have repayment rates that fail the repayment rate measure (71 percent vs. 56 percent).

Table 16: Percent of Leavers Who Have Left By a Given Year, by Degree Program in 2003-04

Program Type	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Bachelor's Degree	13	28	50	68	90	100%
Associate's Degree	24	43	65	78	92	100%
Certificate	25	76	83	88	96	100%
Total	**23**	**44**	**64**	**77**	**92**	**100%**

Source: BPS: 04/09.

Table 17: Comparison of Retention Rates for Institutions Passing and Failing the Repayment Rate Measure Overall

Institutions with…	Retention Rate
Failing repayment rate	56%
Passing repayment rate	71%
All institutions	**68%**

Source: NSLDS and IPEDS.

If institutions successfully reform failing programs, we would expect institutions to bring their retention rates within the range observed for programs that pass the repayment rate measure. If currently failing institutions were able to raise their retention rate to the average for institutions passing the repayment measure, nearly 60,000 more students per year would be retained for a second year.

While differences in the demographic characteristics of students play a role in retention—the retention rate at institutions with the lowest percentage of students receiving Pell Grants is 76 percent compared to 62 percent at institutions with the highest percentage of students receiving Pell Grants—it is clear that improvements can be made through investments in retention efforts. While both institutional and student demographic characteristics affect the retention rate, it is important to note that institutions that pass the repayment rate measure had retention rates that were 27 percent higher than for those that failed the repayment rate measure.

Table 18: Retention Rate of Failing and Passing Programs, By Pell Grant Concentration Quintile

Institutions with…	Lowest	Second Lowest	Middle	Second Highest	Highest
Failing repayment rate	44%	55%	57%	60%	58%
Passing repayment rate	79%	70%	56%	68%	67%
All institutions	76%	69%	56%	62%	62%

Source: NSLDS, IPEDS, and Common Origination and Disbursement (COD) system.

Increased Graduation Rates

As important as retention rates are, the ultimate goal is the completion of a degree or certificate. President Obama has called for the United States to have the highest proportion of young adults with college degrees and certificates in the world by 2020. The President's 2020 goal is not simply a restatement of the longstanding national

[22] *Source:* U.S. Department of Education, National Center for Education Statistics, 2003–04 Beginning Postsecondary Students Longitudinal Study, Second Follow-up (BPS:04/09)

policy of promoting access to higher education but a reflection of the fact that the United States needs more working adults with degrees and certificates.

Degrees and certificates are only attained through diligent effort by students enrolled at institutions that place their success at the center of the institution's efforts. There are many types of institutions—public; private nonprofit; and for-profit—that have high graduation rates. Programs that are currently passing the repayment rate threshold established under these final regulations have graduation rates that are 35 percent higher than the rate for institutions that have repayment rates that fail the repayment rate measure (50 percent compared to 37 percent) and the bachelor's degree graduation rate was 61 percent higher for institutions that pass the repayment rate measure than for institutions that fail the repayment rate measure (53 percent compared to 33 percent).

Like retention rates, if institutions successfully reform programs, we would expect them to bring their graduation rates within the range that is observed for programs that pass the repayment rate measure. If currently failing institutions were able to raise their graduation rate to that of the institutions that are passing the repayment measure, nearly 70,000 more students per year would receive a degree or certificate.

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Table 19: Comparison of Graduation Rates for Institutions Passing and Failing the Repayment Rate Measure by Percentage of Students Receiving Pell Grants

		Lowest	Second Lowest	Second Highest	Highest	Total
Public 4-year	**Overall Graduation Rate**					
	Failing Repayment Rate	5%	25%	33%	31%	30%
	Passing Repayment Rate	66%	57%	47%	37%	54%
	All institutions	66%	56%	47%	34%	53%
	Bachelor's Degree Graduation Rate					
	Failing Repayment Rate			36%	31%	32%
	Passing Repayment Rate	67%	57%	48%	38%	55%
	All institutions	67%	57%	48%	35%	54%
Private Nonprofit 4-year	**Overall Graduation Rate**					
	Failing Repayment Rate	11%		62%	32%	34%
	Passing Repayment Rate	77%	60%	48%	41%	62%
	All institutions	77%	60%	49%	38%	61%
	Bachelor's Degree Graduation Rate					
	Failing Repayment Rate	81%		86%	34%	37%
	Passing Repayment Rate	78%	60%	49%	43%	63%
	All institutions	78%	60%	50%	40%	62%
Private For-profit 4-year	**Overall Graduation Rate**					
	Failing Repayment Rate	37%	6%	23%	44%	36%
	Passing Repayment Rate	42%	49%	44%	20% *	23% *
	All institutions	38%	22%	34%	25%	27%
	Bachelor's Degree Graduation Rate					
	Failing Repayment Rate	42%	6%	30%	43%	36%
	Passing Repayment Rate	57%	57%	39%	19%	22%
	All institutions	47%	24%	35%	23%	25%

*A small number of institutions have a significant impact on the graduation rate in this sector.

Source: NSLDS, IPEDS, and COD.

Table 20: Mean Graduation Rates at 2-year and Less-than-2-year Institutions by Percentage of Students Receiving Pell Grants and Whether the Institution's Overall Repayment Rate Passes or Fails the Repayment Rate Metric

	Lowest	Second Lowest	Second Highest	Highest	Total
Public 2-year					
Failing repayment rate	20%	18%	15%	16%	17%
Passing repayment rate	23%	24%	24%	21%	23%
All institutions	22%	23%	20%	18%	21%
Private Nonprofit 2-year					
Failing repayment rate		49%	23%	38%	38%
Passing repayment rate	53%	66%	53%	48%	52%
All institutions	53%	65%	52%	45%	50%
Private For-profit 2-year					
Failing repayment rate	43%		42%	49%	49%
Passing repayment rate	48%	75%	65%	63%	63%
All institutions	44%	75%	61%	56%	55%
Public Less-than-2-year					
Failing repayment rate	79%	76%	80%	74%	74%
Passing repayment rate	78%	85%	81%	80%	81%
All institutions	78%	85%	81%	80%	80%
Private Nonprofit Less-than-2-year					
Failing repayment rate				76%	76%
Passing repayment rate	85%	67%	85%	77%	75%
All institutions	85%	67%	85%	77%	76%
Private For-profit Less-than-2-year					
Failing repayment rate	81%	86%	73%	62%	62%
Passing repayment rate	74%	78%	76%	69%	69%
All institutions	76%	78%	76%	65%	66%

Source: NSLDS, IPEDS, and COD.

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Improved Default Rates

Given the nature of the repayment rate, it is not surprising that significantly lower default rates are observed at institutions that pass the repayment rate. But it is also important to consider the cost of defaults on former students who cannot afford to repay their loans. These borrowers face very serious problems if they cannot pay their loans.

Once a loan is assigned to a guaranty agency or the Department for collection, credit bureaus are notified, and the borrower's credit rating will suffer. In 2010, 6.4 million students had a Federal student loan reported to one or more credit bureaus as being in default. These circumstances increase the cost of borrowing for the defaulter and are likely to affect whether the borrower can obtain a loan at all. Borrowers who default on their loans often struggle to rent or buy a home, or buy a car. Often a poor credit rating adversely affects the borrower's ability to obtain a job. The borrower is subject to administrative wage garnishment, whereby the Department will require the defaulted borrower's employer to forward 15 percent of his or her disposable pay toward repayment of the loan. Some borrowers have lost their jobs because their employer did not want to be responsible for the wage garnishment or because the need to garnish the employee's wages called into question the employee's reliability. If the borrower is a Federal employee, he or she faces the possibility of having 15 percent of disposable pay offset by the Department toward repayment of the loan through Federal salary offset. A borrower could also be limited in terms of obtaining a security clearance or a job at some agencies including the Department of Education. Further, the Treasury Department offsets Federal tax refunds and any other payments, as authorized by law, to repay a defaulted loan. In 2010, approximately 1 million students had nearly $1.5 billion applied to their defaulted Federal student loans from withheld tax refunds, Social Security benefits, and other Federal payments.

The borrower must pay additional collection costs when a loan is assigned to a private collection agency. The largest of these costs is contingent fees that are incurred to collect the loan. While the Department gives the borrower repeated warnings before referring a debt to a collection contractor, if the borrower does not heed those warnings and reach an agreement with the lender on

repayment terms, the Department refers the loan to collection contractors. These contractors earn a commission, or contingent fee, for any payments then made on the loans referred. The Department charges each borrower the cost of the commission earned by the contractor, and applies payments from the borrower, first to defray the contingent fee earned for that payment, and second, to the interest and principal owed on the debt. As a result, the amount needed to satisfy a student loan debt collected by the Department's collection contractors can be up to 25 percent more than the principal and interest repaid by the borrower. In 2010, more than 1.5 million borrowers paid approximately $380 million in contingent fees to private collection agencies. Finally, if these collection efforts are unsuccessful, the Department may take additional legal action to force a borrower to repay the loan.

Once a loan is declared in default, the borrower is no longer entitled to any deferments or forbearances. In addition, the borrower cannot receive any additional title IV, HEA student aid until he or she has made payments of an approved amount for at least six consecutive months. Each year the Department denies aid to nearly 350,000 students who have defaulted on their loans until those obligations are resolved. Discharging Federal student loans in bankruptcy is very rare.

These consequences of default are severe and often go unacknowledged by those who argue that the public costs of supporting public higher education outweigh the costs of default. These critics further ignore the community and generational effects these consequences have on postsecondary access that are very significant but difficult to quantify.

While the anticipated benefits in terms of improved retention and graduation rates are somewhat speculative, the impact on default rates—with all the negative consequences that accrue to borrowers, their families, and the broader community—are more direct. If institutions are successful in reforming programs, cohort default rates will decline dramatically. If these final regulations have a positive impact by reducing the number of borrowers defaulting on loans, the number of borrowers entering default within three years could decline by over 292,000 over the next five years. This estimate was derived by multiplying the number of borrowers defaulting in programs that fell below the threshold for passing the repayment rate measure by the difference in the repayment rate.

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Table 21: Comparison of Two- and Three-Year Default Rates for Institutions Passing and Failing the Repayment Rate Measure

Institutions with…	Two-Year Default Rate	Three-Year Default Rate
Failing repayment rate	11.8%	22.3%
Passing repayment rate	6.1%	10.9%
All institutions	**7.3%**	**13.2%**

Source: NSLDS.

Table 22: Comparison of Two- and Three-Year Default Rates for Institutions Passing and Failing the Repayment Rate Measure by Percentage of Students Receiving Pell Grants

Two-Year Default Rate

Institutions with…	Lowest	Second Lowest	Middle	Second Highest	Highest
Failing repayment rate	11.1%	10.8%	10.2%	13.5%	14.0%
Passing repayment rate	4.8%	5.9%	7.9%	9.0%	9.4%
All institutions	5.4%	6.3%	8.5%	11.2%	11.9%

Three-Year Default Rate

Institutions with…	Lowest	Second Lowest	Middle	Second Highest	Highest
Failing repayment rate	19.1%	18.1%	20.6%	25.7%	27.9%
Passing repayment rate	7.8%	9.9%	15.2%	18.2%	19.8%
All institutions	8.9%	10.7%	16.6%	21.8%	24.3%

Source: NSLDS, IPEDS, and COD.

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Social Benefits

Improved Market Information

Students will receive private benefits associated with improved information, which will allow them to make better educational choices. But better information also has a social benefit component as well. Strengthening the connection between training programs and the labor market will allow both to function more efficiently.

First, earnings and repayment information will provide a clear indication to institutions about whether or not their students are successful in securing stable and well-paying positions. This information will help institutions determine when it would be

prudent to expand some programs or pare back others. Second, meeting the debt-to-earnings ratio and repayment rate thresholds will encourage institutions to prepare students for jobs in well-paying and in-demand fields. This effect creates an incentive to move programs up-market so that they prepare students for jobs with better salaries and employment prospects.

Finally, the better and clearer information that will be available about programs leading to gainful employment will also benefit institutions with high-performing programs, which can use their performance on the measures to differentiate themselves from competitors and lessen the need for complex and expensive marketing efforts. Currently, institutions must devote a significant amount of revenues to marketing and recruiting costs because available data do not allow them to easily indicate quality.[23] Graduation rates are not broken down to the programmatic level and fail to capture many students. Placement rates are not comparable across institutions because they are calculated in different ways.[24] Licensure rates provide little indication of quality because the vast majority of students pass their licensing examinations.[25] In place of these types of marketing efforts, the gainful employment regulations would allow an institution to demonstrate to prospective students that its programs provide better wages, lower debt burdens, and a higher likelihood of repayment than competitor offerings—easily understandable data that tell a clear story about student success.

Better Return on Money Spent on Education

The social benefits that should accrue as a result of this rule largely result from a better return on money spent on education (associated with an increase in human capital). While the focus of the rule is necessarily on better returns to Federal student aid, there will also likely be better returns on other kinds of aid and cash tuition payments. Because of the increasing information provided to students and programs that meet minimum performance standards, students are expected to make more optimal education choices, leading to better income prospects. Since education has positive spillover effects, a society would want to subsidize it. Increasing the returns should not only increase the positive private benefits to students but increase the positive spillover effects to society.

While it is currently difficult to precisely quantify the changes in positive spillover effects that are attributable to this rule, the Department will evaluate its ability to measure these effects as additional information regarding student earnings and other aspects of this rule become available. This is also consistent with Executive Order 13563, Section 1, which states that our regulatory system "must measure, and seek to improve, the actual results of regulatory requirements." Consistent with Section 1 principles of Executive Order 13563, the agency must measure and seek to improve the actual results of regulatory requirements.

Unlike many other efforts to improve education and workforce training, efforts to improve gainful employment programs in response to these regulations will be grounded in reliable data on the outcomes of part of the overall investment in Federal student aids, which in FY 2010, exceeded $140 billion and provided aid to 14 million students. While the rule only specifically addresses programs which, by law, must lead to gainful employment in a recognized occupation, the resulting data and program improvement efforts will have significant spillover effects on the degree programs at non-profit and public institutions.

Costs

A primary goal of this rule is to ensure that Federal student aid funds, including student loans that must be repaid whether a student was satisfied with the program of study or not, are well spent. In the process of achieving that goal, there is an increase in expenses that occurs as a result of students transferring from failing to succeeding programs, as well as two main compliance costs that institutions will face as a result of this regulation.

Increase in Expenses When Students Transfer From Failing to Succeeding Programs

As a result of this rule, some segment of students is likely to transfer from failing to succeeding programs. In the process, many of them will also be transferring among postsecondary education sectors. In some cases, students will move from more expensive programs to less expensive programs; in other cases, students will move from less expensive programs to more expensive programs.

Educating additional students requires a postsecondary education institution to incur additional costs—both fixed costs (for example, additional classroom space) and variable costs (such as hiring additional instructors). As a result, there will be a shift of certain costs from institutions with failing programs to institutions with successful programs. There is a net increase in expenses that results when students transfer from failing programs to successful programs. This net increase in expenses per student being educated amounts to a cost of $133 million (under the high-dropout scenario) to $178 million (low-dropout scenario) per year. The increase in expenses for programs may be associated with better programs and services that help students succeed in the labor market.

Paperwork Burdens

As detailed in the *Paperwork Burden Costs* section, institutions will also accrue some costs to comply with the data and reporting pieces of the regulation. This occurs in the form of time spent determining alternative earnings information (if the institution chooses to do so), challenging data for the debt-to-earnings ratios and repayment rates, providing debt warnings to students, and providing notification that a failing program has been voluntarily discontinued. These costs are estimated in greater detail in the *Paperwork Burden Costs* section, but we project this element of compliance costs to be $5.4 million a year.

Additional Compliance Costs Associated With Meeting Debt Measures

Institutions will also bear some costs to manage their performance under the debt measures. Institutions concerned about failing the debt measures might accrue costs on services like increased loan counseling for graduates that could help improve results on measures like the repayment rate without any substantive changes to their offerings.

It is important to note that these costs are associated with improved outcomes, and are essential to ensuring that federal money goes toward providing students with a valuable education.

Some institutions that are not at risk of failing the debt measures may also choose to improve their programs as a result of this regulation's emphasis on gainful employment. These additional expenses could come in many different forms. For example, an institution may choose to spend more on curriculum development to better link a program's content to the needs of in-demand and well-paying jobs in the workforce. Institutions could also allocate more funds toward other functions, such as instruction to hire better faculty; providing training to existing faculty to improve program outcomes; tutoring or other support services to assist struggling students; career counseling to help students find jobs; or other areas where increased investment could yield improved performance on the gainful employment measures. These are costs that would likely not occur only at institutions with failing or barely-passing programs, as institutions frequently take steps to improve all facets of the product they are providing students. Institutions could recoup some or all of the costs associated with program improvement from improving the retention of students, which will generate additional tuition and fee revenues.

Because there is significant variation in the types of institutions that will take on these improvement costs, the type of reforms they will employ, it is difficult for us to quantify the amount of these additional costs.

The Department will monitor programmatic improvements against a wide variety of performance measures as the rule is implemented, consistent with Executive Order 13563. While today, many postsecondary education institutions use general labor market data from the BLS to evaluate the "value proposition" for

[23] For a discussion of the amounts spent on marketing by for-profit colleges see interviews from PBS Frontline with Mark DeFusco, a former director at the University of Phoenix or Jeffrey Silber, a senior analyst at BMO Capital Markets. The interviews are available at *http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/defusco.html* and *http://www.pbs.org/wgbh/pages/frontline/collegeinc/interviews/silber.html.*

[24] Andrea Sykes, Laurium Evaluation Group, "Background Group: Calculating Job Placement Rates under Gainful Employment Regulations," February 2011.

[25] For example, passage rates on barbering and cosmetology examination results reported by the State of California show that nearly 100 percent of test takers pass their licensure exams. See *http://www.barbercosmo.ca.gov/applicants/schls_rslts.shtml.* Similarly, data from the National Council of State Boards of Nursing show that 87 percent of first-time U.S. educated students pass the national licensing test for licensed practical/vocational nurses. See *https://www.ncsbn.org/Table_of_Pass_Rates_2010.pdf.*

prospective students, these institutions, as early as 2012, will have data on the actual performance of their former students. This information, which, as discussed above, will be extremely important for prospective students, also will help shape the changes that are made to the programs offered to ensure compliance with these rules.

Distributional Effects (Transfers)

While the overall costs and benefits of this rule are discussed above, there are also certain "transfers" or distributional effects associated with the reallocation of resources between different sectors of society.

Transfers Affecting Institutional Revenues

For institutions, the impact of the final regulations is mixed. Institutions with failing programs, including programs that lose eligibility, are likely to see lower revenues. On the other hand, institutions with high-performing programs are likely to see growing enrollment and revenue and to benefit from additional market information that permits institutions to demonstrate the value of their programs.

Under our two scenarios, we estimate that the for-profit education sector would see a cumulative drop in revenue annually, on average, of $338.1 million a year. This estimate does not include paperwork and compliance costs, because it reflects only transfers. The projected decrease in annual revenue represents less than 2 percent of the sector's estimated $26 billion in revenue in 2009, the most recent year for which data are available. By contrast, data reported by for-profit institutions to IPEDS show that schools in the for-profit sector had an average revenue growth of 13 percent per year over the five-year period from 2004–05 to 2008–09 (not including investment revenue). Some of the decrease in revenue will take the form of a transfer of tuition and fee revenues from failing programs to other programs when students change schools. Another portion will take the form of a transfer of Federal student aid money from failing programs to the Federal government when students who previously attended failing programs choose not to pursue further education. Finally, a portion of the decrease in revenue will take the form of a transfer of loans and cash tuition payments from failing programs to the students themselves when students choose not to pursue further education. See Table 14 for more details.

We estimate that the effects of these regulations on *net* revenue for the for-profit education industry will be less—$60.8 million per year on average. This estimate does not include paperwork and compliance costs, because it reflects only transfers. The effects on net revenue are smaller because schools will either reduce expenses due to a lessened need for instructors or take in new revenue as students transfer into successful programs.

While the regulations will have the effect of reducing the revenue of the for-profit postsecondary education industry as a whole, they also may have the effect of increasing revenue for companies whose programs pass the debt measures. The Department estimates that, as a result of these regulations, between 115,000 and 141,000 students will transfer between one for-profit institution and another by 2015. The movement of students from low performing programs at one institution to a better performing program at another institution will cause stronger programs to grow and, likely, produce larger profits.

Additional analysis of the regulations' impact on small businesses is presented in the *Final Regulatory Flexibility Analysis* section of this RIA.

Transfers Affecting Federal, State, and Local Governments

Several commenters argued that the cost estimates of the effects of the proposed regulations were incomplete because they did not take into account the full cost of other sectors of higher education, including other government subsidies provided to public or private nonprofit institutions. In particular, the commenters noted that public institutions receive direct funding from States and private nonprofit institutions are exempt from taxes. The commenters also indicated that the Department had misinterpreted a study by the Florida Office of Program Policy and Government Accountability about the costs of for-profit and public sector institutions. Some commenters provided estimates that suggested including these subsidies in the effects calculations would result in increased costs to taxpayers if students shift from institutions in the for-profit sectors to public or private, nonprofit institutions. The largest cost estimate came from the Parthenon Group, which estimated that between 465,000 and 660,000 students would shift from for-profit institutions to community colleges each year, resulting in a cost of an additional $2 billion annually for community colleges to serve these students. However, we estimate that most of those that fail to enroll or leave a failing program will enroll in another program offered by a for-profit institution. The data that will be available under the rule will be used by institutions offering strong programs in terms of economic return to differentiate those programs from those of their less effective competitors.

Federal Revenues

The cost implications for the Federal Government result largely from changes to tax revenues and changes to expenditures on student aid. Federal tax revenues would fall to the extent that for-profit education companies pay less in corporate taxes, institutions lay off employees, or fewer students earn credentials that could increase their earnings. On the other hand, Federal tax revenue would increase to the extent that institutions improve the performance of their programs and students transfer to better performing programs, which could lead to higher completion rates and credentials that carry greater economic benefits. As seen in Table 14, there is also a small transfer of money from failing programs to the Federal Government when students who previously received Federal aid drop out of those programs. As discussed in more depth in the *Net Budget Impacts* section, the net effect is difficult to estimate reliably but is likely to be small, around $23 million to $51 million in savings to the Federal Government annually, depending on whether one uses the low dropout or high dropout scenario.

State and Local Government Costs

The impact of the regulations on State income tax revenue will be similar to the impact on Federal revenue, and it is also likely to be small. There may also be an impact on State and local expenditures on higher education. We do not dictate to State or local governments how they should choose to spend their funds on higher education. Nor do we interfere with their own independent decisions to expand enrollment, determinations that are typically made as part of a long-term planning process. Given that States possess full control over whether or not to expand enrollment, it is incorrect to attribute any costs associated with these independent decisions to these regulations.

The higher cost estimate suggested by some commenters assumes States expanding enrollment face marginal costs that are similar to their average cost or that they will only choose to expand through traditional brick-and-mortar institutions. In fact, many States across the country are experimenting with innovative models that use different methods of instruction and content delivery that allow students to complete courses faster and at a lower cost. Rather than adding additional buildings or campuses, States may instead opt to expand distance education offerings or try innovative practices like those used by the Western Governors University, which awards credit when students demonstrate they have mastered competency of the material. Forecasting the extent to which future growth would occur in traditional settings versus distance education or some other model is outside the scope of this analysis.

Finally, a crucial assumption in estimating the increase in cost is that the expense per completion in the for-profit sector is lower than it is in the public sector. Such assumptions, however, fail to account for concerns about the quality of a degree. Producing large numbers of certificates or degrees that leave students with unmanageable debt burdens and poor employment prospects is not preferable to students earning credentials that, while more expensive to obtain, result in students earning higher and more stable incomes. Reducing such discussions about cost solely to monetary elements fails to recognize the important dimension around quality that these regulations also seek to capture. It also fails to take into consideration the fact those institutions offering strong programs, in terms of economic return, will use this information to differentiate the programs they offer from those of their less effective competitors and, thus, enroll more students.

VI. Paperwork Burden Costs

In assessing the potential impact of these regulations, the Department recognizes that certain provisions are likely to increase workload for some program participants. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of the preamble. Additional workload would normally be

expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. In total, these regulations are estimated to increase burden on institutions participating in the title IV, HEA student assistance programs by 261,512 hours per year. The monetized cost of this additional burden on institutions, using wage data developed using BLS data, available at *http://www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is $5,443,820, as shown in Table 23. This cost was based on an hourly rate of $22.12 that was used to reflect increased management time to establish new data collection procedures associated with the gainful employment provisions. The final regulations will also increase the paperwork burden on students by an estimated 22,516 hours as they read the debt warnings from institutions. The monetized cost of this additional burden on students, using wage data developed using BLS data, available at *http://www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is $376,468.

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Table 23: Estimated Annual Paperwork Burden for Institutions by Requirement

Provision	Reg. Section	OMB Control #	Hours	Costs
Optional reporting of tuition and fees.	668.7(c)(2)(i)(A)(2)	OMB 1845-0109	233,595	$5,167,121
Pre-draft data challenges to list of names to be submitted to the SSA.	668.7(e)(1)	OMB 1845-0109	2,772	$61,317
Post-draft data corrections challenging the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, or the median loan debt for the program that was used in the numerator of the draft debt-to-earnings ratios.	668.7(e)(2)	OMB 1845-0109	4,620	$102,194
Notification of intent to use alternative earnings and submission of alternative earnings.	668.7(g)	OMB 1845-0109	4,655	$102,969
Debt warnings	668.7(j)(1)-(j)(2)	OMB 1845-0109	462	$10,219
Notification to students and the Secretary that a failing program has been voluntarily discontinued.	668.7(j)(5)	OMB 1845-0109	15,408	$340,825

Table 22 relates the estimated burden for institutions of each paperwork requirement to the hours and costs estimated in the *Paperwork Reduction Act of 1995* section of this preamble. The largest burden comes from the optional reporting of tuition and fees to limit the amount of debt included in the debt-to-earnings calculation. The estimated burden of reporting tuition and fee information about students is 233,595 hours and $5,167,121.

Prior to the issuance of the draft debt-to-earnings ratios, the Secretary will provide a list to institutions, of students that will be included in the applicable two- or four-year period used to calculate the debt-to-earnings ratios beginning in FY 2012. Institutions will have 30 days after the date the list is sent to the institution to provide corrections such as evidence that a student should be included or excluded from the list or to submit

corrected or updated student identity information. The estimated burden from these pre-draft data challenges is 2,772 hours and $61,317. After the issuance of draft debt measures, institutions will have the ability to challenge the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, the list of borrowers used to calculate the loan repayment rate, or the median loan debt for the program that was used in the numerator of the draft debt-to-earnings ratio. The burden associated with challenges to the draft debt measures is 4,620 hours annually at a cost of $102,194. Programs that fail the debt measures may demonstrate that a failing program would meet a debt-to-earnings standard by recalculating the debt-to-earnings ratios using the median loan debt for the program and using alternative earnings data from: a State-sponsored data system, an institutional survey conducted in accordance with NCES standards, or, for fiscal years 2012, 2013, and 2014, BLS data. The estimated burden of notifying the Secretary of the intent to use alternative earnings data and of supplying the alternative earnings information is 4,655 hours and $102,969.

Additional items included in the burden on institutions reported under OMB 1845–0109 include an estimated burden of 15,311 hours for notifying students when an institution voluntarily withdraws a failing program from title IV, HEA participation and the date when title IV, HEA aid will no longer be available for the program and an estimated 462 hours in issuing debt warnings to current students. Together, these provisions have an estimated cost to institutions of $340,825. A total of 22,516 hours and $376,468 of burden on students for reading the notice of voluntarily withdrawal is recorded under OMB 1845–0109.

VII. Net Budget Impacts

The regulations are estimated to have a positive net budget impact ranging between $23 million (in the low dropout scenario) to $51 million (in the high dropout scenario). Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. (A cohort reflects all loans originated in a given fiscal year.)

These estimates were developed using the Office of Management and Budget's (OMB) Credit Subsidy Calculator. The OMB calculator takes projected future cash flows from the Department's student loan cost estimation model and produces discounted subsidy rates reflecting the net present value of all future Federal costs associated with awards made in a given fiscal year. Values are calculated using a "basket of zeros" methodology under which each cash flow is discounted using the interest rate of a zero-coupon Treasury bond with the same maturity as that cash flow. To ensure comparability across programs, this methodology is incorporated into the calculator and used government-wide to develop estimates of the Federal cost of credit programs. Accordingly, the Department believes it is the appropriate methodology to use in developing estimates for these regulations. That said, in developing the following Accounting Statement, the Department consulted with OMB on how to integrate our discounting methodology with the discounting methodology traditionally used in developing regulatory impact analyses.

Absent evidence of the impact of these regulations on student behavior, budget cost estimates were based on behavior as reflected in various Department data sets and longitudinal surveys listed under *Assumptions, Limitations, and Data Sources.* Program cost estimates were generated by running projected cash flows related to each provision through the Department's student loan cost estimation model. Student loan cost estimates are developed across five risk categories: For-profit institutions (less than 2-year), 2-year institutions, freshmen/sophomores at 4-year institutions, juniors/seniors at 4-year institutions, and graduate students. Risk categories have separate assumptions based on the historical pattern of behavior—for example, the likelihood of default or the likelihood to use statutory deferment or discharge benefits—of borrowers in each category.

The scenarios presented in these final regulations anticipate some small savings in Federal student aid programs as students who would have attended programs that fail the debt measures elect not to pursue postsecondary education and do not take out Federal loans or receive Pell Grants. In some years, costs from students not taking Federal loans offset savings from Pell Grants.

As we estimate that many students who transfer out of failing programs will continue to receive student aid, the estimates for the effects on the Federal student aid programs are based on the number of students expected to drop out under the high dropout and low dropout scenarios described in this RIA. Since some prospective students will decide not to enroll and students already enrolled may decide to leave postsecondary education rather than re-enroll at another institution, we estimate a small net Federal savings. Of these estimated savings, approximately $26.2 million in the high dropout scenario and $59.1 million in the low dropout scenario would be from reductions in Pell Grants, which are offset by estimated increased costs in student loans. These potential savings represent our best estimate of the effect of the regulations on the Federal student aid programs, but student responsiveness to program performance, programs' efforts to improve performance, and potential increases in retention rates could offset the estimated savings.

Assumptions, Limitations, and Data Sources

The impact estimates provided in the preceding section reflect a baseline in which the changes implemented in these regulations do not exist. Costs have been quantified for five years.

In developing these estimates, a wide range of data sources was used, including data from the NSLDS; operational and financial data from Department of Education systems; and data from a range of surveys conducted by NCES such as the 2007–2008 NPSAS, the 2008–09 IPEDS, and the 2009 follow-up to the 2004 BPS. Data from other sources, such as the U.S. Census Bureau and the Missouri Department of Higher Education, were also used. Data on administrative burden at participating institutions are extremely limited; accordingly, in the NPRM, the Department expressed interest in receiving comments in this area. We recognize that, despite the Department's diligent efforts and extensive public input, there are limitations in the best available data and there remains some uncertainty about the impact of these final regulations. Therefore, the Department intends to monitor the implementation of these regulations carefully, consider new data as they become available to ensure against unintended adverse consequences, and reconsider relevant issues if the evidence warrants. As additional data become available, the Department may update these estimates.

We identify and explain burdens specifically associated with information collection requirements in the *Paperwork Reduction Act of 1995* section of the preamble.

VIII. Alternatives Considered

A number of commenters suggested fundamentally different approaches for defining "gainful employment." Some of these approaches, including graduation and placement rates, a higher repayment rate threshold, an index, alternative debt measures, and default rates, were alternatives discussed by the Department in the negotiated rulemaking process, the NPRM, or both. The alternatives suggested by commenters are discussed below.

Return on Investment and Net Present Value

Some commenters argued that the proposed gainful employment debt measures evaluate only one aspect of the quality of programs—whether a student's initial debt burden was reasonable—but fail to account for other long-standing measures of program quality or a student's long-term return on his or her educational investment. The commenters believed that structuring regulations in this manner may discourage institutions from offering training in jobs with the potential for long-term salary growth for fear of losing program eligibility. For example, based on BLS data, entry-level salaries for graduates from programs for auto technicians range from $19,840 to $25,970. According to the commenters, salaries for auto technicians may have long-term growth potential because it can take a technician two to five years after graduation to become fully qualified. Mastering additional complex specialties also requires the technician to have years of experience and advanced training. According to the commenters, applying the proposed gainful employment measures to these programs may prevent students from pursuing training in these necessary fields.

Some commenters offered that a more reasonable measure of the quality of an educational program would be the student's return on investment (ROI), not a first-year debt service calculation. The commenters

argued that a student's initial capacity to service debt should be one consideration in judging educational program quality, but not the essential metric. Instead, the analysis of a program should take into account the potential long term benefits and earnings.

Other commenters believed that, according to finance theory, the only correct method for determining the value of a program would be a Net Present Value (NPV) approach that considers the present value of all incremental lifetime earnings stemming from the program and the present value of the total costs of the program. The commenters contended that, even if it were economically rational to base the regulations on another approach, the proposed regulations are economically irrational because the debt-to-earnings and loan repayment tests are based on arbitrary three- and four-year evaluation periods that are too short to fairly reflect the benefits of education.

While we appreciate the suggestion to incorporate a return on investment calculation into these final regulations, we believe there are significant theoretical and practical reasons for not doing so. To be sure, an ROI or NPV approach helps to distinguish among competing investment opportunities. However, inherent in an ROI or NPV calculation is a specified discount rate so that all future cash flows (income as well as expenses) can be described in terms of present-day values. Thus the selection of an appropriate discount rate is key to this calculation. If the Department were to implement an ROI or NPV calculation in the proposed metrics, it would have no basis for establishing a discount rate for borrowers who make personal investment decisions with respect to pursuing postsecondary education programs.

The Department agrees that there are long-term benefits, in particular with respect to increased lifetime earnings, for those with formal education or training beyond high school. However, those earnings accrue of the course of a career that could span three or four decades. Measurements of program performance 30 or 40 years in the past would not be meaningful for helping institutions improve or for protecting students against low-quality programs. We do know from The National Longitudinal Survey of Youth conducted by the BLS that the length of time an employee remains with the same employer tends to be shorter for younger workers and that the average worker will have about eleven different jobs in the first 25 years or so of his or her working lifetime.[26] However, we are unaware of any on-going, longitudinal tracking of work-life earnings by specific occupation.

Retention, Completion, and Placement Rates

Some commenters suggested a variety of alternative measures for determining whether a program leads to gainful employment including retention rates, employment rates, job placement rates adjusted for local economic conditions, and completion rates. Other commenters believed there was no need to further define gainful employment because (1) national accrediting agencies require that the majority of students graduate and find jobs in the field in which they were trained, or (2) students who pass State licensing examinations are gainfully employable.

We likewise appreciate the suggestions to use retention rates, employment rates, job placement rates, and completion rates as alternative measures. During the negotiation sessions, some non-Federal negotiators objected to a proposal for using graduation rates on the ground that the proposed standard was too demanding, but they did not propose an alternative. Some negotiators also raised concerns about the ability of institutions to obtain valid placement information from graduates and employers. In the Program Integrity Issues final regulations published on October 29, 2010, the Department required disclosure of program-level graduation and placement rates. Based on the information we have available, using them as a measure of whether a program leads to gainful employment would be premature.

Default Rates

Some commenters suggested the use of default rates to measure program performance. The application of default rates to institutional eligibility is one tool that Congress has used that is related to debt burdens. Under current law, prospective students are not allowed to use their Federal aid at an institution where its former students had a high default rate. However, the cohort default rate only includes borrowers who defaulted by going 360 days without making a payment within two years of entering repayment. These borrowers represent only a small portion of borrowers who are struggling with their loans. The default measurement does not include borrowers who are in late stages of delinquency, even if they default after two years. The metric also does not include those who are delinquent on their payments or borrowers who cease making payments without defaulting by receiving a forbearance or deferment. A significant number of borrowers fall into these categories. According to a recent study of students in the 2005 cohort by the Institute for Higher Education Policy, 26 percent of borrowers became delinquent on their loans at some point.[27] Because of the concerns outlined above, the repayment rate better captures the experience of all these individuals who are struggling to repay their loans.

Gainful Employment Index

Other commenters suggested that the Department use a composite score based on default, graduation, and placement rates. The commenters argued that institutions with exceptional, industry-determined rates have proven their success in providing quality education and therefore should be allowed to continue serving their students without impediments. The commenters noted that Representative Robert Andrews pioneered a composite index in the 1990s and suggested using default, graduation, and placement rates along with the number of Pell Grant recipients to determine an overall score for an institution. According to the commenters, factoring in Pell Grant information would acknowledge the unhappy truth that low-income students are less likely to complete higher education programs. To avoid punishing schools for accepting these students into their programs, the commenters suggested the Department use a formula that would acknowledge the extra difficulties faced by students at a lower socioeconomic level. Some commenters supporting the composite index approach suggested weighting the placement rate at 50 percent, the cohort default rate at 30 percent, and the graduation rate at 20 percent.

The commenters argued that a composite index approach is superior to the proposed debt measures in the following ways. First, the composite index would not rely on one characteristic (debt load) or a complex loan repayment rate, but on a number of outcomes, most importantly the employment of graduates. Second, the index could be implemented readily since cohort default and graduation rates are already tracked by the Department, and the great majority of for-profit colleges already track student placement. Third, this approach is analogous to the currently used financial responsibility composite score for institutions that integrates a basket of three financial measures into one index. Finally, it measures outcomes at the institutional level, rather than the program level, reducing complexity and difficulty in implementing a gainful employment standard. The commenters stated that the index approach could be implemented relatively rapidly without disrupting the market and risking unintended consequences. If the metrics need refinement, the commenters offered that the Department could implement the index, and over the next 36 months redefine how default rates are measured (potentially moving to measuring the repayment of principal in dollars) and how graduation rates are measured (potentially moving to track all students). Alternatively, it could apply the index at the program level after the relevant information is gathered and analyzed.

Although the concept of a composite index is appealing, the suggested index uses some of the same indicators, which in our view fall short of directly evaluating a program's performance. The specific indicators suffer from important shortcomings: default rates measure only a portion of the borrowers who have had difficulty repaying their loans, the statutory definition of graduation rate excludes transfer and part-time students, and placement rates are defined differently by accrediting agencies and States. Applying the composite index at the institutional level would mask poorly performing programs because only the overall performance of the institution, not each program, would be evaluated. Moreover, if the institution's overall performance was subpar, the composite index would jeopardize the

[26] Bureau of Labor Statistics, National Longitudinal Survey of Youth, available at *http://www.bls.gov/news.release/pdf/nlsoy.pdf*

[27] Alisa F. Cunningham and Gregory S. Kienzl, "Delinquency: The Untold Story of Student Loan Borrowing," March 2011, available at *http://www.ihep.org/assets/files/publications/a-f/Delinquency-The_Untold_Story_FINAL_March_2011.pdf.*

eligibility of the entire institution. By using purpose-built measures applied at the program level, these regulations effectively target poor-performing programs without necessarily placing the entire institution at risk because only those programs become ineligible for title IV, HEA funds. Finally, the Department does not believe that programs enrolling lower-income students cannot help those students achieve success and would be concerned about the consequences for writing into law lower expectations for the future employment and debt repayment of those students.

Earnings Comparison

Commenters also suggested that the Department use, particularly for short-term programs, a comparison of pre-program and post-program earnings to capture the near-term effect of the program. This approach has some merit conceptually. However, earnings immediately before enrollment may not be an accurate measure of an individual's baseline earning potential without the program. Pre-enrollment earnings are particularly unlikely to reflect earnings potential for dependent students, workers returning to school after becoming unemployed, or those using their training to switch fields. Moreover, such a measurement would not identify programs where large numbers of students are taking out debts they cannot afford to repay.

Disclosure

A number of commenters recommended that the Department require additional disclosures so that consumers can make better-informed decisions. The final regulations do create a number of additional disclosures to help students make informed choices among institutions and programs. However, disclosures alone cannot serve as a standard for determining whether a program complies with the gainful employment requirement in the statute. For example, with a disclosure approach an institution might report that one of its programs did not place a single graduate into a job, yet the program would remain eligible as "preparing students for gainful employment in a recognized occupation" because it disclosed the fact that it had failed to do so.

Delay for Further Study and Data Collection

Some commenters recommended that the Department delay the issuance of final regulations to allow further study of the issues around gainful employment programs. Some commenters mentioned that the Government Accountability Office is currently studying related issues. Other commenters expressed the view that the Department should establish procedures to calculate each program's repayment rate and debt-to-earnings ratios before using those measures to set program eligibility to reduce the uncertainty around the impact of the regulations and give institutions more time to improve their programs.

The Department believes that action is urgently needed to address the problem of poorly performing gainful employment programs. Each year of delay would likely mean hundreds of thousands of additional students enrolling in programs that are likely to leave them with unaffordable debts and poor employment prospects. The process of developing these regulations has taken nearly two years and involved unprecedented levels of public engagement, including three public hearings in the spring of 2009, three negotiated rulemaking sessions in the winter of 2009–10, and the postponement of the final regulations by eight months to allow the careful consideration of over 90,000 comments, two additional public hearings in October 2010, and dozens of additional meetings with individuals and organizations who commented on the NPRM. In addition, the Department has carefully analyzed the information and data available to it from public sources, its research activities, and the Federal financial aid program.

Finally, the Department has revised the regulations to provide programs with an opportunity to improve their performance before losing eligibility. In 2011, the Department will release data to institutions on an informational basis, helping them identify and improve their failing programs. No programs will lose eligibility until they have failed the debt measures for three out of four FYs. When the first eligibility losses occur in 2014, they will be limited to the lowest-performing 5 percent of programs. To help institutions anticipate the impact of the regulations, the Department is prepared to accept BLS earnings information during a transition period of three years, and the repayment rate measure has been designed to recognize programs demonstrating rapid improvement.

IX. Final Regulatory Flexibility Analysis

These gainful employment regulations will affect institutions that participate in the title IV, HEA programs, and individual students and loan borrowers. The U.S. Small Business Administration (SBA) Size Standards define for-profit institutions as "small businesses" if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. The SBA Size Standards define nonprofit institutions as small organizations if they are independently owned and operated and not dominant in their field of operation, or as small entities if they are institutions controlled by governmental entities with populations below 50,000. The revenues involved in the sector affected by these regulations, and the concentration of ownership of institutions by private owners or public systems means that the number of title IV, HEA eligible institutions that are small entities would be limited but for the fact that the nonprofit entities fit within the definition of a small organization regardless of revenue. Additionally, the concentration of small entities in the sectors directly affected by these provisions and the potential for some of the programs offered by those entities to lose eligibility to participate in the title IV, HEA programs led to the preparation of this Final Regulatory Flexibility Analysis.

Description of the Reasons That Action by the Agency Is Being Considered

The Secretary is establishing through these regulations a definition of gainful employment in a recognized occupation by establishing what we consider, for purposes of meeting the requirements of section 102 of the HEA, to be a reasonable relationship between the loan debt incurred by students in a training program and income earned from employment after the student completes the training. The regulations clarify, for purposes of establishing a student's eligibility to receive title IV, HEA funds, a program's eligibility based on providing training that leads to gainful employment in a recognized occupation. An institution must provide a warning to students and prospective students if a program does not pass any of the debt measures.

Student debt is more prevalent and individual borrowers are incurring more debt than ever before. Twenty years ago, only one in six full-time freshmen at 4-year public colleges and universities took out a Federal student loan; now more than half do. Today, nearly two-thirds of all graduating college seniors carry student loan debt, up from less than one-half a generation ago. All other things being equal, any former students would be better off leaving college without debt. The less debt a student has, the more funds they are able to devote to buying a home, saving for retirement or for their children's education, or serving the community. Student loan debt is worth having if it makes it possible to gain the education and training that enhances productivity as a citizen, civic leader, worker, or entrepreneur. To the extent that the student loan debt brings little or no benefit to the students (or to society), it is a cost that public policy should attempt to minimize or eliminate. It is in this context that the requirement that a program of study must lead to "gainful employment" can best be understood. The cost of excess student debt manifests in three significant ways: payment burdens on the borrower; subsidies from taxpayers; and the negative consequences of default (which fall on the borrower and taxpayers).

The concept of training leading to gainful employment was intended to ensure that this connection between debt and earnings would not be lost. The Department, however, has historically applied the barest minimum enforcement: when applying to access Federal funds, the institution must check a box that says its programs "prepare students for gainful employment in a recognized occupation." [28] While the Department does audit and review other aspects of program eligibility (such as the length of the program), there is no standard for determining whether a program in fact meets the gainful employment requirement.

As described in this RIA, the trends in graduates' earnings, student loan debt, defaults, and repayment underscore the need for the Department to act. The gainful employment standard takes into consideration repayment rates on Federal student loans and the relationship between total student loan debt and earnings after completion of a postsecondary program, and in some cases of new or additional programs,

[28] The application form is available at *http://www.eligcert.ed.gov/ows-doc/eapp.pdf*. Most institutions complete an electronic version of the form.

the institution's application to the Department to target the worst-performing programs and to encourage institutions to improve their programs.

Succinct Statement of the Objectives of, and Legal Basis for, the Regulations

As discussed under the heading *Legal Authority* in the *Analysis of Comments and Changes* section of the preamble, the gainful employment regulations are intended to address growing concerns about high levels of loan debt for students enrolled in postsecondary programs that presumptively provide training that leads to gainful employment in a recognized occupation. The HEA applies different criteria for determining the eligibility of programs and institutions for title IV, HEA program funds. For public and private nonprofit institutions, degree programs of greater than one year in length are generally eligible for title IV, HEA aid regardless of the subject or purpose of the program so long as they meet other requirements. In the case of shorter programs and programs of any length at for-profit institutions, eligibility is restricted to programs that "prepare students for gainful employment in a recognized occupation." This difference in eligibility is longstanding and has been retained through many amendments to the HEA. As recently as the HEOA, Congress again adopted this distinct treatment of for-profit institutions while adding an exception for certain liberal arts baccalaureate programs at some for-profit institutions.

Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Regulations Will Apply

These final regulations apply to programs eligible for title IV, HEA funding because they prepare students for gainful employment. At this time, the Department does not have an accurate count of the number of programs offered by institutions. However, we estimate that as many as 13,728 programs offered by small entities could be subject to these regulations. The proxy used for the number of "programs" is IPEDS Completions data. It counts each instance of a six-digit CIP code (area of study) by award level. So, for example, if an institution awards a certificate in business as well as a bachelor's degree and a master's degree, the programs are counted as three separate programs. The programs are aggregated to the six-digit ID level so that they can be looked at with the repayment data, and the number of programs is unduplicated as a program offered at multiple locations represented by the six-digit OPEID is considered one program. Given that the category of small entities includes some private nonprofit institutions regardless of revenues, a wide range of small entities is covered by the regulations. The entities may include institutions with multiple programs, a few of which are covered by the regulations, to single-program institutions with well established ties to a local employer base. Many of the programs subject to the regulations are offered by for-profit institutions and public and private nonprofit institutions with programs less than two years in length. As demonstrated in Table 24, these sectors have a greater concentration of small entities. Across all sectors, the average total revenue for entities with revenue below $7 million is $2,439,483 based on IPEDS 2008–2009 data.

Table 24: Institutional Characteristics of Small Entities by Sector

	Number of Institutions	Share of Sector Tuition and Fee Revenue	Total Programs	Number of Regulated Programs	Number of Large Regulated Programs	Share of Programs that Are Large Regulated	Share of Enrollment in Large Regulated Programs
4-year Institutions							
Public	4	0%	21	7	1	5%	0%
Private Nonprofit	356	2%	2,585	346	68	3%	0%
Private For-profit	52	1%	342	342	116	34%	1%
2-year Institutions							
Public	88	1%	1,669	1,382	568	34%	0%
Private Nonprofit	142	43%	549	280	170	31%	29%
Private For-profit	405	17%	2,191	2,187	1,152	53%	20%
Less-than-2-year Institutions							
Public	202	68%	1,483	1,482	669	45%	38%
Private nonprofit	61	62%	218	213	127	58%	52%
Private For-profit	983	40%	3,264	3,255	2,027	62%	45%

Source: IPEDS.

The structure of the regulations and the small numbers provisions in the final regulations reduce the effect of the regulations on small entities but complicate the analysis. The regulations provide for the evaluation of individual gainful employment programs offered by postsecondary institutions, but these programs are administered by the institution, either at the branch level or on a system-wide basis. Many institutions have programs that would be considered small, but the classification for this analysis is at the institutional level since a program that is determined ineligible under the regulations would affect the institution's ability to operate. Of the 1,440 for-profit institutions with less than $7 million in revenues, approximately 76 percent have fewer than five programs and the loss of title IV, HEA eligibility for any program would be more likely to cause the institution to shut down than would be the case for larger entities with multiple programs.

The small numbers provision finalized in these regulations requires 30 completers for the debt-to-earnings ratios and 30 borrowers entering repayment in the applicable 2YP, 2YP–A, 2YP–R, 4YP, or 4YP–R for calculation of the debt measures in order for a program to fail the debt measures and potentially be found ineligible. To develop the data necessary to calculate the debt measures, the Department will be entering into a data matching agreement with another Federal agency that has income data, most likely the SSA. The data matching agreement will not permit us to be able to identify an individual program completer's income. Therefore, we will need to assure that data for particular individuals will not be identifiable. To ensure individual data are not identifiable, we will need to suppress small cell sizes based on the requirements of the other Federal agency, which currently requires more than ten individuals.

Under the NPRM, the treatment of programs with a small number of completers was not fully determined. The Department requested comments about small programs in the NPRM, and many commenters did request clarification on how programs with a small number of completers would be treated. While the possibility of rolling up data first from six- to four-digit CIP codes,

then from four- to two-digit CIP code families, then to the entire institution was considered in the NPRM, this approach was rejected.

Under these final regulations, programs that do not have a minimum of 30 completers or borrowers in the 2YP, 2YP–A, or 2YP–R will be evaluated for a four-year period consisting of years three to six in repayment (4Y–P) or years six to nine in repayment (4YP–R). Programs that do not have a minimum of 30 completers or borrowers in the 4YP or 4YP–R will not be evaluated for ineligibility. If the list of completers the Department sends to SSA has more than 30 individuals, the mean or median earnings calculated by SSA will be used to evaluate the program's debt-to-earnings ratios, even if the number of completers used in the calculation is less than 30 after SSA removes any identity mismatches from the list of completers. Programs with fewer than 10 completers in the relevant calculation period cannot be evaluated with data from SSA and the debt-to-earnings ratios will not be produced for those programs. Ultimately, if there are insufficient observations, we will not be able to assess an institution's performance against the debt measures and, in this circumstance, the program is considered to satisfy the debt measures.

The small numbers provision brings the estimated number of programs that could become ineligible under the regulations down from 55,405 to 21,049 programs at all institutions and from 13,566 to 5,728 programs at small entities. Table 25 demonstrates the effect of the small numbers provision on small entities by sector and revenue category. Across all sectors and revenue categories, approximately 62 percent of regulated programs would not have enough completers to be determined ineligible based on existing completions data. While the 30 completer or borrower minimum means that a significant percentage of programs will not be ineligible, it does reduce the chance that the performance of one or two borrowers could result in large variability in a program's performance on the debt measures from year to year. Additionally, while the percentage of programs to which the small numbers provision applies is high, especially for the four-year institutions, the regulated programs with at least 31 completers still represent approximately 92 percent of enrollment in regulated programs at small entities.

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Table 25: Effect of Small Numbers Provision on Regulated Programs by Sector and Revenue Category

			Institutional Revenue Under $7 Million		Institutional Revenue Over $7 Million	
		Regulated Program Share	Number of Programs	Share of Programs	Number of Programs	Share of Programs
4-year	Public Regulated Programs		6	100%	0	0%
	Small data programs	100%	6	100%	0	0%
	Other regulated programs	0%	0	0%	0	0%
	Private Nonprofit Regulated Programs		242	6%	3,836	94%
	Small data programs	81%	192	79%	3,103	81%
	Other regulated programs	19%	50	21%	733	19%
	Private For-profit Regulated Programs		334	100%	0	0%
	Small data programs	66%	222	66%	0	0%
	Other regulated programs	34%	112	34%	0	0%
2-Year	Public Regulated Programs		317	100%	0	0%
	Small data programs	54%	170	54%	0	0%
	Other regulated programs	46%	147	46%	0	0%
	Private Nonprofit Regulated Programs		156	71%	64	29%
	Small data programs	48%	61	39%	45	70%
	Other regulated programs	52%	95	61%	19	30%
	Private For-profit Regulated Programs		1,938	100%	0	0%
	Small data programs	47%	901	47%	0	0%
	Other regulated programs	53%	1,036	53%	0	0%
Less-than 2-Year	Public Regulated Programs		621	100%	0	0%
	Small data programs	52%	323	52%	0	0%
	Other regulated programs	48%	298	48%	0	0%
	Private Nonprofit Regulated Programs		80	63%	46	37%
	Small data programs	27%	24	30%	10	22%
	Other regulated programs	73%	56	70%	36	78%
	Private For-profit Regulated Programs		2,006	100%	0	0%
	Small data programs	34%	679	34%	0	0%
	Other regulated programs	66%	1,327	66%	0	0%
Total	Regulated Programs		**3,994**	29%	**9,646**	71%
	Small data programs	**60%**	**3,197**	**80%**	**5,737**	**59%**
	Other regulated programs	**40%**	**797**	**20%**	**3,910**	**41%**

Source: IPEDS.

The combination of the small numbers provision and the estimated performance of these programs on the debt measures limit the number of programs at small entities as defined by the Small Business Administration that can be found ineligible under the debt measures. While private nonprofit institutions are classified as small entities, our estimates indicate that no more than 4.9 percent of programs at those institutions are likely to fail the debt measures, with an even smaller percentage likely to be found ineligible. It is unlikely that the number of ineligible programs would reach the 5 percent ineligibility cap available based on FY 2014 data. The governmental entities controlling public sector institutions are not expected to fall below the 50,000 threshold for small status under the SBA's Size Standards, but even if they do, programs at public sector institutions are highly unlikely to fail the debt measures. Therefore, our analysis of the effects on small entities focuses on the for-profit sectors. From the estimates described in the *Analysis of the Regulations* section above, the percentage of programs subject to evaluation in the for-profit sectors likely to be found ineligible is 7.1 percent for 4-year institutions, 6.4 percent for 2-year institutions, and 1.8 percent for less-than-2-year institutions. When modeled using the small entities only, those percentages were 6.3 percent, 4.5 percent, and 1.4 percent respectively. Tables 26 A–C and 27 A–C present the results for programs when the model runs are limited to small entities. As indicated above, these results are slightly better than the performance of the full set of institutions. Among programs that are not subject to the small numbers provision, small entities have a higher percentage of programs with initial repayment rates above 35 percent.

Table 26: Estimated Results for Programs at Small Entities under the Low Dropout Scenario

Table 26-A: 4-year Institutions

		Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions		
		Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public	Pass	7	7	7	100%	99%	98%
	Fail Once	0	0	0	1%	1%	1%
	Fail Twice	0	0	0	0%	0%	1%
	Ineligible Year 3	0	0	0	0%	0%	0%
	Ineligible Year 4	0	0	0	0%	0%	0%
Private Nonprofit	Pass	4,384	4,372	4,359	98%	97%	95%
	Fail Once	12	17	22	1%	2%	3%
	Fail Twice	4	8	11	1%	1%	1%
	Ineligible Year 3	0	3	3	0%	0%	0%
	Ineligible Year 4	0	0	5	0%	0%	1%
Private For-profit	Pass	328	323	318	88%	84%	80%
	Fail Once	9	9	10	7%	8%	8%
	Fail Twice	5	6	7	5%	5%	6%
	Ineligible Year 3	0	4	4	0%	3%	3%
	Ineligible Year 4	0	0	3	0%	0%	3%

Table 26-B: 2-year Institutions

		Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions		
		Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public	Pass	1,381	1,381	1,379	100%	100%	100%
	Fail Once	1	1	2	0%	0%	0%
	Fail Twice	0	0	1	0%	0%	0%
	Ineligible Year 3	0	0	0	0%	0%	0%
	Ineligible Year 4	0	0	0	0%	0%	0%
Private Nonprofit	Pass	391	389	386	99%	98%	96%
	Fail Once	2	3	4	1%	2%	2%
	Fail Twice	1	2	2	0%	1%	1%
	Ineligible Year 3	0	1	1	0%	0%	0%
	Ineligible Year 4	0	0	1	0%	0%	1%
Private For-profit	Pass	2,086	2,035	1,993	91%	87%	83%
	Fail Once	65	82	86	6%	7%	8%
	Fail Twice	36	46	58	3%	4%	5%
	Ineligible Year 3	0	24	24	0%	2%	2%
	Ineligible Year 4	0	0	26	0%	0%	2%

Table 26-C: Less-than-2-year Institutions

		Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions		
		Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public	Pass	1,478	1,475	1,471	99%	99%	98%
	Fail Once	3	4	6	1%	1%	1%
	Fail Twice	1	2	3	0%	0%	0%
	Ineligible Year 3	0	1	1	0%	0%	0%
	Ineligible Year 4	0	0	1	0%	0%	0%
Private Nonprofit	Pass	276	273	271	98%	97%	96%
	Fail Once	2	3	4	1%	2%	2%
	Fail Twice	1	2	2	1%	1%	1%
	Ineligible Year 3	0	1	1	0%	0%	0%
	Ineligible Year 4	**0**	0	1	0%	0%	1%
Private For-profit	Pass	3,198	3,169	3,138	97%	96%	94%
	Fail Once	39	48	58	2%	2%	3%
	Fail Twice	18	26	32	1%	1%	2%
	Ineligible Year 3	0	12	12	0%	1%	1%
	Ineligible Year 4	0	0	15	0%	0%	1%

Source: NSLDS, IPEDS, BPS, NPSAS, and MDHE.

Table 27: Estimated Results for Programs at Small Entities under the High Dropout Scenario

Table 27-A: 4-year Institutions

		Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions		
		Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public	Pass	7	7	7	100%	99%	98%
	Fail Once	0	0	0	1%	1%	1%
	Fail Twice	0	0	0	0%	0%	1%
	Ineligible Year 3	0	0	0	0%	0%	0%
	Ineligible Year 4	0	0	0	0%	0%	0%
Private Nonprofit	Pass	4,384	4,372	4,359	98%	97%	95%
	Fail Once	12	17	22	1%	2%	3%
	Fail Twice	4	8	11	1%	1%	1%
	Ineligible Year 3	0	3	3	0%	0%	0%
	Ineligible Year 4	0	0	5	0%	0%	1%
Private For-Profit	Pass	328	322	317	88%	83%	79%
	Fail Once	9	10	10	8%	8%	9%
	Fail Twice	5	6	7	5%	6%	6%
	Ineligible Year 3	0	4	4	0%	3%	3%
	Ineligible Year 4	0	0	4	0%	0%	3%

Table 27-B: 2-year Institutions

		Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions		
		Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public	Pass	1,381	1,381	1,379	100%	100%	100%
	Fail Once	1	1	2	0%	0%	0%
	Fail Twice	0	**0**	1	0%	0%	0%
	Ineligible Year 3	0	**0**	0	0%	0%	0%
	Ineligible Year 4	0	**0**	0	0%	0%	0%
Private Nonprofit	Pass	391	388	386	99%	97%	96%
	Fail Once	2	3	4	1%	2%	2%
	Fail Twice	1	2	2	0%	1%	1%
	Ineligible Year 3	0	1	1	0%	0%	0%
	Ineligible Year 4	0	0	1	0%	0%	1%
Private For-Profit	Pass	2,084	2,029	1,985	91%	86%	82%
	Fail Once	67	86	90	6%	7%	8%
	Fail Twice	36	48	61	3%	4%	5%
	Ineligible Year 3	0	24	24	0%	2%	2%
	Ineligible Year 4	0	0	27	0%	0%	2%

Table 27-C: Less-than-2-year Institutions

		Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions		
		Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public	Pass	1,478	1,475	1,471	99%	99%	98%
	Fail Once	3	4	6	1%	1%	1%
	Fail Twice	1	2	3	0%	0%	0%
	Ineligible Year 3	0	1	1	0%	0%	0%
	Ineligible Year 4	0	**0**	1	0%	0%	0%
Private Nonprofit	Pass	276	273	271	98%	97%	96%
	Fail Once	2	3	4	1%	2%	2%
	Fail Twice	1	2	2	1%	1%	1%
	Ineligible Year 3	0	1	1	0%	0%	0%
	Ineligible Year 4	**0**	0	1	0%	0%	1%
Private For-Profit	Pass	3,197	3,166	3,134	97%	96%	94%
	Fail Once	40	49	60	2%	2%	3%
	Fail Twice	19	28	34	1%	1%	2%
	Ineligible Year 3	0	13	13	0%	1%	1%
	Ineligible Year 4	0	0	15	0%	0%	1%

Source: NSLDS, IPEDS, BPS, NPSAS, and MDHE.

The revenue profile and cost structure of small entities vary from that of the overall set of institutions. Table 28 provides per-enrollee average revenue and expense amounts by sector for small entities.

Table 28: Sector Average Revenues and Expenses per Enrollee at Small Entities

		4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
		Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Institutions with Passing Repayment Rates	**Revenues**									
	Total	11,805	20,616	11,114	8,818	10,478	8,024	12,408	8,474	7,990
	Tuition and Fee	6,764	11,109	9,405	2,805	6,467	6,318	4,784	4,415	5,814
	Core*	11,086	14,798	10,870	8,614	10,063	7,989	12,408	8,261	7,989
	Expenses									
	Total	10,530	26,465	10,936	9,893	27,040	7,104	10,581	9,805	7,337
	Instructional	4,731	8,243	3,143	6,522	7,132	2,951	6,572	5,273	2,954
	Core**	10,530	21,463	10,780	9,598	26,670	7,051	10,581	9,804	7,337
Institutions with Failing Repayment Rates	**Revenues**									
	Total	20,979	10,028	7,078	9,146	7,565	7,286	5,305	6,086	10,248
	Tuition and Fee	8,242	8,142	2,253	4,991	5,884	3,567	2,456	4,462	5,747
	Core*	15,480	9,787	6,871	8,543	7,532	7,286	5,305	6,086	8,894
	Expenses									
	Total	23,844	10,026	5,207	9,792	7,209	5,915	5,654	5,155	10,442
	Instructional	5,469	2,772	2,159	2,592	2,593	4,345	3,290	2,226	3,187
	Core**	18,977	9,898	4,899	9,110	7,170	5,915	5,654	5,139	9,231

*Total revenues for the essential education activities of the institution. Core revenues for public institutions (using the Governmental Accounting Standards Board (GASB) standards) include tuition and fees; government appropriations (federal, state, and local); government grants and contracts; private gifts, grants, and contracts; investment income; other operating and nonoperating sources; and other revenues and additions. Core revenues for private, not-for-profit and public institutions reporting under the Financial Accounting Standards Board (FASB) standards include tuition and fees; government appropriations (federal, state, and local); government grants and contracts; private gifts, grants, and contracts; investment return; sales and services of educational activities; and other sources. Core revenues for private, for-profit institutions reporting under FASB standards include tuition and fees; government appropriations (federal, state, and local); government grants and contracts; private grants and contracts; net investment income; sales and services of educational activities; and other sources. In general, core revenues exclude revenues from auxiliary enterprises (e.g., bookstores, dormitories), hospitals, and independent operations.

**Total expenses for the essential education activities of the institution. Core expenses for public institutions reporting under GASB standards include expenses for instruction, research, public service, academic support, student services, institutional support, operation and maintenance of plant, depreciation, scholarships and fellowships, interest and other operating and nonoperating expenses. Core expenses for FASB (primarily private, not-for-profit and for-profit) institutions include expenses on instruction, research, public service, academic support, student services, institutional support, net grant aid to students, and other expenses. For both FASB and GASB institutions, core expenses exclude expenses for auxiliary enterprises (e.g., bookstores, dormitories), hospitals, and independent operations.

Source: IPEDS.

The number of students from small entities estimated to drop out of education or transfer out of programs at small entities as a result of those programs failing the gainful employment debt measures or becoming ineligible and the accompanying revenue effects are shown in Table 30. The effects of incoming transfers are estimated by applying the share of small entities in a sector to the estimated number of students transferring into the sector in the results generated by the model runs for the full set of institutions described in this Regulatory Impact Analysis. Small entities that fail the debt measures and eventually become ineligible are more likely to close than larger institutions with multiple programs. As a result, the sector revenue losses presented in Table 29 assume that small entities lose 85 percent of total revenues per enrollee leaving failing and ineligible programs, while all institutions lose 100 percent of tuition and fee revenues per enrollee leaving failing and ineligible programs. The estimated cumulative drop in revenue from small entities resulting from students transferring or dropping out of programs that fail the gainful employment debt measures is $91.8 million from programs at for-profit institutions in a four-year period, an average of $22.9 million annually. When offset by the potential revenue gains or expense reductions, the estimated net effects are a $49.5 million loss over four years for programs at for-profit institutions, an average annual loss of $12.4 million. This estimate does not include paperwork and compliance costs, because it reflects only transfers. These estimates are based on student transfers coming in from small entities only and inter-sector transfers from small for-profit entities. Transfers in from large entities could offer small entities opportunities for additional net revenues that would offset these estimated losses.

Table 29: Estimated Direct Revenue and Expense Effects for Small Entities

Table 29-A: For-profit 4-year (Dollars in Thousands)

			Year 2	Year 3	Year 4	Year 5
Private For-profit 4-year	**Low Drop Scenario**					
	Student Movement	Number Dropping Out	50	94	134	287
		Number Transferring Out	160	165	213	205
		Number Transferring In	17	40	63	84
	Tuition and Fee Revenue	Loss From Drops	300.8	565.5	806.2	1,726.6
		Loss From Transfers Out	962.6	992.7	1,281.4	1,233.3
		Gain From Transfers In	162.7	380.0	595.7	790.6
	Expenses	Reduction from Drops	208.30	391.60	558.24	1195.62
		Reduction from Transfers Out	666.55	687.38	887.34	854.02
		Increase from Transfers In	189.19	441.91	692.66	919.36
	Net Change in Revenues for Sector		-415.02	-541.06	-738.98	-1,039.0
	High Drop Scenario					
	Student Movement	Number Dropping Out	119	220	308	379
		Number Transferring Out	66	141	201	255
		Number Transferring In	13	31	49	65
	Tuition and Fee Revenue	Loss From Drops	715.9	1,323.5	1,853.0	2,280.1
		Loss From Transfers Out	397.1	848.3	1,209.2	1,534.1
		Gain From Transfers In	121.5	290.2	462.6	612.1
	Expenses	Reduction from Drops	495.7	916.5	1,283.1	1,578.9
		Reduction from Transfers Out	275.0	587.4	837.4	1,062.3
		Increase from Transfers In	141.3	337.5	537.9	711.8
	Net Change in Revenues for Sector		-362.1	-715.2	-1,017.0	-1,272.6

Source: NSLDS, IPEDS, BPS, NPSAS, and MDHE.

Table 29-B: For-profit 2-year (Dollars in Thousands)

			Year 2	Year 3	Year 4	Year 5
Private For-profit 2-year	**Low Drop Scenario**					
	Student Movement	Number Dropping Out	271	571	915	1,170
		Number Transferring Out	622	1,284	2,004	2,526
		Number Transferring In	479	726	1,228	1,385
	Tuition and Fee Revenue	Loss From Drops	1,678.3	3,536.2	5,666.6	7,245.8
		Loss From Transfers Out	3,852.0	7,951.8	12,410.7	15,643.5
		Gain From Transfers In	3,026.4	4,584.1	7,759.1	8,747.5
	Expenses	Reduction from Drops	1,202.2	2,533.1	4,059.2	5,190.5
		Reduction from Transfers Out	2,759.4	5,696.2	8,890.4	11,206.1
		Increase from Transfers In	3,403.1	5,154.6	8,724.7	9,836.2
	Net Change in Revenues for Sector		-1,945.4	-3,829.1	-6,093.4	-7,581.4
	High Drop Scenario					
	Student Movement	Number Dropping Out	609	1,279	2,055	2,607
		Number Transferring Out	493	1,037	1,630	2,042
		Number Transferring In	474	727	1,155	1,293
	Tuition and Fee Revenue	Loss From Drops	3,771.5	7,920.8	12,726.6	16,145.1
		Loss From Transfers Out	3,053.1	6,422.1	10,094.6	12,646.1
		Gain From Transfers In	2,993.2	4,590.7	7,297.4	8,167.7
	Expenses	Reduction from Drops	2,701.7	5,674.0	9,116.6	11,565.5
		Reduction from Transfers Out	2,187.1	4,600.5	7,231.2	9,059.0
		Increase from Transfers In	3,365.8	5,162.0	8,205.6	9,184.3
	Net Change in Revenues for Sector		-2,308.4	-4,639.8	-7,381.5	-9,183.3

Source: NSLDS, IPEDS, BPS, NPSAS, and MDHE.

Table 29-C: For-profit less-than-2-year (Dollars in Thousands)

			Year 2	Year 3	Year 4	Year 5
Private For-profit Less-than-2-year	**Low Drop Scenario**					
	Student Movement	Number Dropping Out	267	615	937	1,237
		Number Transferring Out	442	1,044	1,592	2,095
		Number Transferring In	1,070	2,042	2,883	3,587
	Tuition and Fee Revenue	Loss From Drops	2,325.7	5,357.0	8,161.7	10,774.9
		Loss From Transfers Out	3,850.0	9,093.8	13,867.1	18,248.5
		Gain From Transfers In	6,220.5	11,874.1	16,760.1	20,851.9
	Expenses	Reduction from Drops	2,091.0	4,816.4	7,338.1	9,687.6
		Reduction from Transfers Out	3,461.5	8,176.1	12,467.7	16,407.0
		Increase from Transfers In	7,850.3	14,985.1	21,151.3	26,315.1
	Net Change in Revenues for Sector		-2,253.0	-4,569.3	-6,614.2	-8,392.0
	High Drop Scenario					
	Student Movement	Number Dropping Out	490	1,162	1,797	2,383
		Number Transferring Out	338	822	1,268	1,677
		Number Transferring In	1,026	1,982	2,764	3,373
	Tuition and Fee Revenue	Loss From Drops	4,268.1	10,121.6	15,652.8	20,757.1
		Loss From Transfers Out	2,944.1	7,160.0	11,044.9	14,607.5
		Gain From Transfers In	5,966.5	11,523.8	16,067.5	19,611.0
	Expenses	Reduction from Drops	3,837.4	9,100.2	14,073.2	18,662.5
		Reduction from Transfers Out	2,647.0	6,437.5	9,930.3	13,133.4
		Increase from Transfers In	7,529.7	14,543.0	20,277.2	24,749.1
	Net Change in Revenues for Sector		-2,291.0	-4,763.2	-6,903.8	-8,706.8

Source: NSLDS, IPEDS, BPS, NPSAS, and MDHE.

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While many programs at small entities would not be determined ineligible under the small numbers provisions and their performance on the debt measures, it is still important for the Department to have data on all of these programs for several reasons. As for all programs, they would be required to disclose their performance. The Department believes that students considering or attending programs with small numbers of borrowers or completers will find the debt measures useful in their decision-making process, even as the Department believes that a larger sample is needed to make reliable eligibility determinations. These data will also be useful to institutions seeking to improve the performance of their programs or considering expanding enrollment in their programs. Finally, examining these programs' data over time will help the Department evaluate the performance of all gainful employment programs. The estimated costs associated with complying with the data collection and reporting requirements are summarized below.

Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Table 30 relates the estimated burden of each information collection requirement to the hours and costs estimated in the *Paperwork Reduction Act of 1995* section of the preamble. This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of the preamble. Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. In total, these changes are estimated to increase burden on small entities participating in the title IV, HEA programs by 30,339 hours per year. The monetized cost of this additional burden on institutions, using wage data developed using BLS data available at *http://www.bls.gov/ncs/ect/sp/ecsuphst.pdf,* is $671,093. This cost was based on an hourly rate of $22.12 that was used to reflect increased management time to establish new data collection procedures associated with the gainful employment provisions.

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Table 30: Estimated Paperwork Burden for Small Entities

Provision	Reg. Section	OMB Control #	Hours	Costs
Optional reporting of tuition and fees.	668.7(c)(2)(i)(A)(2)	OMB 1845-0109	23,360	$516,712
Pre-draft data challenges to list of names to be submitted to the SSA.	668.7(e)(1)	OMB 1845-0109	693	$15,329
Post-draft data corrections challenging the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, or the median loan debt for the program that was used in the numerator of the draft debt-to-earnings ratios.	668.7(e)(2)	OMB 1845-0109	1,155	$25,549
Notification of intent to use alternative earnings and submission of alternative earnings.	668.7(g)	OMB 1845-0109	1,164	$25,742
Debt warnings	668.7(j)(1)-(j)(2)	OMB 1845-0109	116	$2,555
Notification to students and the Secretary that a failing program has been voluntarily discontinued.	668.7(j)(5)	OMB 1845-0109	3,852	$85,206

Table 30 relates the estimated burden for small entities of each paperwork requirement to the hours and costs estimated in the *Paperwork Reduction Act of 1995* section of this preamble. The largest burden comes from the optional reporting of tuition and fees to limit the amount of debt included in the debt-to-earnings calculation. The estimated burden for small entities of reporting tuition and fee information about students is 23,360 hours and $516,712.

Prior to the issuance of the draft debt-to-earnings ratios, the Secretary will provide a list to institutions of students that will be included in the applicable two- or four-year period used to calculate the debt-to-earnings ratios beginning in FY 2012. Institutions will have 30 days after the date the list is sent to the institution, to provide corrections such as, evidence that a student should be included or excluded from the list or to submit corrected or updated student identity information. The estimated burden from these pre-draft data challenges is 1,155 hours and $25,742. After the issuance of draft debt measures, institutions will have the ability to challenge the accuracy of the loan data for a borrower that was used to calculate the draft loan repayment rate, the list of borrowers used to calculate the loan repayment rate, or the median loan debt for the program that was used in the numerator of the draft debt-to-earnings ratio. The burden associated with challenges to the draft debt measures is 2,772 hours annually at a cost of $61,317. Programs that fail the debt measures may demonstrate that a failing program would meet a debt-to-earnings standard by recalculating the debt-to-earnings ratios using the median loan debt for the program and using alternative earnings data from: a State-sponsored data system, an institutional survey conducted in accordance with NCES standards, or, for fiscal years 2012, 2013, and 2014, BLS data. The estimated burden of notifying the Secretary of the intent to use alternative earnings data and of supplying the alternative earnings information is 1,164 hours and $25,742.

Additional items included in the burden estimate for institutions reported under OMB

1845–0109 include an estimated burden of 3,852 hours for notifying the Secretary and students when an institution voluntarily withdraws a failing program from title IV, HEA participation and the date when title IV, HEA aid will no longer be available for the program and an estimated 116 hours in issuing debt warnings to current students. Together, these provisions have an estimated cost of $113,503 for small entities.

Identification, to the Extent Practicable, of All Relevant Federal Regulations That May Duplicate, Overlap, or Conflict With the Regulations

The regulations are unlikely to conflict with or duplicate existing Federal regulations. Under existing law and regulations administered by the Department, institutions are required to disclose data in a number of complementary areas related to the regulations. For example, among the information that institutions must disclose under the HEA is price information including a "net price" calculator and a pricing summary page. The additional information required by these final regulations will help students make informed decisions about the affordability of their student loan debts and the performance of the covered programs.

Alternatives Considered

As described above, the Department evaluated the regulations for their effect on different types of institutions, including the small entities that comprise approximately 60 percent of title IV, HEA eligible institutions subject to these regulations. As discussed in the Alternatives Considered *section* of this RIA, several different approaches were analyzed, including the use of graduation and placement rates, disclosure alone, a NPV return on investment analysis, an index of factors, default rates, and higher thresholds for the repayment rate. Default rates are not used because a low default rate is not synonymous with a low debt burden. As noted earlier, forbearance, deferments for economic hardship and unemployment, and income-contingent and income-based repayment are important consumer protections that help keep former students out of default; however cohort default rates, alone, are not an adequate standard for assessment of whether a program prepares students for gainful employment. Nor can disclosure serve as a standard for determining whether a program complies with the gainful employment requirement in the statute. For example, with a disclosure approach an institution might report that one of its programs did not place a single graduate into a job, yet the program would remain eligible as "preparing students for gainful employment in a recognized occupation" because it disclosed the fact that it had failed to do so. For graduation and placement rates, non-Federal negotiators raised concerns about the ability of institutions to obtain valid placement information from graduates and employers. Based on the information we have available, using them as a measure of gainful employment would be premature. No specific proposal was considered for an index, nor is it clear how such an index would logically measure gainful employment. Furthermore, one should be cautious about assuming that an institution enrolling lower-income students should necessarily have lower expectations for the future employment or earnings of graduates. An index could be a good approach to provide incentives, perhaps as a method of distributing funds in a program. While we find the concept appealing, we are not convinced that it is appropriate for accomplishing the goals of these regulations.

As the analysis and comments from outside parties shaped the proposal, alternatives were developed that reduced the proposal's negative effects. These alternatives include a delayed effective date for the gainful employment standard, an ability of institutions to request that a program's repayment rate be evaluated for those three years further along in their careers, a cap limiting the number of programs that could lose eligibility in the first year after the regulations take effect to the lowest-performing programs producing no more than 5 percent of completers during the prior award year, increased debt-to-earnings limits, and a decreased repayment rate threshold. These alternatives are not specifically targeted at small entities, but the delayed effective date and initial cap on the regulations' effect will provide time for small entities to adapt to the regulations. Clarification of the treatment of programs with a small number of completers or borrowers is particularly relevant for small entities and, along with the changes to the calculation of the debt measures and the requirement that a program is not ineligible until it fails the debt measures for three of four FYs, reduces the effect of the regulations on small entities and opens opportunities for programs that serve students well.

RIA Technical Notes

All data analyzed as part of this regulatory impact analysis, including the regressions relating repayment rate to student and institutional characteristics, is available on-line at *http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/integrity-analysis.html.* This file was created by merging data provided from the National Student Loan Data System (NSLDS) with information collected by the National Center for Education Statistics' Integrated Postsecondary Education Data System (IPEDS). Analysts who wish to append additional information to this file are cautioned that all IPEDS data has been aggregated by six-digit OPE IDs, because that is the level at which repayment rates are reported.

The RIA analysis file contains 5,495 unique records. The regressions reported in this filing are limited to a subset of those records, specifically: (a) Those that had undergraduate offerings, (b) those that have a non-missing repayment rate (e.g., institutions may participate in title IV, HEA grant programs but not in the loan programs), and (c) those that had no missing predictor variables. The final analytic population is 4,255 institutions, or 77 percent of the total RIA file.

Table TA-1: Distribution of cases included in the initial and final RIA Regression analysis dataset, by institution sector

		Included In Initial Dataset[1]		Included in Final Dataset[2]	
Sector	Total Cases	Number	Percent	Number	Percent
4-year Institutions					
Public	596	576	97%	547	92%
Private Nonprofit	1,479	1,205	81%	1,136	77%
For-Profit	211	183	87%	174	82%
2-year Institutions					
Public	1,041	828	80%	824	79%
Private Nonprofit	170	146	86%	118	69%
For-Profit	582	530	91%	506	87%
<2-year Institutions					
Public	231	135	58%	112	48%
Private Nonprofit	65	41	63%	38	58%
For-Profit	1,099	856	78%	800	73%
Total	**5,474**	**4,500**	**82%**	**4,255**	**78%**

[1] To be included in the initial dataset, cases had to meet the following criteria: (a) in initial analytic file, (b) have undergraduate offerings, and (c) have a non-missing repayment rate in the initial analytic file.
[2] To be included in the final dataset, cases had to have no missing values on any predictor variable later used in a regression model.

Source: NSLDS and IPEDS.

The regression analysis has five components:

(1) An ordinary least squares regression relating repayment rate (RepayRateFinalRule) to four possible sets of predictor variables;

a. Student body characteristics, including the percentage of students at an institution who are identified as racial/ethnic minorities (PerMinority), the percentage of students at an institution who receive Pell grants (PellPerWinsor),[29] the percentage of the undergraduate student population represented by women (pctugwomen), and the percentage of the undergraduate student population under the age of 25 (pctugunder25).

[29] This variable has been winsorized to reduce extreme observations.

Table TA-2: Distribution of cases included in initial RIA dataset that were excluded from the final file due to missing predictors, by institution sector

Sector	Included in Initial Dataset	Excluded from Final Set Due to Missing Data		Included in Final Dataset
		Number	Percent	
4-year Institutions				
Public	576	29	5%	547
Private Nonprofit	1,205	69	6%	1136
For-Profit	183	9	5%	174
2-year Institutions				
Public	828	4	0%	824
Private Nonprofit	146	28	19%	118
For-Profit	530	24	5%	506
Less-than-2-year Institutions				
Public	135	23	17%	112
Private Nonprofit	41	3	7%	38
For-Profit	856	56	7%	800
Total	**4,500**	**245**	**5%**	**4,255**

Source: NSLDS and IPEDS.

b. Measures of institutional spending and growth, including instructional (InstPerTotalExp) and non-instructional (CorePerTotalExp) costs and the percentage change in the size of the entering undergraduate class at an institution between 2006 and 2009 (PctChangeEntering06_09).

c. Total graduation rate (GradRateTot).

d. And, among 4-year institutions, a measure of institutional selectivity: An institutions acceptance rate (AcceptRate08).

(2) An ordinary least squares regression relating repayment rate (RepayRateFinalRule) to the percentage of students at an institution who are identified as racial/ethnic minorities;

(3) An ordinary least squares regression relating repayment rate (RepayRateFinalRule) to the percentage of students at an institution who receive Pell grants;

(4) All pairwise correlations between the dependent and independent variables; and

(5) The semi-partial correlation between repayment rate and each of the independent variables used in the regression analysis.

In the discussion of the results of that analysis, we rely on two concepts with which not all readers may be familiar.

The standardized regression coefficient. Comparing the strength of predictors in a regression model is complicated by the fact that not all independent variables are likely to be in the same metric. Such is the case here; for example, we include both rates (e.g., retention) and per-FTE expenses (e.g., instructional expenses). To increase comparability, regression coefficients can be *standardized,* so that all variables have the same "scale." The larger the absolute value of a standardized regression coefficient, the greater the effect it has on the dependent variable. Technically, the standardized regression coefficient, beta, is read as: "A one standard deviation change in *x* makes a *beta* standard deviation change in *y*."

RIA Appendix A–1: High Dropout Scenario

This scenario features a drop-out starting at 15% of those remaining after baseline dropouts and transfers for a single failure and up to 42% for for-profit-less-than-2-year institutions. The transfer rates associated with this scenario run from 20% for a single failure to 40% for ineligibility. The transfers are distributed according to our opinion that most transfers attributable to gainful employment would occur within the sectors, particularly the for-profit sectors. This is due to the capacity and flexibility of successful for-profit programs to expand at a faster rate than public institutions.

Table A-1A: Enrollment Assumptions

	Public 4-year	Private Nonprofit 4-year	Private For-profit 4-year	Public 2-year	Private Nonprofit 2-year	Private For-profit 2-year	Public Less-than-2-year	Private Nonprofit Less-than-2-year	Private For-Profit Less-than-2-year
Annual Enrollment Growth Percentage for 2008 to 2012	0.015	0.02	0.07	0.03	0.02	0.06	0.02	0.02	0.07
Year 1 to Year 2 Growth	1.02	1.03	1.07	1.03	1.03	1.06	1.02	1.03	1.05
Year 2 to Year 3 Growth	1.03	1.03	1.07	1.03	1.03	1.07	1.03	1.04	1.07
Year 3 to Year 4 Growth	1.03	1.03	1.07	1.04	1.04	1.07	1.04	1.03	1.07
Year 4 to Year 5 Growth	1.03	1.03	1.07	1.04	1.04	1.07	1.04	1.03	1.07

Table A-1B: Debt Ratio Failure Rate

For Institutions that Passed the Debt Ratios in the Previous Year

	Repayment Rate in next year		
	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	2%	4%	8%
Private Nonprofit 4-year	3%	8%	12%
Private For-profit 4-year	8%	15%	29%
Public 2-year	2%	2%	4%
Private Nonprofit 2-year	5%	8%	10%
Private For-profit 2-year	6%	12%	20%
Public less-than-2-year	2%	4%	6%
Private Nonprofit less-than-2-year	3%	4%	8%
Private For-profit less-than-2-year	3%	4%	8%

For Institutions that Failed the Debt Ratios in the Previous Year

	Repayment Rate in next year		
Year 2	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	85%	85%	90%
Private Nonprofit 4-year	85%	85%	90%
Private For-profit 4-year	80%	80%	85%
Public 2-year	85%	85%	90%
Private Nonprofit 2-year	85%	85%	90%
Private For-profit 2-year	80%	80%	85%
Public less-than-2-year	80%	80%	85%
Private Nonprofit less-than-2-year	80%	80%	85%
Private For-profit less-than-2-year	80%	80%	85%

	Repayment Rate in Next Year		
Year 3	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	75%	75%	80%
Private Nonprofit 4-year	75%	75%	80%
Private For-profit 4-year	70%	70%	75%
Public 2-year	75%	75%	80%
Private Nonprofit 2-year	75%	75%	80%
Private For-profit 2-year	70%	70%	75%
Public less-than-2-year	70%	70%	75%
Private Nonprofit less-than-2-year	70%	70%	75%
Private For-profit less-than-2-year	70%	70%	75%

	Repayment Rate in Next Year		
Year 4	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	70%	70%	75%
Private Nonprofit 4-year	70%	70%	75%
Private For-profit 4-year	65%	65%	70%
Public 2-year	70%	70%	75%
Private Nonprofit 2-year	70%	70%	75%
Private For-profit 2-year	65%	65%	70%
Public less-than-2-year	65%	65%	70%
Private Nonprofit less-than-2-year	65%	65%	70%
Private For-profit less-than-2-year	65%	65%	70%

Table A-1C: Repayment Category Transition Assumptions

Year 1 to Year 2

Repayment Rate Year 1	Repayment Rate Year 2: 45% or Above	Between 35% and 45%	Below 35%
45% or Above	85%	10%	5%
Between 35% and 45%	15%	65%	20%
Below 35%	3%	12%	85%

Year 2 to Year 3

Repayment Rate Year 1: 45% or Above	Repayment Rate Year 3: 45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2			
45% or Above	90%	8%	2%
Between 35% and 45%	25%	55%	20%
Below 35%	2%	28%	70%

Repayment Rate Year 1: Between 35% and 45%			
Repayment Rate Year 2			
45% or Above	65%	25%	10%
Between 35% and 45%	15%	75%	10%
Below 35%	5%	10%	85%

Repayment Rate Year 1: Below 35%			
Repayment Rate Year 2			
45% or Above	40%	40%	20%
Between 35% and 45%	25%	60%	15%
Below 35%	1%	9%	90%

Year 3 to Year 4

	Repayment Rate Year 4		
Repayment Rate Year 1: 45% or Above	45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2: 45% or Above			
Repayment Rate Year 3			
45% or Above	96%	2%	2%
Between 35% and 45%	30%	60%	10%
Below 35%	5%	35%	60%

Repayment Rate Year 1: 45% or Above			
Repayment Rate Year 2: Between 35% and 45%			
Repayment Rate Year 3			
45% or Above	30%	60%	10%
Between 35% and 45%	15%	75%	10%
Below 35%	5%	25%	70%

Repayment Rate Year 1: 45% or Above			
Repayment Rate Year 2: Below 35%			
Repayment Rate Year 3			
45% or Above	40%	40%	20%
Between 35% and 45%	25%	60%	15%
Below 35%	2%	13%	85%

	Repayment Rate Year 4		
Repayment Rate Year 1: Between 35% and 45%	45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2: 45% or Above			
Repayment Rate Year 3			
45% or Above	90%	9%	1%
Between 35% and 45%	25%	65%	10%
Below 35%	8%	22%	70%

Repayment Rate Year 1: Between 35% and 45%			
Repayment Rate Year 2: Between 35% and 45%			
Repayment Rate Year 3			
45% or Above	70%	20%	10%
Between 35% and 45%	15%	75%	10%
Below 35%	5%	15%	80%

Repayment Rate Year 1: Between 35% and 45%			
Repayment Rate Year 2: Below 35%			
Repayment Rate Year 3			
45% or Above	40%	40%	20%
Between 35% and 45%	10%	60%	30%
Below 35%	5%	10%	85%

	Repayment Rate Year 4		
Repayment Rate Year 1: Below 35%	45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2: 45% or Above			
Repayment Rate Year 3			
45% or Above	95%	3%	2%
Between 35% and 45%	15%	75%	10%
Below 35%	8%	32%	60%

Repayment Rate Year 1: Below 35%			
Repayment Rate Year 2: Between 35% and 45%			
Repayment Rate Year 3			
45% or Above	85%	10%	5%
Between 35% and 45%	10%	75%	15%
Below 35%	5%	15%	80%

Repayment Rate Year 1: Below 35%			
Repayment Rate Year 2: Below 35%			
Repayment Rate Year 3			
45% or Above	40%	40%	20%
Between 35% and 45%	15%	60%	25%
Below 35%	0%	2%	98%

Table A-1D: Student Transition Assumptions

	To: Institutions in Sector that did not Fail									
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions			
From: Failed Once	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Drop Out
Public 4-year	0.02	0.02	0.08	0.01	0.00	0.02	0.00	0.00	0.00	0.11
Private Nonprofit 4-year	0.00	0.02	0.09	0.01	0.00	0.02	0.00	0.00	0.00	0.11
Private For-profit 4-year	0.00	0.02	0.06	0.01	0.00	0.02	0.00	0.00	0.02	0.10
Public 2-year	0.01	0.01	0.02	0.02	0.02	0.02	0.00	0.00	0.01	0.08
Private Nonprofit 2-year	0.01	0.01	0.01	0.01	0.01	0.02	0.00	0.00	0.01	0.07
Private For-profit 2-year	0.00	0.00	0.02	0.01	0.02	0.03	0.01	0.01	0.02	0.09
Public Less-than-2-year	0.00	0.00	0.01	0.02	0.01	0.04	0.02	0.02	0.03	0.13
Private Nonprofit Less-than-2-year	0.00	0.00	0.01	0.01	0.01	0.03	0.01	0.01	0.02	0.10
Private For-Profit Less-than-2-year	0.00	0.00	0.01	0.01	0.01	0.04	0.01	0.01	0.03	0.12

	To: Institutions in Sector that did not Fail									
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions			
From: Failed Twice	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Drop Out
Public 4-year	0.02	0.02	0.04	0.02	0.02	0.04	0.01	0.01	0.01	0.16
Private Nonprofit 4-year	0.02	0.02	0.04	0.02	0.02	0.05	0.01	0.01	0.01	0.16
Private For-profit 4-year	0.00	0.01	0.02	0.01	0.01	0.03	0.01	0.01	0.01	0.10
Public 2-year	0.01	0.01	0.01	0.01	0.01	0.02	0.00	0.00	0.01	0.08
Private Nonprofit 2-year	0.01	0.01	0.02	0.01	0.01	0.02	0.00	0.00	0.01	0.10
Private For-profit 2-year	0.00	0.01	0.02	0.01	0.01	0.02	0.00	0.00	0.01	0.10
Public Less-than-2-year	0.01	0.01	0.02	0.02	0.02	0.03	0.02	0.02	0.03	0.20
Private Nonprofit Less-than-2-year	0.01	0.01	0.01	0.02	0.01	0.02	0.01	0.02	0.02	0.13
Private For-Profit Less-than-2-year	0.00	0.01	0.01	0.02	0.01	0.02	0.01	0.02	0.02	0.16

	To: Institutions in Sector that did not Fail									
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions			
From: Ineligible	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Drop Out
Public 4-year	0.03	0.02	0.05	0.02	0.02	0.04	0.01	0.01	0.01	0.22
Private Nonprofit 4-year	0.03	0.02	0.06	0.02	0.02	0.04	0.01	0.01	0.01	0.22
Private For-profit 4-year	0.00	0.02	0.04	0.00	0.02	0.03	0.00	0.01	0.01	0.12
Public 2-year	0.01	0.01	0.02	0.02	0.01	0.02	0.00	0.00	0.01	0.11
Private Nonprofit 2-year	0.01	0.01	0.02	0.02	0.01	0.03	0.00	0.00	0.01	0.14
Private For-profit 2-year	0.00	0.01	0.03	0.01	0.02	0.04	0.00	0.01	0.01	0.15
Public Less-than-2-year	0.01	0.01	0.02	0.02	0.02	0.04	0.02	0.02	0.04	0.27
Private Nonprofit Less-than-2-year	0.01	0.01	0.01	0.02	0.02	0.03	0.02	0.02	0.03	0.19
Private For-Profit Less-than-2-year	0.00	0.01	0.01	0.01	0.02	0.04	0.01	0.02	0.04	0.22

	To: Institutions in Sector that had one Fail								
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
From: Failed Once	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Public 4-year	0	0	0	0	0	0	0	0	0
Private Nonprofit 4-year	0	0	0	0	0	0	0	0	0
Private For-profit 4-year	0	0	0	0	0	0	0	0	0
Public 2-year	0	0	0	0	0	0	0	0	0
Private Nonprofit 2-year	0	0	0	0	0	0	0	0	0
Private For-profit 2-year	0	0	0	0	0	0	0	0	0
Public Less-than-2-year	0	0	0	0	0	0	0	0	0
Private Nonprofit Less-than-2-year	0	0	0	0	0	0	0	0	0
Private For-Profit Less-than-2-year	0	0	0	0	0	0	0	0	0

	To: Institutions in Sector that had one Fail								
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
From: Failed Twice	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Public 4-year	0.007	0.007	0.007	0.000	0.000	0.000	0.000	0.000	0.000
Private Nonprofit 4-year	0.007	0.007	0.007	0.000	0.000	0.000	0.000	0.000	0.000
Private For-profit 4-year	0.000	0.005	0.005	0.000	0.000	0.000	0.000	0.000	0.000
Public 2-year	0.002	0.002	0.002	0.003	0.003	0.003	0.002	0.002	0.002
Private Nonprofit 2-year	0.002	0.002	0.002	0.004	0.004	0.004	0.002	0.002	0.002
Private For-profit 2-year	0.000	0.002	0.002	0.004	0.004	0.004	0.002	0.002	0.002
Public Less-than-2-year	0.000	0.000	0.000	0.008	0.000	0.008	0.004	0.004	0.008
Private Nonprofit Less-than-2-year	0.000	0.000	0.000	0.005	0.000	0.005	0.003	0.003	0.005
Private For-Profit Less-than-2-year	0.000	0.000	0.000	0.006	0.000	0.006	0.003	0.003	0.006

	To: Institutions in Sector that had one Fail								
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
From: Ineligible	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Public 4-year	0.008	0.008	0.008	0.004	0.004	0.004	0	0	0
Private Nonprofit 4-year	0.008	0.008	0.008	0.004	0.004	0.004	0	0	0
Private For-profit 4-year	0	0.005	0.005	0	0.003	0.003	0	0	0
Public 2-year	0.002	0.002	0.002	0.003	0.003	0.003	0.003	0.003	0.003
Private Nonprofit 2-year	0.002	0.002	0.002	0.004	0.004	0.004	0.004	0.004	0.004
Private For-profit 2-year	0	0.003	0.003	0.003	0.006	0.006	0	0	0.006
Public Less-than-2-year	0.004	0.004	0.004	0.007	0.007	0.007	0.007	0.007	0.015
Private Nonprofit Less-than-2-year	0.003	0.003	0.003	0.005	0.005	0.005	0.005	0.005	0.01
Private For-Profit Less-than-2-year	0	0.004	0.004	0	0.007	0.007	0.004	0.004	0.014

Table A-1E: Student Transition Results

	Year 2	Year 3	Year 4	Year 5
Public 4-Year				
No Fail	327,060	330,420	333,954	340,714
Transfer Out of Sector	186	585	970	1,355
Transfer Into Sector from Out	125	479	918	1,379
Transfer within Sector	29	95	160	226
Remain in Sector and Status*	1,151	3,307	5,012	6,698
Drop Out	162	525	892	1,256
Private Nonprofit 4-year				
No Fail	171,637	176,033	182,377	190,347
Transfer Out of Sector	164	438	767	1133
Transfer Into Sector from Out	1433	3808	6018	8074
Transfer within Sector	30	73	123	179
Remain in Sector and Status*	1015	2397	3809	5389
Drop Out	145	398	707	1051
Private For-profit 4-year				
No Fail	2,568,184	2,621,422	2,692,559	2,773,370
Transfer Out of Sector	4,520	12,154	19,083	25,144
Transfer Into Sector from Out	1,407	3,086	4,919	6,509
Transfer within Sector	5,118	10,674	14,691	18,302
Remain in Sector and Status*	67,466	163,182	238,471	302,278
Drop Out	8,188	19,696	29,447	38,087

	Year 2	Year 3	Year 4	Year 5
Public 2-Year				
No Fail	3,964,029	4,053,618	4,146,656	4,279,736
Transfer Out of Sector	1,349	3,625	5,846	8,289
Transfer Into Sector from Out	1,298	3,248	4,583	5,600
Transfer within Sector	386	908	1,367	1,911
Remain in Sector and Status*	14,408	37,700	58,521	81,151
Drop Out	1,385	3,672	5,947	8,488
Private Nonprofit 2-yar				
No Fail	29,129	30,732	33,995	39,629
Transfer Out of Sector	21	57	111	198
Transfer Into Sector from Out	1,169	2,923	5,198	7,208
Transfer within Sector	4	11	19	34
Remain in Sector and Status*	255	617	1,076	1,839
Drop Out	20	56	112	198
Private For-profit 2-year				
No Fail	696,362	700,059	704,303	721,865
Transfer Out of Sector	3,324	6,699	10,304	12,735
Transfer Into Sector from Out	2,267	6,015	9,552	12,826
Transfer within Sector	1,230	2,297	3,699	4,644
Remain in Sector and Status*	36,889	71,007	102,621	122,080
Drop Out	4,099	8,257	13,007	16,268

	Year 2	Year 3	Year 4	Year 5
Public Less-than-2-year				
No Fail	116,658	120,421	125,025	131,667
Transfer Out of Sector	8	34	80	137
Transfer Into Sector from Out	473	1,321	2,077	2,701
Transfer within Sector	1	5	10	16
Remain in Sector and Status*	51	198	398	640
Drop Out	9	39	90	152

Private Nonprofit Less-than-2-year				
No Fail	36,707	38,132	40,352	43,000
Transfer Out of Sector	22	63	117	178
Transfer Into Sector from Out	401	1,232	2,138	2,891
Transfer within Sector	3	8	15	24
Remain in Sector and Status*	194	522	873	1,274
Drop Out	25	71	132	201

Private For-profit Less-than-2-year				
No Fail	672,177	704,618	741,717	781,205
Transfer Out of Sector	1,208	2,765	4,142	5,365
Transfer Into Sector from Out	2,231	4,309	6,008	7,333
Transfer within Sector	356	768	1,209	1,596
Remain in Sector and Status*	10,909	21,616	29,563	37,198
Drop Out	1,749	3,902	5,874	7,629

***Students stay at an institution that had the same result--either failing or passing--the gainful employment test. It is assumed that students who transfer within a sector do not attend an institution that has failed these tests.**

Table A-1F: Program Transition Results

	Gainful Employment Programs			Share of Programs Subject to Debt Measures*		
	Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public 4-year	**4,943**	**4,943**	**4,943**			
Pass	4,926	4,913	4,897	98.7%	97.7%	96.4%
Fail Once	13	19	25	1.0%	1.5%	1.9%
Fail Twice	4	9	12	0.3%	0.7%	1.0%

Ineligible Year 3	-		3	3	0.0%	0.2%	0.2%
Ineligible Year 4	-	-		6	0.0%	0.0%	0.4%
Private Nonprofit 4-year		**4,400**	**4,400**	**4,400**			
Pass		4,384	4,371	4,358	98.1%	96.7%	95.1%
Fail Once		12	17	22	1.4%	2.0%	2.6%
Fail Twice		4	8	11	0.5%	1.0%	1.3%
Ineligible Year 3	-		3	3	0.0%	0.4%	0.4%
Ineligible Year 4	-	-		5	0.0%	0.0%	0.6%
Private For-profit 4-year		**4,243**	**4,243**	**4,243**			
Pass		3,915	3,783	3,668	86.0%	80.4%	75.5%
Fail Once		209	227	239	8.9%	9.7%	10.2%
Fail Twice		118	153	168	5.1%	6.5%	7.2%
Ineligible Year 3	-		80	80	0.0%	3.4%	3.4%
Ineligible Year 4	-	-		87	0.0%	0.0%	3.7%
Public 2-year		**30,232**	**30,232**	**30,232**			
Pass		30,125	30,056	29,976	98.9%	98.2%	97.3%
Fail Once		77	100	130	0.8%	1.0%	1.4%
Fail Twice		30	55	69	0.3%	0.6%	0.7%
Ineligible Year 3	-		21	21	0.0%	0.2%	0.2%
Ineligible Year 4	-	-		35	0.0%	0.0%	0.4%
Private Nonprofit 2-year		**394**	**394**	**394**			
Pass		391	389	386	98.5%	97.4%	96.2%
Fail Once		2	3	4	1.1%	1.5%	2.0%
Fail Twice		1	2	2	0.4%	0.8%	1.0%
Ineligible Year 3	-		1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-		1	0.0%	0.0%	0.5%
Private For-profit 2-year		**4,754**	**4,754**	**4,754**			
Pass		4,396	4,220	4,084	87.3%	81.1%	76.3%
Fail Once		225	279	284	8.0%	9.9%	10.1%
Fail Twice		133	165	204	4.7%	5.9%	7.2%
Ineligible Year 3	-		90	90	0.0%	3.2%	3.2%
Ineligible Year 4	-	-		91	0.0%	0.0%	3.2%
Public less-than-2-year		**2,043**	**2,043**	**2,043**			

Pass	2,039	2,035	2,031	99.6%	99.3%	98.9%
Fail Once	3	5	7	0.3%	0.5%	0.7%
Fail Twice	1	2	3	0.1%	0.2%	0.3%
Ineligible Year 3	-	1	1	0.0%	0.1%	0.1%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.1%
Private Nonprofit less-than-2-year	**279**	**279**	**279**			
Pass	275	273	271	98.2%	97.1%	95.8%
Fail Once	2	3	4	1.3%	1.7%	2.2%
Fail Twice	1	2	2	0.5%	0.9%	1.1%
Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit less-than-2-year	**4,117**	**4,117**	**4,117**			
Pass	4,016	3,964	3,909	96.3%	94.5%	92.5%
Fail Once	68	83	101	2.5%	3.0%	3.7%
Fail Twice	34	48	58	1.2%	1.7%	2.1%
Ineligible Year 3	-	23	23	0.0%	0.8%	0.8%
Ineligible Year 4	-	-	26	0.0%	0.0%	0.9%

* Programs that had more than 30 completers and students entering repayment in a four-year period. Percentages are based on the 21,049 programs estimated to meet these criteria.

RIA Appendis A–2: Low Dropout Scenario

This scenario features a drop-out starting at 5% of those remaining after baseline dropouts and transfers for a single failure and up to 22% for for-profit-less-than-2-year institutions. The transfer rates associated with this scenario run from 25% for a single failure to 50% for ineligibility, slightly higher than under Scenario A–1 as fewer students dropped out in this scenario. The transfers are distributed according to our opinion that most transfers attributable to gainful employment would occur within the sectors, particularly the for-profit-sectors. This is due to the capacity and flexibility of successful for-profit programs to expand at a faster rate than public institutions.

Table A-2A: Enrollment Assumptions

	Public 4-year	Private Nonprofit 4-year	Private For-profit 4-year	Public 2-year	Private Nonprofit 2-year	Private For-profit 2-year	Public Less-than-2-year	Private Nonprofit Less-than-2-year	Private For-Profit Less-than-2-year
Annual Enrollment Growth Percentage for 2008 to 2012	0.015	0.02	0.07	0.03	0.02	0.06	0.02	0.02	0.07
Year 1 to Year 2 Growth	1.02	1.03	1.07	1.03	1.03	1.06	1.02	1.03	1.05
Year 2 to Year 3 Growth	1.02	1.03	1.07	1.03	1.03	1.07	1.03	1.04	1.06
Year 3 to Year 4 Growth	1.02	1.03	1.07	1.03	1.03	1.06	1.03	1.04	1.06
Year 4 to Year 5 Growth	1.03	1.03	1.07	1.04	1.04	1.06	1.04	1.03	1.06

Table A-2B: Debt Ratios Failure Distribution

For Institutions that Passed the Debt Ratios in the Previous Year

	Repayment Rate in Next Year		
	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	2%	4%	8%
Private Nonprofit 4-year	3%	8%	12%
Private For-profit 4-year	8%	15%	29%
Public 2-year	2%	2%	4%
Private Nonprofit 2-year	5%	8%	10%
Private For-profit 2-year	6%	12%	20%
Public less-than-2-year	2%	4%	6%
Private Nonprofit less-than-2-year	3%	4%	8%
Private For-profit less-than-2-year	3%	4%	8%

For Institutions that Failed the Debt Ratios in the Previous Year

	Repayment Rate in Year 2		
Year 1 to Year 2	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	85%	85%	95%
Private Nonprofit 4-year	85%	85%	95%
Private For-profit 4-year	80%	80%	90%
Public 2-year	85%	85%	95%
Private Nonprofit 2-year	85%	85%	95%
Private For-profit 2-year	80%	80%	90%
Public less-than-2-year	80%	80%	90%
Private Nonprofit less-than-2-year	80%	80%	90%
Private For-profit less-than-2-year	80%	80%	85%

	Repayment Rate in Year 3		
Year 2 to Year 3	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	80%	80%	85%
Private Nonprofit 4-year	80%	80%	85%
Private For-profit 4-year	75%	75%	80%
Public 2-year	80%	80%	85%
Private Nonprofit 2-year	80%	80%	85%
Private For-profit 2-year	75%	75%	80%
Public less-than-2-year	75%	75%	80%
Private Nonprofit less-than-2-year	75%	75%	80%
Private For-profit less-than-2-year	75%	75%	80%

	Repayment Rate in Year 4		
Year 3 to Year 4	45% or Above	Between 35% and 45%	Below 35%
Public 4-year	75%	75%	80%
Private Nonprofit 4-year	75%	75%	80%
Private For-profit 4-year	70%	70%	75%
Public 2-year	75%	75%	80%
Private Nonprofit 2-year	75%	75%	80%
Private For-profit 2-year	70%	70%	75%
Public less-than-2-year	70%	70%	75%
Private Nonprofit less-than-2-year	70%	70%	75%
Private For-profit less-than-2-year	70%	70%	75%

Table A-2C: Repayment Category Transition Assumptions

Year 1 to Year 2

Repayment Rate Year 1	Repayment Rate Year 2: 45% or Above	Between 35% and 45%	Below 35%
45% or Above	85%	10%	5%
Between 35% and 45%	15%	65%	20%
Below 35%	5%	15%	80%

Year 2 to Year 3

Repayment Rate Year 1: 45% or Above	Repayment Rate Year 3: 45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2			
45% or Above	90%	8%	2%
Between 35% and 45%	25%	55%	20%
Below 35%	50%	30%	65%

Repayment Rate Year 1: Between 35% and 45%			
Repayment Rate Year 2			
45% or Above	65%	25%	10%
Between 35% and 45%	15%	75%	10%
Below 35%	5%	15%	80%

Repayment Rate Year 1: Below 35%			
Repayment Rate Year 2			
45% or Above	40%	45%	15%
Between 35% and 45%	25%	65%	10%
Below 35%	5%	10%	85%

Year 3 to Year 4

	Repayment Rate Year 4		
Repayment Rate Year 1: 45% or Above	45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2: 45% or Above			
Repayment Rate Year 3			
45% or Above	96%	2%	2%
Between 35% and 45%	30%	60%	10%
Below 35%	5%	40%	55%

Repayment Rate Year 1: 45% or Above			
Repayment Rate Year 2: Between 35% and 45%			
Repayment Rate Year 3			
45% or Above	30%	60%	10%
Between 35% and 45%	15%	75%	10%
Below 35%	5%	30%	65%

Repayment Rate Year 1: 45% or Above			
Repayment Rate Year 2: Below 35%			
Repayment Rate Year 3			
45% or Above	40%	40%	20%
Between 35% and 45%	25%	60%	15%
Below 35%	5%	15%	80%

	Repayment Rate Year 4		
Repayment Rate Year 1: Between 35% and 45%	45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2: 45% or Above			
Repayment Rate Year 3			
45% or Above	90%	9%	1%
Between 35% and 45%	25%	65%	10%
Below 35%	5%	30%	65%

Repayment Rate Year 1: Between 35% and 45%

Repayment Rate Year 2: Between 35% and 45%			
Repayment Rate Year 3			
45% or Above	70%	20%	10%
Between 35% and 45%	15%	75%	10%
Below 35%	5%	20%	75%

Repayment Rate Year 1: Between 35% and 45%

Repayment Rate Year 2: Below 35%			
Repayment Rate Year 3			
45% or Above	40%	40%	20%
Between 35% and 45%	10%	60%	30%
Below 35%	5%	15%	80%

	Repayment Rate Year 4		
Repayment Rate Year 1: Below 35%	45% or Above	Between 35% and 45%	Below 35%
Repayment Rate Year 2: 45% or Above			
Repayment Rate Year 3			
45% or Above	95%	3%	2%
Between 35% and 45%	15%	75%	10%
Below 35%	10%	35%	55%

Repayment Rate Year 1: Below 35%

Repayment Rate Year 2: Between 35% and 45%			
Repayment Rate Year 3			
45% or Above	85%	10%	5%
Between 35% and 45%	10%	75%	15%
Below 35%	5%	25%	75%

Repayment Rate Year 1: Below 35%

Repayment Rate Year 2: Below 35%			
Repayment Rate Year 3			
45% or Above	40%	40%	20%
Between 35% and 45%	15%	60%	25%
Below 35%	0%	7%	93%

Table A-2D: Student Transition Assumptions

	To: Institutions in Sector that did not Fail									
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions			
From: Failed Once	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Drop Out
Public 4-year	0.03	0.02	0.09	0.02	0.02	0.02	0.00	0.00	0.00	0.04
Private Nonprofit 4-year	0.00	0.02	0.11	0.02	0.02	0.02	0.00	0.00	0.00	0.04
Private For-profit 4-year	0.00	0.01	0.08	0.01	0.01	0.01	0.00	0.00	0.01	0.04
Public 2-year	0.01	0.01	0.02	0.03	0.02	0.03	0.01	0.00	0.01	0.03
Private Nonprofit 2-year	0.01	0.01	0.02	0.01	0.02	0.03	0.00	0.00	0.01	0.03
Private For-profit 2-year	0.00	0.00	0.02	0.01	0.02	0.03	0.01	0.01	0.02	0.04
Public Less-than-2-year	0.00	0.00	0.02	0.02	0.01	0.05	0.02	0.02	0.04	0.07
Private Nonprofit Less-than-2-year	0.00	0.00	0.01	0.01	0.01	0.04	0.01	0.01	0.03	0.05
Private For-Profit Less-than-2-year	0.00	0.00	0.02	0.02	0.01	0.04	0.02	0.02	0.03	0.07

	To: Institutions in Sector that did not Fail									
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions			
From: Failed Twice	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Drop Out
Public 4-year	0.02	0.02	0.06	0.02	0.02	0.05	0.01	0.01	0.01	0.06
Private Nonprofit 4-year	0.03	0.02	0.06	0.02	0.02	0.05	0.01	0.01	0.01	0.07
Private For-profit 4-year	0.01	0.01	0.04	0.01	0.01	0.03	0.00	0.01	0.01	0.04
Public 2-year	0.01	0.01	0.02	0.01	0.01	0.02	0.00	0.00	0.01	0.04
Private Nonprofit 2-year	0.01	0.01	0.02	0.02	0.02	0.02	0.01	0.01	0.01	0.04
Private For-profit 2-year	0.00	0.01	0.02	0.02	0.02	0.03	0.00	0.01	0.01	0.05
Public Less-than-2-year	0.01	0.01	0.02	0.02	0.02	0.04	0.02	0.03	0.04	0.10
Private Nonprofit Less-than-2-year	0.01	0.01	0.01	0.01	0.01	0.02	0.01	0.02	0.02	0.07
Private For-Profit Less-than-2-year	0.00	0.01	0.02	0.02	0.02	0.04	0.00	0.03	0.04	0.09

	To: Institutions in Sector that did not Fail									
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions			
From: Ineligible	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Drop Out
Public 4-year	0.04	0.03	0.07	0.03	0.03	0.05	0.01	0.01	0.01	0.09
Private Nonprofit 4-year	0.04	0.03	0.08	0.03	0.03	0.05	0.01	0.01	0.01	0.10
Private For-profit 4-year	0.00	0.02	0.05	0.00	0.02	0.03	0.00	0.01	0.01	0.05
Public 2-year	0.01	0.01	0.02	0.02	0.01	0.03	0.00	0.00	0.01	0.05
Private Nonprofit 2-year	0.02	0.01	0.03	0.03	0.02	0.04	0.01	0.01	0.01	0.06
Private For-profit 2-year	0.00	0.01	0.04	0.01	0.02	0.05	0.00	0.01	0.01	0.07
Public Less-than-2-year	0.01	0.01	0.02	0.03	0.03	0.06	0.03	0.03	0.06	0.13
Private Nonprofit Less-than-2-year	0.01	0.01	0.01	0.02	0.02	0.04	0.02	0.02	0.04	0.10
Private For-Profit Less-than-2-year	0.00	0.01	0.02	0.01	0.03	0.05	0.01	0.03	0.05	0.12

	To: Institutions in Sector that had one Fail								
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
From: Failed Once	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Public 4-year	0	0	0	0	0	0	0	0	0
Private Nonprofit 4-year	0	0	0	0	0	0	0	0	0
Private For-profit 4-year	0	0	0	0	0	0	0	0	0
Public 2-year	0	0	0	0	0	0	0	0	0
Private Nonprofit 2-year	0	0	0	0	0	0	0	0	0
Private For-profit 2-year	0	0	0	0	0	0	0	0	0
Public Less-than-2-year	0	0	0	0	0	0	0	0	0
Private Nonprofit Less-than-2-year	0	0	0	0	0	0	0	0	0
Private For-Profit Less-than-2-year	0	0	0	0	0	0	0	0	0

	To: Institutions in Sector that had one Fail								
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
From: Failed Twice	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Public 4-year	0.008	0.008	0.008	0.000	0.000	0.000	0.000	0.000	0.000
Private Nonprofit 4-year	0.008	0.008	0.008	0.000	0.000	0.000	0.000	0.000	0.000
Private For-profit 4-year	0.000	0.005	0.005	0.000	0.000	0.000	0.000	0.000	0.000
Public 2-year	0.002	0.002	0.002	0.004	0.004	0.004	0.002	0.002	0.002
Private Nonprofit 2-year	0.002	0.002	0.002	0.005	0.005	0.005	0.002	0.002	0.002
Private For-profit 2-year	0.000	0.003	0.003	0.003	0.005	0.005	0.000	0.003	0.003
Public Less-than-2-year	0.000	0.000	0.000	0.009	0.000	0.009	0.005	0.005	0.009
Private Nonprofit Less-than-2-year	0.000	0.000	0.000	0.006	0.000	0.006	0.003	0.003	0.006
Private For-Profit Less-than-2-year	0.000	0.000	0.000	0.000	0.000	0.010	0.005	0.005	0.010

	To: Institutions in Sector that had one Fail								
	4-year Institutions			2-year Institutions			Less-than-2-year Institutions		
From: Ineligible	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit
Public 4-year	0.009	0.009	0.009	0.005	0.005	0.005	0	0	0
Private Nonprofit 4-year	0.01	0.01	0.01	0.005	0.005	0.005	0	0	0
Private For-profit 4-year	0	0.006	0.006	0	0.003	0.003	0	0	0
Public 2-year	0.002	0.002	0.002	0.004	0.004	0.004	0.004	0.004	0.004
Private Nonprofit 2-year	0.003	0.003	0.003	0.005	0.005	0.005	0.005	0.005	0.005
Private For-profit 2-year	0	0.004	0.004	0.004	0.007	0.007	0	0.007	0.007
Public Less-than-2-year	0.005	0.005	0.005	0.009	0.009	0.009	0.009	0.009	0.018
Private Nonprofit Less-than-2-year	0.003	0.003	0.003	0.006	0.006	0.006	0.006	0.006	0.013
Private For-Profit Less-than-2-year	0	0.004	0.004	0	0.009	0.009	0.004	0.009	0.018

Table A-2E: Student Transition Results

	Year 2	Year 3	Year 4	Year 5
Public 4-Year				
No Fail	327,060	330,513	334,498	341,952
Transfer Out of Sector	226	714	1,192	1,688
Transfer Into Sector from Out	161	728	1,336	1,930
Transfer within Sector	44	133	219	310
Remain in Sector and Status*	1,204	3,495	5,327	7,192
Drop Out	53	185	330	482
Private Nonprofit 4-year				
No Fail	171,637	175,933	182,350	190,671
Transfer Out of Sector	218	570	1004	1518
Transfer Into Sector from Out	1293	3809	6340	8783
Transfer within Sector	24	66	119	182
Remain in Sector and Status*	1063	2526	4063	5876
Drop Out	49	143	268	415
Private For-profit 4-year				
No Fail	2,568,184	2,625,280	2,706,729	2,799,614
Transfer Out of Sector	5,544	14,489	22,604	30,068
Transfer Into Sector from Out	1,864	4,041	6,334	8,407
Transfer within Sector	6,567	14,008	19,457	24,608
Remain in Sector and Status*	69,769	169,495	248,208	318,288
Drop Out	3,412	8,362	12,722	16,802

	Year 2	Year 3	Year 4	Year 5
Public 2-Year				
No Fail	3,964,029	4,054,896	4,151,204	4,288,503
Transfer Out of Sector	1,683	4,442	7,100	10,115
Transfer Into Sector from Out	1,877	4,377	5,990	7,275
Transfer within Sector	491	1,141	1,710	2,403
Remain in Sector and Status*	14,829	38,754	59,762	82,966
Drop Out	526	1431	2366	3428
Private Nonprofit 2-yar				
No Fail	29,129	32,202	38,334	47,803
Transfer Out of Sector	26	74	152	289
Transfer Into Sector from Out	2,622	5,755	8,930	11,827
Transfer within Sector	5	14	27	47
Remain in Sector and Status*	261	664	1,231	2,227
Drop Out	7	23	49	94
Private For-profit 2-year				
No Fail	696,362	695,333	697,946	713,706
Transfer Out of Sector	4,190	8,279	12,662	15,721
Transfer Into Sector from Out	2,295	6,472	10,559	14,477
Transfer within Sector	1,548	2,876	4,557	5,730
Remain in Sector and Status*	37,982	72,302	102,637	122,182
Drop Out	1,822	3,688	5,797	7,306

	Year 2	Year 3	Year 4	Year 5
Public Less-than-2-year				
No Fail	116,658	120,529	124,907	131,141
Transfer Out of Sector	10	43	91	157
Transfer Into Sector from Out	578	1,048	1,634	2,216
Transfer within Sector	1	5	11	18
Remain in Sector and Status*	54	212	399	642
Drop Out	5	20	42	72
Private Nonprofit Less-than-2-year				
No Fail	36,707	38,230	40,733	43,832
Transfer Out of Sector	28	78	148	254

Transfer Into Sector from Out	488	1,523	2,747	3,795
Transfer within Sector	3	10	19	33
Remain in Sector and Status*	200	543	949	1,548
Drop Out	12	36	70	118
Private For-profit Less-than-2-year				
No Fail	672,177	698,883	730,442	764,292
Transfer Out of Sector	1,579	3,511	5,195	6,698
Transfer Into Sector from Out	2,326	4,440	6,267	7,797
Transfer within Sector	412	980	1,533	2,018
Remain in Sector and Status*	11,278	21,928	29,581	36,936
Drop Out	953	2,063	3,055	3,950

***Students stay at an institution that had the same result--either failing or passing--the gainful employment test. It is assumed that students who transfer within a sector do not attend an institution that has failed these tests.**

Table A-2F: Program Transition Results

	Gainful Employment Programs			Share of Programs Subject to Debt Measures*		
	Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public 4-year	4,943	4,943	4,943			
Pass	4,926	4,913	4,898	98.7%	97.7%	96.5%
Fail Once	13	18	24	1.0%	1.4%	1.9%
Fail Twice	4	9	12	0.3%	0.7%	0.9%
Ineligible Year 3	-	3	3	0.0%	0.2%	0.2%
Ineligible Year 4	-	-	6	0.0%	0.0%	0.4%
Private Nonprofit 4-year	4,400	4,400	4,400			
Pass	4,384	4,372	4,359	98.1%	96.7%	95.2%
Fail Once	12	17	22	1.4%	2.0%	2.6%
Fail Twice	4	8	11	0.5%	0.9%	1.3%
Ineligible Year 3	-	3	3	0.0%	0.4%	0.4%
Ineligible Year 4	-	-	5	0.0%	0.0%	0.6%
Private For-profit 4-year	4,243	4,243	4,243			
Pass	3,920	3,796	3,688	86.2%	80.9%	76.3%
Fail Once	205	219	233	8.8%	9.4%	9.9%
Fail Twice	118	147	158	5.0%	6.3%	6.8%
Ineligible Year 3	-	80	80	0.0%	3.4%	3.4%
Ineligible Year 4	-	-	84	0.0%	0.0%	3.6%
Public 2-year	30,232	30,232	30,232			
Pass	30,127	30,061	29,986	98.9%	98.2%	97.4%
Fail Once	76	96	124	0.8%	1.0%	1.3%
Fail Twice	29	54	67	0.3%	0.6%	0.7%
Ineligible Year 3	-	21	21	0.0%	0.2%	0.2%
Ineligible Year 4	-	-	35	0.0%	0.0%	0.4%
Private Nonprofit 2-year	394	394	394			
Pass	391	389	386	98.5%	97.5%	96.3%
Fail Once	2	3	4	1.1%	1.5%	1.9%
Fail Twice	1	2	2	0.4%	0.8%	1.0%
Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%

Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit 2-year	4,754	4,754	4,754			
Pass	4,402	4,239	4,113	87.5%	81.8%	77.3%
Fail Once	220	266	272	7.8%	9.4%	9.6%
Fail Twice	133	159	191	4.7%	5.6%	6.8%
Ineligible Year 3	-	90	90	0.0%	3.2%	3.2%
Ineligible Year 4	-	-	88	0.0%	0.0%	3.1%
Public less-than-2-year	2,043	2,043	2,043			
Pass	2,039	2,035	2,031	99.6%	99.3%	98.9%
Fail Once	3	5	7	0.3%	0.5%	0.6%
Fail Twice	1	2	3	0.1%	0.2%	0.3%
Ineligible Year 3	-	1	1	0.0%	0.1%	0.1%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.1%
Private Nonprofit less-than-2-year	279	279	279			
Pass	275	274	271	98.2%	97.2%	96.0%
Fail Once	2	3	4	1.3%	1.6%	2.1%
Fail Twice	1	2	2	0.5%	0.9%	1.1%
Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit less-than-2-year	4,117	4,117	4,117			
Pass	4,018	3,970	3,919	96.4%	94.7%	92.8%
Fail Once	68	80	97	2.4%	2.9%	3.5%
Fail Twice	32	46	54	1.1%	1.7%	2.0%
Ineligible Year 3	-	22	22	0.0%	0.8%	0.8%
Ineligible Year 4	-	-	26	0.0%	0.0%	0.9%

* Programs that had more than 30 completers and students entering repayment in a four-year period. Percentages are based on the 21,049 programs estimated to meet these criteria.

RIA Appendix A–3: Program Results for Small Institutions

The scenarios described here mirror those described in the high dropout and low dropout scenarios, with the data set limited to small institutions only.

Table A-3(1): Program Transition Results for Small Institutions Under the High Dropout Scenario

	Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions*		
	Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public 4-year	7	7	7			
Pass	7	7	7	99.5%	98.8%	98.0%
Fail Once	0	0	0	0.5%	0.9%	1.3%
Fail Twice	-	0	0	0.0%	0.3%	0.5%
Ineligible Year 3	-	-	-	0.0%	0.0%	0.0%
Ineligible Year 4	-	-	0	0.0%	0.0%	0.2%
Private Nonprofit 4-year	4,400	4,400	4,400			
Pass	4,384	4,371	4,358	98.1%	96.7%	95.1%
Fail Once	12	17	22	1.4%	2.0%	2.6%
Fail Twice	4	8	11	0.5%	1.0%	1.3%
Ineligible Year 3	-	3	3	0.0%	0.4%	0.4%
Ineligible Year 4	-	-	5	0.0%	0.0%	0.6%
Private For-profit 4-year	342	342	342			
Pass	328	322	318	87.8%	83.0%	79.0%
Fail Once	9	10	10	7.5%	8.3%	8.6%
Fail Twice	5	6	7	4.7%	5.5%	6.1%
Ineligible Year 3	-	4	4	0.0%	3.2%	3.2%
Ineligible Year 4	-	-	4	0.0%	0.0%	3.1%
Public 2-year	1,382	1,382	1,382			
Pass	1,381	1,380	1,379	99.9%	99.7%	99.5%
Fail Once	1	1	2	0.1%	0.2%	0.3%
Fail Twice	-	0	1	0.0%	0.1%	0.1%
Ineligible Year 3				0.0%	0.0%	0.0%

	-	-	-			
Ineligible Year 4	-	-	0	0.0%	0.0%	0.1%
Private Nonprofit 2-year	394	394	394			
Pass	391	389	386	98.5%	97.4%	96.2%
Fail Once	2	3	4	1.1%	1.5%	2.0%
Fail Twice	1	2	2	0.4%	0.8%	1.0%
Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit 2-year	2,187	2,187	2,187			
Pass	2,084	2,029	1,985	91.1%	86.3%	82.4%
Fail Once	67	86	90	5.8%	7.4%	7.8%
Fail Twice	36	48	61	3.1%	4.2%	5.3%
Ineligible Year 3	-	24	24	0.0%	2.1%	2.1%
Ineligible Year 4	-	-	27	0.0%	0.0%	2.3%
Public less-than-2-year	1,482	1,482	1,482			
Pass	1,478	1,475	1,471	99.4%	98.9%	98.4%
Fail Once	3	5	6	0.5%	0.7%	0.9%
Fail Twice	1	2	3	0.1%	0.3%	0.4%
Ineligible Year 3	-	1	1	0.0%	0.1%	0.1%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.2%
Private Nonprofit less-than-2-year	279	279	279			
Pass	275	273	271	98.2%	97.1%	95.8%
Fail Once	2	3	4	1.3%	1.7%	2.2%
Fail Twice	1	2	2	0.5%	0.9%	1.1%
Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit less-than-2-year	3,255	3,255	3,255			
Pass	3,197	3,166	3,133	97.1%	95.6%	94.0%
Fail Once	40	49	60	1.9%	2.4%	3.0%
Fail Twice	19	28	34	0.9%	1.4%	1.7%
Ineligible Year 3	-	13	13	0.0%	0.6%	0.6%
Ineligible Year 4	-	-	15	0.0%	0.0%	0.7%

*Programs that had fewer than 30 completers or students entering repayment in a four-year period.

Table A-3(2): Program Transition Results for Small Number Institutions Under the Low Dropout Scenario

	Gainful Employment Programs at Small Institutions			Share of Programs Subject to Debt Measures at Small Institutions*		
	Year 2	Year 3	Year 4	Year 2	Year 3	Year 4
Public 4-year	7	7	7			
Pass	7	7	7	99.5%	98.8%	97.8%
Fail Once	0	0	0	0.5%	0.9%	1.3%
Fail Twice	-	0	0	0.0%	0.3%	0.5%
Ineligible Year 3	-	-	0	0.0%	0.0%	0.2%
Ineligible Year 4	-	-	0	0.0%	0.0%	0.2%
Private Nonprofit 4-year	4,400	4,400	4,400			
Pass	4,384	4,372	4,359	98.1%	96.7%	95.2%
Fail Once	12	17	22	1.4%	2.0%	2.6%
Fail Twice	4	8	11	0.5%	0.9%	1.3%
Ineligible Year 3	-	3	3	0.0%	0.4%	0.4%
Ineligible Year 4	-	-	5	0.0%	0.0%	0.6%
Private For-profit 4-year	342	342	342			
Pass	328	323	319	88.0%	83.5%	79.8%
Fail Once	9	9	10	7.4%	8.0%	8.4%
Fail Twice	5	6	7	4.7%	5.3%	5.7%
Ineligible Year 3	-	4	4	0.0%	3.2%	3.2%
Ineligible Year 4	-	-	3	0.0%	0.0%	2.9%
Public 2-year	1,382	1,382	1,382			
Pass	1,381	1,380	1,379	99.9%	99.8%	99.6%
Fail Once	1	1	2	0.1%	0.2%	0.3%
Fail Twice	-	-	-	0.0%	0.0%	0.0%
Ineligible Year 3	-	-	0	0.0%	0.0%	0.1%
Ineligible Year 4	-	-	0	0.0%	0.0%	0.1%
Private Nonprofit 2-year	394	394	394			
Pass	391	389	386	98.5%	97.5%	96.3%
Fail Once	2	3	4	1.1%	1.5%	1.9%
Fail Twice	1	2	2	0.4%	0.8%	1.0%

Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit 2-year	2,187	2,187	2,187			
Pass	2,086	2,034	1,993	91.2%	86.7%	83.1%
Fail Once	65	82	86	5.7%	7.1%	7.5%
Fail Twice	36	46	58	3.1%	4.0%	5.0%
Ineligible Year 3	-	24	24	0.0%	2.1%	2.1%
Ineligible Year 4	-	-	26	0.0%	0.0%	2.3%
Public less-than-2-year	1,482	1,482	1,482			
Pass	1,478	1,475	1,471	99.4%	98.9%	98.4%
Fail Once	3	4	6	0.5%	0.7%	0.9%
Fail Twice	1	2	3	0.1%	0.3%	0.4%
Ineligible Year 3	-	1	1	0.0%	0.1%	0.1%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.2%
Private Nonprofit less-than-2-year	279	279	279			
Pass	275	274	271	98.2%	97.2%	96.0%
Fail Once	2	3	4	1.3%	1.6%	2.1%
Fail Twice	1	2	2	0.5%	0.9%	1.1%
Ineligible Year 3	-	1	1	0.0%	0.3%	0.3%
Ineligible Year 4	-	-	1	0.0%	0.0%	0.5%
Private For-profit less-than-<2-year	3,255	3,255	3,255			
Pass	3,198	3,169	3,139	97.2%	95.7%	94.3%
Fail Once	39	48	58	1.9%	2.3%	2.8%
Fail Twice	18	26	32	0.9%	1.3%	1.6%
Ineligible Year 3	-	12	12	0.0%	0.6%	0.6%
Ineligible Year 4	-	-	15	0.0%	0.0%	0.7%

*Programs that had fewer than 30 completers or students entering repayment in a four-year period.

RIA Appendix B:

Tables 12_40% Alt: Estimated Direct Revenue and Expense Effects (Dollars in Millions)

Table 12-A: 4-year Institutions

			Year 2	Year 3	Year 4	Year 5
Public 4-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.6	1.9	3.2	4.5
		Loss From Transfers Out	0.7	2.1	3.5	4.9
		Gain From Transfers In	0.6	2.2	4.2	6.3
	Expenses	Reduction from Drop Outs	2.7	8.7	14.8	20.9
		Reduction from Transfers Out	3.1	9.7	16.1	22.6
		Increase from Transfers In	3.2	12.3	23.6	35.5
	Net Change in Revenues for Sector		**1.9**	**4.4**	**4.9**	**4.9**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.2	0.7	1.2	1.7
		Loss From Transfers Out	0.8	2.6	4.3	6.0
		Gain From Transfers In	0.7	3.3	6.1	8.8
	Expenses	Reduction from Drop Outs	0.9	3.1	5.5	8.0
		Reduction from Transfers Out	3.8	11.9	19.8	28.1
		Increase from Transfers In	4.1	18.7	34.4	49.7
	Net Change in Revenues for Sector		**0.2**	**-3.7**	**-8.4**	**-12.5**
Private Nonprofit 4-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	1.2	3.2	5.8	8.6
		Loss From Transfers Out	1.3	3.6	6.3	9.2
		Gain From Transfers In	16.1	42.8	67.6	90.6
	Expenses	Reduction from Drop Outs	2.8	7.6	13.5	20.1
		Reduction from Transfers Out	3.1	8.4	14.6	21.6
		Increase from Transfers In	35.2	93.4	147.7	198.1
	Net Change in Revenues for Sector		**-15.7**	**-41.5**	**-64.0**	**-83.6**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.4	1.2	2.2	3.4
		Loss From Transfers Out	1.8	4.6	8.2	12.4
		Gain From Transfers In	14.5	42.8	71.2	98.6
	Expenses	Reduction from Drop Outs	0.9	2.7	5.1	7.9
		Reduction from Transfers Out	4.2	10.9	19.2	29.0
		Increase from Transfers In	31.7	93.5	155.6	215.5
	Net Change in Revenues for Sector		**-14.3**	**-42.9**	**-70.5**	**-95.8**
Private For-profit 4-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	63.3	152.3	227.7	294.6
		Loss From Transfers Out	35.0	94.0	147.6	194.5
		Gain From Transfers In	14.8	32.4	51.6	68.3
	Expenses	Reduction from Drop Outs	51.3	123.4	184.5	238.7
		Reduction from Transfers Out	28.3	76.2	119.6	157.6
		Increase from Transfers In	12.1	26.6	42.4	56.1
	Net Change in Revenues for Sector		**-16.0**	**-41.0**	**-62.0**	**-80.6**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	26.4	64.7	98.4	129.9
		Loss From Transfers Out	42.9	112.1	174.8	232.5
		Gain From Transfers In	19.5	42.4	66.4	88.2
	Expenses	Reduction from Drop Outs	21.4	52.4	79.7	105.3
		Reduction from Transfers Out	34.7	90.8	141.6	188.4
		Increase from Transfers In	16.1	34.8	54.6	72.4
	Net Change in Revenues for Sector		**-9.7**	**-26.0**	**-40.0**	**-53.1**

Table 12-B: 2-year Institutions

			Year 2	Year 3	Year 4	Year 5
Public 2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	1.0	2.6	4.3	6.1
		Loss From Transfers Out	1.0	2.6	4.2	5.9
		Gain From Transfers In	1.5	3.6	5.1	6.3
	Expenses	Reduction from Drop Outs	2.7	7.2	11.7	16.7
		Reduction from Transfers Out	2.7	7.1	11.5	16.3
		Increase from Transfers In	3.0	7.4	10.5	12.8
	Net Change in Revenues for Sector		**1.9**	**5.3**	**9.4**	**14.4**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.4	1.0	1.7	2.5
		Loss From Transfers Out	1.2	3.2	5.1	7.3
		Gain From Transfers In	2.1	4.9	6.7	8.2
	Expenses	Reduction from Drop Outs	1.0	2.8	4.7	6.7
		Reduction from Transfers Out	3.3	8.7	14.0	19.9
		Increase from Transfers In	4.3	10.0	13.7	16.6
	Net Change in Revenues for Sector		**0.6**	**2.2**	**4.8**	**8.4**
Private Nonprofit 2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.1	0.3	0.6	1.0
		Loss From Transfers Out	0.1	0.3	0.6	1.0
		Gain From Transfers In	7.5	18.8	33.5	46.5
	Expenses	Reduction from Drop Outs	0.1	0.2	0.4	0.8
		Reduction from Transfers Out	0.1	0.2	0.4	0.8
		Increase from Transfers In	12.7	31.6	56.3	78.0
	Net Change in Revenues for Sector		**-5.2**	**-12.9**	**-23.0**	**-32.0**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.2	0.5
		Loss From Transfers Out	0.1	0.4	0.8	1.4
		Gain From Transfers In	16.9	37.1	57.6	76.2
	Expenses	Reduction from Drop Outs	0.0	0.1	0.2	0.4
		Reduction from Transfers Out	0.1	0.3	0.6	1.1
		Increase from Transfers In	28.4	62.3	96.7	128.0
	Net Change in Revenues for Sector		**-11.5**	**-25.3**	**-39.3**	**-52.2**
Private For-profit 2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	26.3	53.1	83.6	104.6
		Loss From Transfers Out	21.4	43.1	66.2	81.9
		Gain From Transfers In	15.6	41.3	65.6	88.1
	Expenses	Reduction from Drop Outs	11.8	23.8	37.6	47.0
		Reduction from Transfers Out	9.6	19.3	29.8	36.8
		Increase from Transfers In	7.0	18.5	29.4	39.5
	Net Change in Revenues for Sector		**-17.7**	**-30.2**	**-46.4**	**-54.1**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	11.7	23.7	37.3	47.0
		Loss From Transfers Out	26.9	53.2	81.4	101.1
		Gain From Transfers In	15.8	44.4	72.5	99.4
	Expenses	Reduction from Drop Outs	5.3	10.7	16.7	21.1
		Reduction from Transfers Out	12.1	23.9	36.6	45.4
		Increase from Transfers In	7.1	19.9	32.5	44.6
	Net Change in Revenues for Sector		**-12.6**	**-17.9**	**-25.4**	**-26.7**

Table 12-C: Less-than-2-year Institutions

			Year 2	Year 3	Year 4	Year 5
Public Less-than-2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.3	0.5
		Loss From Transfers Out	0.0	0.1	0.3	0.5
		Gain From Transfers In	2.3	6.3	10.0	13.0
	Expenses	Reduction from Drop Outs	0.0	0.1	0.2	0.4
		Reduction from Transfers Out	0.0	0.1	0.2	0.3
		Increase from Transfers In	2.1	5.9	9.3	12.1
	Net Change in Revenues for Sector		**0.1**	**0.3**	**0.5**	**0.5**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.1	0.3
		Loss From Transfers Out	0.0	0.2	0.3	0.6
		Gain From Transfers In	2.8	5.0	7.8	10.6
	Expenses	Reduction from Drop Outs	0.0	0.0	0.1	0.2
		Reduction from Transfers Out	0.0	0.1	0.2	0.4
		Increase from Transfers In	2.6	4.7	7.3	9.9
	Net Change in Revenues for Sector		**0.2**	**0.3**	**0.4**	**0.4**
Private Nonprofit Less-than-2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	0.1	0.2	0.3	0.5
		Loss From Transfers Out	0.1	0.2	0.3	0.4
		Gain From Transfers In	1.8	5.4	9.4	12.8
	Expenses	Reduction from Drop Outs	0.1	0.2	0.3	0.5
		Reduction from Transfers Out	0.0	0.1	0.3	0.4
		Increase from Transfers In	1.6	4.8	8.4	11.3
	Net Change in Revenues for Sector		**0.2**	**0.6**	**1.0**	**1.4**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	0.0	0.1	0.2	0.3
		Loss From Transfers Out	0.1	0.2	0.4	0.6
		Gain From Transfers In	2.2	6.7	12.1	16.8
	Expenses	Reduction from Drop Outs	0.0	0.1	0.2	0.3
		Reduction from Transfers Out	0.1	0.2	0.3	0.6
		Increase from Transfers In	1.9	6.0	10.8	14.9
	Net Change in Revenues for Sector		**0.2**	**0.7**	**1.3**	**1.8**
Private For-profit Less-than-2-year	**High Dropout Scenario**					
	Tuition and Fee Revenue	Loss From Drop Outs	8.7	19.4	29.3	38.0
		Loss From Transfers Out	6.0	13.8	20.6	26.7
		Gain From Transfers In	13.7	26.4	36.8	45.0
	Expenses	Reduction from Drop Outs	3.9	8.6	13.0	16.9
		Reduction from Transfers Out	2.7	6.1	9.2	11.9
		Increase from Transfers In	6.7	13.0	18.1	22.1
	Net Change in Revenues for Sector		**-1.2**	**-5.0**	**-9.0**	**-13.1**
	Low Dropout Scenario					
	Tuition and Fee Revenue	Loss From Drop Outs	4.7	10.3	15.2	19.7
		Loss From Transfers Out	7.9	17.5	25.9	33.4
		Gain From Transfers In	14.3	27.2	38.4	47.8
	Expenses	Reduction from Drop Outs	2.1	4.6	6.8	8.7
		Reduction from Transfers Out	3.5	7.8	11.5	14.8
		Increase from Transfers In	7.0	13.4	18.9	23.5
	Net Change in Revenues for Sector		**0.2**	**-1.6**	**-3.3**	**-5.2**

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Part IV

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 210, 215, 220 *et al.*
Child and Adult Care Food Program Improving Management and Program Integrity; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210, 215, 220, 225, and 226

RIN 0584–AC24

Child and Adult Care Food Program Improving Management and Program Integrity

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule incorporates into the Child and Adult Care Food Program regulations modifications, clarifications, and technical changes to the two interim rules published by the Department on June 27, 2002 and September 1, 2004. These changes result from over 1,000 public comments received in response to the two interim rules; State agencies' and the Department's experience in implementing the changes in these two rules over several years; and the Department's conduct of an extensive data collection and analysis (the Child Care Assessment Project) designed to evaluate implementation of these two interim rules by family day care home sponsors and providers. This rule clarifies or modifies regulatory provisions relating to: State agency criteria for approving new and renewing institutions' applications; sponsoring organization requirements pertaining to the "block claim" edit check and review averaging; and State- and institution-level requirements pertaining to the serious deficiency process. The changes in this final rule are designed to further improve Program management and integrity and, where possible, to streamline and simplify Program requirements.

DATES: *Effective date:* This final rule is effective July 13, 2011.

Approval date: The information collection requirements contained in this rule is subject to OMB approval. Once they have been approved, FNS will publish a separate action in the **Federal Register** announcing OMB's approval.

FOR FURTHER INFORMATION CONTACT: Ms. Julie Brewer or Ms. Tina Namian at 3101 Park Center Drive, Room 634, Alexandria, VA 22302–1594, or by telephone at (703) 305–2590. A regulatory impact analysis was completed as part of the development of this final rule. Copies of this analysis may be requested from Ms. Brewer or Ms. Namian.

SUPPLEMENTARY INFORMATION:

Background

Evolution of the Two Interim Rules

As noted in the **SUMMARY**, USDA has published two interim rules intended to improve Program management and integrity in the Child and Adult Care Food Program (CACFP), at 67 FR 43447 (June 27, 2002) and at 69 FR 53501 (September 1, 2004).

Section 243 of Public Law 106–224, the Agricultural Risk Protection Act of 2000 (ARPA), included a number of nondiscretionary provisions that amended section 17 of the Richard B. Russell National School Lunch Act ([NSLA], 42 U.S.C. 1766). Section 307 of Public Law 106–472, the Grain Standards and Warehouse Act of 2000, further amended one provision in § 17 of the NSLA. These statutory changes were implemented in the CACFP regulations in the first interim rule, published on June 27, 2002. Simultaneously, the Department was working on a second rule. That rule was issued in proposed form on September 12, 2000 (65 FR 55101). In response to State and Federal review findings of mismanagement and Program abuse and to audit findings and recommendations by the Department's Office of Inspector General (OIG), the rule proposed a series of changes to the CACFP regulations. After analyzing 548 public comments on the proposed rule, the Department modified some of its original proposals and published a second interim rule on September 1, 2004, that implemented additional discretionary changes to the CACFP regulations. Taken together, the changes implemented in the two interim rules were designed to improve Program management and accountability in the CACFP while also simplifying other requirements, where possible, in order to offset some of the administrative burden associated with the new requirements in those rules.

Why is the Department publishing this final rule? Didn't the two interim rules already implement those changes?

Yes, interim rules have the force and effect of law upon the stated effective date. The changes in these two interim rules are fully implemented. However, the Department anticipated the need to make additional modifications to the provisions of the interim rules, based on Federal, State, and institution experience in operating the Program under the new rules and comments received on the interim rules. To that end, the Department provided an extended comment period for both rules, which gave State agencies and institutions adequate time to fully implement the provisions. In addition, since the publication of the second interim rule, the Department has undertaken an extensive data collection and analysis, known as the Child Care Assessment Project (CCAP). The CCAP was designed to evaluate implementation of the new regulatory requirements by family day care home sponsors and providers.

During the comment period, the Department provided National training on each of the interim rules and issued extensive guidance designed to address implementation issues. The Department believes that the National training and the guidance it provided have fully addressed a number of the commenters' questions and concerns about the two interim rules. Many of those comments were submitted prior to the provision of the training and the guidance. For that reason, the preamble will not address all of the comments received. The regulatory language set forth at the end of this rulemaking is limited to the changes to the two interim rules being made by this final rule.

Can you provide a list of the previously-published implementation guidance?

Yes. In order to help State agencies implement ARPA's provisions and the two interim rules, the Department issued the following guidance:

- July 20, 2000—"Implementing Statutory Changes to the CACFP Mandated by the Agricultural Risk Protection Act of 2000 (Pub. L. 106–224)";
- October 16, 2000—"Monitoring Requirements for Sponsoring Organizations in the CACFP";
- October 17, 2000—Letter to State agency directors on termination of institutions and day care homes;
- April 12, 2001—"Effects of the Agricultural Risk Protection Act, Public Law 106–224, on termination of the agreements of day care home providers in the CACFP";
- March 1, 2002—"Use of 'stop payments' in the CACFP";
- February 21, 2003—"Implementation of Interim Rule: Monitor Staffing Standards in the CACFP";
- January 27, 2004—"CACFP Memorandum #1–04: Sponsor Monitoring Requirements in the CACFP";
- September 1, 2004—"Implementing Changes to the CACFP in Interim Rule entitled, 'Child and Adult Care Food Program: Improving Management and Program Integrity '";
- December 23, 2004—"Additional Guidance on the CACFP Second Interim Rule";

• March 11, 2005—"CACFP Policy #02–05: Collection of Required Enrollment Information by Child Care Centers and Day Care Homes";
• March 29, 2005—"Transfer of Data Related to the CACFP and the Food Stamp Program";
• July 1, 2005—"CACFP Policy #03–05: Documenting Reasons for Block Claims by Child Care Centers and Day Care Homes";
• September 23, 2005—"CACFP Policy #06–2005: Questions and Answers Regarding Institution Applications from Training on the Second Interim Rule";
• September 23, 2005—"CACFP Policy #07–2005: Conducting a Five-Day Reconciliation in Centers Participating in the CACFP";
• November 7, 2005—"CACFP Policy #03–2006: Questions and Answers on the Serious Deficiency Process in the CACFP";
• February 23, 2006—"CACFP Policy #07–2006: Questions and Answers on State Agency Oversight Tools, Sponsor Oversight Tools, and Training and Other Operational Issues in the CACFP";
• May 23, 2006—"CACFP #12–2006: Issues Relating to Block Claims Submitted by Sponsored Child Care Centers and Family Day Care Homes";
• January 26, 2007—"CACFP #01–2007: Retention of records relating to institutions, responsible principals or responsible individuals, and family day care homes on the National Disqualified List; retention of records relating to serious deficiencies"; and
• August 27, 2007—"CACFP #15–2007: Documentation of Block Claims Submitted by Sponsored child Care Centers and Family Day Care Homes".

All of these guidance memorandums are available on the FNS Web site at *http://www.fns.usda.gov/cnd/Care/Regs-Policy/Policy/Memoranda.htm.*

Can you describe in more detail the CACFP management improvement training provided by the department before and after publication of the two interim rules?

In the fall and winter of 1999–2000, the Department trained State agencies on management improvement techniques that had been presented in comprehensive management improvement guidance (MIG). In 2001, the Department provided training on FNS Instruction 796–2,[1] revision 3, to State agencies. Training on the MIG and FNS Instruction 796–2 was crucial to addressing the CACFP financial and administrative management problems that had been uncovered by State and Federal reviewers and auditors.

Finally, after publishing each of the interim rules, the Department developed extensive training related to each specific component of the two interim rules. These training sessions were conducted in 2002–2003 and 2004–2005 at workshops around the country. Staff from each State agency attended the trainings. The curricula and materials for each training session on the interim rules were then re-formatted and distributed to State agencies, so that State agencies could use them to train participating institutions.

How, if at all, does this final rule differ from the two interim rules?

This final rule refines the wording of some provisions previously implemented in the two interim rules and the implementation guidance, mostly to clarify regulatory intent, but in several places, to make changes to previous requirements. The preamble discussion will make clear which provisions from the two interim rules have had wording changed for clarification, and which have been changed in a substantive manner.

In total, how many comments did the department receive on the two interim rules?

We received a total of 1,009 comment letters or electronic submissions on the two rules—747 on the first interim rule and 262 on the second interim rule.

Who commented on the rules?

Of the 1,009 comments received on the two rules: 40 were from State agencies; 448 were from individuals associated with institutions participating in CACFP (either independent centers or sponsoring organizations of homes or centers); 455 were from family day care home providers participating in the Program; 39 were from State or National CACFP or children's advocacy organizations; and 27 were from parents, students, nutritionists, or other interested individuals whose institutional affiliation could not be determined. In addition, in writing this final rule, the Department also took into account the many comments and suggestions made by participants in the training sessions held in 2002–2003 and 2004–2005.

What issues raised by commenters will not be addressed in this preamble?

Because of the extended comment period and the timing of the two interim rules' publication, some public comments were submitted before the provisions were fully implemented, or before training on the two interim rules was provided. Therefore, as previously stated, a number of the issues raised by commenters have already been addressed and resolved in guidance or training, and do not require discussion in this preamble.

In addition, the Department received a number of suggestions from commenters concerning the terminology and definitions used in the two interim rules. Although the Department believes that some of these suggestions have merit, we have decided that, in order to avoid confusion, we will not make any changes to terminology in this final rulemaking, unless absolutely necessary to clarify the meaning of specific regulatory terms. The Department may consider making changes to regulatory terminology and format in the future. Readers should assume that provisions from the two interim rules that are not specifically discussed in this rulemaking preamble have not been modified in this final rule. This rulemaking will specifically identify those provisions being clarified or modified in the final rule in order to improve the efficiency or effectiveness of the Program.

How is the remainder of this preamble organized?

The preamble is divided into four parts, and is organized in a manner similar to the interim rules published in 2002 and 2004. The four parts of this final rule are as follows:

I. Institution Eligibility Criteria and State Agency Review and Approval of Institutions' Applications; the Serious Deficiency Process for Institutions
II. State Agency and Institution Review and Oversight Requirements;
III. Training and Other Operational Requirements; and
IV. Non-Discretionary Changes Required by the Personal Responsibility and Work Opportunities Reconciliation Act, the Healthy Meals Act, and the Goodling Act

Part I. Institution Eligibility Criteria and State Agency Review and Approval of Institutions' Applications; the Serious Deficiency Process for Institutions

A. Institution Eligibility Criteria and State Agency Review and Approval of Institutions' Program Applications

Sections 243(a) and (b) of ARPA added a number of statutory requirements that affected institution eligibility and the institution application process. These changes were designed to improve Program management and integrity by ensuring that the information in an application being submitted by a new or renewing

[1] FNS Instruction 796–2 may be found at *http://www.fns.usda.gov/cnd/care/Management/79-2.pdf.*

institution (*i.e.,* by an independent center or a sponsoring organization of day care homes and/or centers) demonstrates that it is fully capable of administering the Program in accordance with the regulations. These changes not only required institutions to demonstrate their ability to administer the Program, both before they begin operations (in their initial applications) and at certain intervals thereafter (in their renewal applications); they were also intended to ensure that State agencies periodically assess and re-assess each institution's potential ability to perform, based on a thorough review of the institution's Program application.

The Department received public comments on five aspects of the two interim rules relating to basic institution eligibility criteria and the State agency's review of an institution's application to participate in CACFP, as follows:

- The reorganization of the institution application requirements at §§ 226.6(b) and 226.6(f);
- The requirements relating to an institution's documentation of its past performance in the Program application;
- The requirement for all new and renewing institutions to demonstrate "VCA" (financial viability, administrative capability, and accountability) in their Program applications;
- The procedures State agencies must follow when they deny an application submitted by a new or renewing institution; and
- The requirement that several institution principals must submit their dates of birth as part of the institution's Program application.

Comments relating to the last issue—the submission of dates of birth—are addressed in Part III(C) of this preamble. The four remaining issues listed above are addressed in the preamble discussion that follows.

(1) Reorganization of the Institution Application Requirements at §§ 226.6(b) and 226.6(f)

The second interim rule reorganized §§ 226.6(b) and 226.6(f), so that § 226.6(b) includes the broad requirements for institution applications and § 226.6(f) specifies the frequency at which an institution is required to update the information contained in its original application. The second interim rule also consolidated or cross-referenced application requirements previously found at §§ 226.6(b), 226.6(f), 226.7(g), 226.15(b), 226.16(b) and 226.23(a) into § 226.6(b), so that State agencies and institutions could more easily refer to them during the application process.

Two commenters stated that the rule was well written, clearly presented and easy to read; seven other commenters felt that § 226.6 was too complex and should be rewritten in a briefer and simpler format. Other commenters made specific suggestions for changes in the terminology used in, or the structure of, § 226.6(b). In addition, forty commenters expressed their concern that the new application criteria were potentially too complex, and might prove to be a barrier to applicants. These commenters recommended that, in order to minimize the potential barrier, State agencies increase their outreach and training efforts and streamline their application processes in the ways permitted by the interim rules.

The Department acknowledges that the structural and other changes made to § 226.6 have added complexity and length to the rule. When adding those new application requirements—many of which were mandated by ARPA—the Department also attempted to find ways to reduce other administrative burdens. For example, the option for State agencies to take renewal applications on a three-year cycle, and to enter into permanent agreements with all types of institutions, will offset some of the administrative burden resulting from the new requirements added in the two interim rules. Furthermore, the current length and structure of this portion of the rules is the result of our more specific delineation of application requirements for new and renewing institutions. If State agencies fully implement these optional provisions, administrative time and effort will be lessened, for them and for institutions. Any further changes to the rule's organization will be considered in the future, and the organization of this section will remain as set forth in the second interim rule.

(2) Application Requirements Relating to an Institution's Past Performance

The first interim rule implemented a series of ARPA provisions designed to prohibit institutions and their principals from participating in CACFP if they had been:

- Determined ineligible to participate in any publicly funded program due to violating these programs' requirements;
- Disqualified from CACFP; or
- Convicted of any activity that indicated a lack of business integrity.

In order to fully implement these statutory requirements, the first interim rule required that an institution's application list all publicly funded programs in which the institution and its principals had participated in the past seven years. The rule also required an institution to certify in its application that neither the institution, nor any of its principals, is ineligible to participate in such programs due to violating those programs' requirements during the seven-year period. In lieu of submitting this certification, the interim rule permitted an institution to submit documentation that the institution or principal previously determined ineligible was later reinstated, or was again eligible to participate in, the publicly funded program, and had paid all debts owed to that program. The rule also required institution applications to include a certification concerning the criminal backgrounds of the institution and its principals.

As part of these certification requirements, the first interim rule included language stating that institutions and principals providing false certifications would be placed on the National Disqualified List (NDL). This language was intended to deter the submission of applications by ineligible institutions and principals, and to provide them with notice regarding the consequences of submitting false certifications. The rule also required that, when reviewing an institution's application, the State agency check the NDL to ensure that the institution is not on the NDL and is, therefore, eligible to participate. Finally, the rule prohibited State agencies from approving an institution's application if the institution or any of its principals had been convicted of any activity indicating a lack of business integrity during the past seven years.

Thirteen comments were received from eleven State agencies and two advocates regarding several aspects of these "past performance" requirements. Two State agency commenters suggested that past performance requirements be eliminated. This cannot be done, since these are statutory requirements. The Department believes that capturing this information on an institution's application is an effective and efficient means of complying with this requirement.

In addition, five State agency commenters made suggestions which they felt would reduce the administrative burden associated with meeting the past performance requirements. One State agency commented that requiring a new institution to list all publicly funded programs in which it participated for the last seven years is burdensome, and that an institution's submission of a "certification of non-disqualification" should suffice. However, the Department believes it is important to require the new institution to submit

both the certification of non-disqualification and the list of publicly funded programs. The certificate of non-disqualification establishes a clear basis for removal from the CACFP (submission of false information) if the institution conceals a prior termination from a publicly funded program. The Department also believes that it is important for the State agency to have a list of publicly funded programs in which the institution previously participated, because it allows the State agency to verify the accuracy of the non-disqualification certification if it chooses.

However, the Department agrees with, and will make, the change suggested by another State agency. The comment suggested that the burden associated with reporting on past performance could be minimized by allowing a renewing institution to include on its application only those new publicly funded programs in which it had begun to participate since its last application was submitted. The Department believes that this suggestion will lower administrative burden while still meeting the intent of the law. Therefore, this regulation will allow a renewing institution to update the list of programs that it submitted in its last application, rather than provide the full list of programs in which it participated for the past seven years. This will minimize unnecessary "re-reporting" of information, which could be especially burdensome for institutions that regularly receive grants or have many other sources of public funding.

Two State agencies commented that an institution should only be required to submit information about programs in which it participated during the past three years, since a three-year record retention requirement is standard in most publicly funded programs. Although the Department agrees that most publicly funded programs require an institution to retain records for a period of three years (or longer if there are outstanding review or audit findings), we do not believe that requiring the principals of an institution to know and document their performance, and the institution's performance, for a seven-year period will pose any special hardship. The principals charged with managing the institution should know the institutions' and all of the principals' record of performance over the past seven years.

One State agency suggested that, if an institution's participation in a publicly funded program has been terminated, and the institution has taken action to correct the deficiency that caused the termination, the State agency should be able to approve the institution's participation in the CACFP, even if the institution had not been formally "reinstated" to eligibility in the other program. This statutory change ensures that only institutions with records of sound performance in other publicly funded programs be permitted to participate in CACFP. Having the CACFP State agency assess an institution's performance in another publicly funded program does not meet that intent. Only if the institution has been reinstated to participation by the other publicly funded program can the State agency be assured that all corrective actions have been fully implemented, and all debts fully repaid.

Finally, four State agencies and two advocacy groups commented that, if the State agency was required to consult the NDL when reviewing an institution's application, the NDL must be web-based and searchable, and must include all the necessary information concerning institutions, principals, and family day care home providers on the list. The Department agrees that the NDL must be accessible and complete if State agencies are to effectively comply with the regulatory requirement to exclude institutions and individuals who are on the List. To that end, the Department has made the NDL available to State agencies. Although privacy issues initially made it impossible for the Department to provide access to the NDL to institutions, they have been able to obtain the information they need about providers and principals from their State agency, and we anticipate being able to make the NDL directly accessible to institutions in the near future.

Accordingly, the only change made to past performance requirements in this final rule is the modification of § 226.6(b)(2)(iii) to permit renewing institutions to list in their applications only those publicly funded programs in which they have begun to participate since the submission of their last application.

(3) Application Requirements Relating to an Institution's "VCA" (Financial Viability, Administrative Capability, and Internal Controls To Ensure Accountability)

The first interim rule implemented the requirement set forth in section 243(b) of ARPA that, in order to participate, an institution must demonstrate in its Program application that it meets three performance standards now included in section 17(d)(1) of the Richard B. Russell National School Lunch Act (NSLA). These standards require the institution to be financially viable; to be administratively capable; and to have in place internal controls to ensure the accountability of Program funds and compliance with Program requirements. Sections 226.6(b)(1)(xviii) and 226.6(b)(2)(vii), which were added to the regulations by the first interim rule, require State agencies to evaluate all applicant institutions against these three performance standards, in order to assess their ability to properly administer the Program, and to deny the application of any institution which does not demonstrate conformance with these performance standards or any other requirements set forth in § 226.6(b). In addition, the rule required ongoing compliance with the VCA standards by defining as a serious deficiency a participating institution's "[f]ailure to operate the Program in conformance with the performance standards * * *" (§ 226.6(c)(3)(ii)(C))

A total of 325 comments were received concerning the VCA performance standards. Of these comments, 263 dealt with the requirement at §§ 226.6(b)(1)(xviii)(A)(*2*) and 226.6(b)(2)(vii)(A)(*2*) that an institution demonstrate in its application that it has adequate financial resources to operate the CACFP and "adequate sources of funds to withstand temporary interruptions in Program payments and/or fiscal claims against the institution." Many commenters suggested eliminating this language, because they thought that it required family day care home sponsors to pay claims to providers during periods when, for reasons beyond their control, CACFP funding was delayed or unavailable.

The Department understands that, if CACFP reimbursements were temporarily unavailable, few if any sponsors would have the resources to pay provider claims. The regulatory wording was intended to address a different situation, involving the State agency's establishment of an overclaim against an institution, or its denial of a portion of the institution's claim for administrative reimbursement.

Many commenters stated their belief that CACFP is intended to be "self-sufficient"; in other words, they believe that all the resources needed to operate CACFP should come from Program reimbursements. While this belief is largely accurate, there are a number of one-time and recurring expenses for which Program funds may not be used, including the costs of incorporation, the preparation of annual IRS–990 reports, fines and penalties, and some other general business costs. Furthermore, once an institution incurs any

administrative cost, there is always the possibility that the State agency may later determine that the institution's use of Federal funds for that expense is unallowable.

If Program reimbursements have already been used to pay a contractor or supplier for an expense later deemed unallowable by the State agency, the sponsor's repayment cannot come from Program funds, because it is impermissible to use Program funds to repay debts to the government. Therefore, every sponsor must have a source of "non-Program" funds out of which such a claim can be paid. The Department does not expect sponsors to reimburse providers if Federal reimbursement is unavailable. However, a sponsor must still have a source of non-Program funds with which to compensate its employees and pay its suppliers.

In short, if the sponsor does not have a source of non-Program funds in these instances, it runs the risk of going out of business, due to its inability to repay the State agency, or to pay its employees or suppliers. The Department would not advise a State agency to deny an institution's application *solely* because it lacked a source of non-Program revenue. However, the institution itself should be eager to have such funds on hand, since its existence as a viable entity, and its continued ability to provide Program benefits to children, may depend on it.

To further clarify this regulatory language's intent, the Department has made some minor modifications to the wording of §§ 226.6(b)(1)(xviii)(A)(*2*) and 226.6(b)(2)(vii)(A)(*2*). The phrase, "has adequate sources of funds to withstand temporary interruptions in Program payments and/or fiscal claims against the institution" has been changed to read, "has adequate sources of funds to continue to pay employees and suppliers during periods of temporary interruptions in Program payments and/or to pay debts when fiscal claims have been assessed against the institution." This language more clearly delineates the situations in which the institution would need to have non-Program funding. In addition, the Department has added to the introductory language at §§ 226.6(b)(1)(xvii) and 226.6(b)(2)(vii) a sentence that reads, "In ensuring compliance with these performance standards, the State agency should use its discretion in determining whether the institution's application, in conjunction with its past performance in CACFP, establishes to the State agency's satisfaction that the institution meets the performance standards."

A related question was submitted by another State agency, which suggested that an institution's budget should only be required to address its planned expenditure of Program reimbursements, not its planned use of non-Program funds. In fact, if the institution does not plan to use non-CACFP funds to support some required CACFP functions, there is no requirement that non-Program funds be addressed in the budget. In that case, the only information needed in the budget or management plan is the institution's source of non-Program funds that could be used to pay overclaims or other costs identified in the preceding paragraph.

However, if the institution plans to use any non-Program resources to meet CACFP requirements, then these funds should be accounted for in the institution's budget. For example, many multi-purpose sponsoring organizations that operate the CACFP devote some non-Program resources to the performance of critical CACFP functions like training or monitoring. Similarly, an independent center may plan to rely on a portion of the parent fees it collects to perform a required CACFP function. In these cases, the institution's budget must account for those non-Program funds that will be devoted to Program administration, so that the State agency has a full understanding of how the institution will fund its performance of all required Program functions.

Accordingly, § 226.7(g) is amended to specify the ways in which "non-program funds" must be addressed in the institution's budget.

In addition, commenters made a number of other suggestions for changing or clarifying various aspects of the performance standards. Forty-seven (47) commenters expressed concern that at-risk afterschool care centers would have great difficulty meeting the performance standards, and should not be held to the same standards as larger Program operators like sponsoring organizations of centers or family day care homes. During our training on the interim rules, we urged State agencies to take into account an institution's size and sophistication when examining different types of organizations' applications. In fact, an entire session of our training on the second interim rule was devoted to a discussion of how State agencies should apply the regulatory language when examining applications submitted by independent child care centers, as opposed to sponsoring organizations of hundreds (or in some cases, thousands) of facilities. We recommend that State agencies apply a "rule of reason" when reviewing materials submitted by different types of institutions, with different levels of Program reimbursement and, in many cases, different levels of managerial sophistication.

One State agency suggested that sponsored centers, as well as institutions, should be required to demonstrate compliance with the VCA standards. We carefully considered the possibility of requiring sponsored centers to comply with the VCA standards, but ultimately rejected it. Even if a sponsored center has, in the past, operated as an independent center in the CACFP, once a sponsoring organization enters into an agreement with that center, the center becomes a sponsored facility, and assumes a different Program relationship with the State agency. As a result of the rule, a sponsoring organization (not each sponsored center) now has primary responsibility for ensuring that the CACFP is operated in accordance with the performance standards in all of its sponsored facilities. That is why we so strongly recommended in training that State agencies take extra care in evaluating a sponsoring organization's compliance with the performance standards, since the sponsor must be able to demonstrate that it can adequately monitor, train, and provide technical assistance to all of the facilities that it sponsors.

Finally, one other State agency requested that the final rule add a definition of "board of directors" or "governing board of directors." Based on questions we have received since the publication of the first interim rule, and based on the data collected in CCAP, we agree that there is a need for further clarification of the regulatory requirements pertaining to institution boards of directors.

When the first interim rule incorporated performance standards in the CACFP regulations, §§ 226.6(b)(1)(xviii)(C)(*1*) and 226.6(b)(2)(vii)(C)(*1*) specified that an institution must demonstrate "adequate oversight of the Program by its governing board of directors." At the time, the Department was reluctant to specify what constitutes "adequate oversight," since many States have their own laws concerning the qualifications, structure, and responsibilities of boards of directors. However, in the years since the first interim rule took effect, the questions submitted to the Department by State agencies and others have convinced us of the need to specifically address two recurring issues concerning boards of directors in this final rule.

First, we have been asked repeatedly how this requirement applies to for-profit centers participating in the CACFP. Although large, publicly-held for-profit corporations have boards of directors, there may be some smaller for-profit entities that do not. In a small, for-profit center, it is quite possible that there will be an owner, but no formally-designated governing board. This rule clarifies this point in a new definition of an "independent governing board of directors", which will apply to any non-profit or for-profit organization that is required by law to have a board of directors.

Second, we have received numerous questions concerning what constitutes an "independent" governing board of directors. Although some States' laws define the characteristics of board independence, others do not. Therefore, this rule will delineate the characteristics of "independent governing boards of directors" that are necessary to assure the adequate oversight of CACFP operations. This final rule requires—in a new definition at § 226.2— that an "institution's governing board of directors" must: (1) Meet on a regular basis; and (2) have the authority to hire and fire the institution's executive director (*i.e.,* the board must be independent of the executive director's control).

Based on State agencies' input and on the information gathered by the CCAP data collection, it appears that some private nonprofit organizations currently participating in CACFP do not have a governing board of directors that fully meets this definition because of lack of independence," The CCAP assessment determined that 36 percent (18 of 50) of the sponsors assessed included sponsor officials or family members serving on their governing boards of directors. In fact, in almost 20 percent of the sponsors assessed (9 of 46), the board of director's chairperson was a sponsor official or family member. Although the current regulations do not directly address this aspect of board independence, it is a critical aspect of a board's ability to provide "adequate oversight of the Program", as described in the Management Improvement Guidance (MIG). The MIG guidance and training emphasized that governing boards of directors which include the CACFP director, other sponsor officials, and/or members of their families cannot perform the type of independent oversight required for the sponsor's successful operation of the CACFP. One of the critical hallmarks of a governing board of directors' independence—the board's ability to hire and fire the organization's executive director—is limited when sponsor officials or their families serve on the board. We encourage State agencies to work closely with institutions participating in CACFP to ensure that such boards are in place, and that this requirement is fully met, as quickly as possible.

Accordingly, this final rule modifies the introductory language to §§ 226.6(b)(1)(xviii) and 226.6(b)(2)(vii), and has made some minor modifications to §§ 226.6(b)(1)(xviii)(A)(*2*) and 226.6(b)(2)(vii)(A)(*2*), to clarify the requirement that institutions have "adequate sources of funds" in order to be determined financially viable, as discussed above. In addition, this final rule includes in §§ 226.6(b)(1)(xviii)(C)(*1*) and 226.6(b)(2)(vii)(C)(*1*) new language concerning the minimum Program requirements for an "independent board of directors", and adds to § 226.2 a new definition of "independent board of directors."

(4) State Agencies' Denial of Institution Applications

The Department received three public comments concerning State agencies' denial of applications submitted by new or renewing institutions. In addition, we received numerous, detailed questions concerning this subject when we conducted training on the two interim rules.

Two State agency commenters requested a change to the language governing State agencies' denial of applications. Sections 226.6(c)(1)(i) and 226.6(c)(2)(i) require the State agency to deny an application if it does not meet all of the requirements set forth at §§ 226.6(b), 226.15(b) and 226.16(b). These commenters suggested that this portion of the regulations should instead state that an application is considered incomplete, and that the State agency does not have to formally deny the application, if it does not contain all of the information required by §§ 226.6(b), 226.15(b) and 226.16(b).

The Department cannot agree with this suggested change, because it would prevent some institutions from ever having the opportunity to appeal the State agency's denial of their applications. If a State agency does not have to deny an "incomplete application", and no application is considered to be "complete" unless it is approvable, then the State agency will never have to formally deny any institution's application. While we recognize that it is often necessary for a State agency to request more information from an institution before it can determine whether the institution's application is approvable, the process of requesting this information must have an end date, or the institution will, *de facto,* lose its opportunity to appeal the State agency's action. Likewise, if there is no end to the process of collecting additional information, a renewing institution could continue participating indefinitely while it submits additional information to the State agency.

For these reasons, the Department strongly recommends that State agencies develop written policy governing the maximum amount of time it will take to review an institution's new or renewal application, including any time for the State agency to request additional information from the institution. If, however, a State agency returns an application to an institution because it was incomplete, and the institution fails to submit more information, the State agency is under no obligation to deny the application. In this instance, by not submitting timely the additional required information, the institution has effectively withdrawn its application from consideration. The only time that the Department would require the State agency to take formal action on an "incomplete application" before the State-established deadline for submitting information is in the rare case where the State agency discovers a serious deficiency when reviewing the institution's application. In those instances, in accordance with §§ 226.6(c)(1)(i) and 226.6(c)(1)(ii), the State agency would be required to deny the institution's application and to declare the institution seriously deficient.

Readers of this preamble should note that, although this final rule continues to refer to "renewal applications" at § 226.6(b)(2), enactment of Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010, made substantial changes to the process by which participating institutions verify their continuing compliance with Program requirements. These changes were addressed in implementing guidance issued on April 8, 2011 ("CACFP 19–2011, "Child Nutrition Reauthorization 2010: CACFP Applications"), as well as in in forthcoming proposed and final rulemaking actions.

B. The Serious Deficiency Process for Institutions

Section 243(c) of ARPA added a number of provisions to section 17(d)(5) of the NSLA which modified the serious deficiency process for institutions. As a result, several important aspects of the serious deficiency process were changed in the first interim rule, including: the content of the notice received by an

institution when it is notified that its performance is "seriously deficient;" the time given the institution to correct its serious deficiency and, if the serious deficiency is not corrected, the content of the notice issued by the State agency informing the institution of its intent to terminate and disqualify the institution and those principals and/or individuals responsible for the serious deficiency; and the process for suspending an institution's Program payments when it has engaged in conduct that poses an imminent threat to children's, or the public's, health or safety. In addition, Section 307(c) of the Grain Standards and Warehouse Improvement Act of 2000 (Pub. L. 106–472, November 9, 2000) further amended section 17(d)(5) of the NSLA by prescribing a specific process for suspending an institution's CACFP participation due to the submission of a false or fraudulent claim. [**Note:** as used in this preamble, the phrase "serious deficiency process" refers to all actions taken by a State agency after it declares an institution seriously deficient, including the institution's appeal and its placement on the National Disqualified List (NDL).]

The most significant change to the serious deficiency process made by ARPA was the requirement that, until the conclusion of the appeal process and the termination of its agreement, an institution will continue to receive Program payments for valid claims submitted. Prior to this, a State agency terminated an institution's agreement and discontinued Program payments at the same time that it declared the institution seriously deficient. Only then did the institution have an opportunity to appeal the State agency's adverse action. Thus, prior to ARPA, the institution received no Program payments (even if it incurred valid Program costs) until its appeal was resolved, and would then receive payments only if it prevailed on appeal. This approach resulted in two undesirable outcomes: (1) An institution could go out of business while its appeal was pending (due to its inability to pay legitimately-incurred costs), even if it later prevailed on appeal; and (2) many State agencies were reluctant to require an institution to improve program management, since the initiation of the serious deficiency process carried with it the simultaneous termination of the institution's agreement and the discontinuation of its Program payments.

Part I (B) of this preamble discusses questions about the serious deficiency process for institutions which were raised by commenters and by those who attended the Department's training on the two interim rules. As in Part I (A) of this preamble, the training and written guidance provided by the Department have already addressed many of the questions raised. Therefore, this portion of the preamble will discuss only those aspects of the serious deficiency process that require additional clarification, as well as any changes being made in this final rule.

(1) General Questions About the Serious Deficiency Process for Institutions

As a result of the statutory changes enacted in ARPA, the first interim rule established more specific requirements governing each stage of the serious deficiency process for institutions, including: the State agency's issuance of a serious deficiency notice; the amount of time given to an institution for corrective action; the appeal process; the termination of the institution's agreement; and the placement of the institution and its "responsible principals and individuals" on the NDL. The Department received numerous written comments, as well as questions during its training sessions, regarding these changes to the serious deficiency process for institutions.

Several training attendees raised questions about the maximum amount of time that may elapse between the State agency's discovery of an institution's serious deficiency and its issuance of a serious deficiency notice. Attendees also raised a related question: whether an institution can terminate its agreement for convenience after the State agency has discovered a serious deficiency, but prior to the time that the serious deficiency notice is issued.

Once a State agency has discovered a serious deficiency, the first interim rule's intent was that the serious deficiency process would be completed (*i.e.,* either corrective action would be taken or the institution's agreement would be terminated), even if the institution terminated its agreement "for convenience" before a formal notice of serious deficiency was issued. The Department anticipated that, once a serious deficiency had been discovered, a State agency would move quickly to issue a serious deficiency notice. Therefore, the first interim rule stated at §§ 226.6(c)(2)(iii)(A)(*6*) and 226.6(c)(3)(iii)(A)(*6*) that, after a State agency has issued a notice of serious deficiency, the institution could not voluntarily terminate its agreement as a means of avoiding formal termination "for cause" and placement on the NDL; the serious deficiency process would still proceed. However, during our training on the interim rules, it became apparent that these questions arose because some State agencies do not, in fact, issue a formal notice for months after discovering the serious deficiency.

In some of these cases, the institution has been told at a review's "exit conference" that it is seriously deficient. However, if the institution does not promptly receive a formal notice of serious deficiency, the institution may decide that it is preferable to terminate its agreement and withdraw from the Program, rather than go through the serious deficiency process, and possibly be placed on the NDL. Allowing institutions to leave CACFP before correcting their serious deficiencies is very detrimental to the Program, because the institution has neither corrected the serious deficiency nor been placed on the NDL, thus making it more possible for the institution and its responsible principals to re-enter the program later. Without having issued a formal serious deficiency notice which defines the institution's required corrective action, any State agency's ability to deny the institution's future re-application is diminished. In addition, if the issuance of a serious deficiency notice is delayed, the institution may assume that there was, in fact, no real serious deficiency, and no need for the institution to correct its management practices.

For these reasons, it is critical that, once a State agency discovers a serious deficiency, the institution promptly receive formal notice of that finding. By definition, a serious deficiency involves very serious Program management issues. The State agency must take prompt action, including issuing the formal notice of serious deficiency, to ensure that the institution corrects the serious deficiency, or has its agreement terminated for cause, as expeditiously as possible. Furthermore, if prompt action does not occur and the institution subsequently appeals a proposed notice of intent to terminate and disqualify, a hearing official may question the "seriousness" of the deficiency if the State agency took months to issue a written notice.

The Department will not establish in this rule a maximum amount of time for the State agency to issue a serious deficiency. We understand that State agencies have different procedures for handling serious deficiencies. There may be a need for supervisory clearance of a reviewer's findings and conclusions, and there may be multiple internal clearances of the written serious deficiency notice before it is issued.

However, we strongly encourage State agencies to take steps to minimize the amount of time that elapses between a

review and the issuance of a serious deficiency notice. Such steps might include: Training State reviewers to ensure that they do not exceed their authority in describing findings to an institution during an exit conference; whenever possible, including on a review team a person capable of speaking on behalf of the State agency concerning serious deficiency determinations; and/or establishing internal policies and procedures which ensure that an institution receives timely notice of its serious deficiency. Once these steps are taken, there should be no reason for a State agency to take more than two to six weeks to issue the notice, after the discovery of the serious deficiency.

A second general question raised in training sessions concerned a State agency's determination of which institution employee(s) should be named in a serious deficiency notice (*i.e.,* which persons should be named as "responsible principals and individuals"). Since then, we have observed instances in which either too many or too few principals and individuals were named as responsible. The former approach will slow the appeal process considerably, as hearing officials attempt to discern whether every person named in the notice is truly responsible for the serious deficiency and, therefore, should be disqualified from Program participation. On the other hand, if the State agency fails to name all of the responsible persons in the notice, it increases the risk that these persons (who will not be placed on the NDL) will continue to participate in CACFP as principals in other institutions.

There is, of course, no "magic number" of responsible principals or individuals that should be named in every serious deficiency. The regulations require that, in every instance, both the chairperson of the institution's board of directors, as well as the executive director or other person responsible for CACFP, receive the notice of serious deficiency, as well as any other principals or individuals named as "responsible" for the institution's serious deficienc(ies). Although it is not specifically stated in the regulations, typically the executive director, owner, or other person with overall responsibility for the CACFP within the institution would be named as "responsible" for the institution's serious deficiency. In general, the State agency should name as "responsible principals" those organization officials who, by virtue of their management position, bear responsibility for the institution's serious deficiency. These management officials also bear responsibility for the poor performance of non-supervisory employees which may have caused the serious deficiency. Non-supervisory employees, including contractors and unpaid staff, should be named "responsible individuals" only when they have been directly involved in egregious acts, such as filing false reports or actively participating with institution principals in a scheme to defraud the Program.

A third general comment made by five State agency commenters was that the first interim rule was burdensome in requiring State agencies to provide FNSROs with a copy of each notice they issued relating to an institution's serious deficiency. The Department included this language in the first interim rule as a means of ensuring that FNSROs would be able to provide State agencies with immediate feedback and technical assistance on the State agency's implementation of the serious deficiency process, and that FNSROs could detect trends across States in the types of regulatory non-compliance leading to determinations of serious deficiency.

Initially, the Department was favorably disposed to reducing this paperwork and requiring only one or two submissions from the State agency to the FNSRO during the course of the serious deficiency process. However, after analyzing the data collected in the CCAP, and after finding a number of flawed State agencies' serious deficiency processes during our conduct of management evaluations, we will not make any change to this aspect of the serious deficiency process. We believe that the most important benefit of maintaining these requirements will be to enable FNSROs to carefully review each document for regulatory compliance as soon as it is issued. If errors are discovered, the FNSRO can then advise the State agency to issue a revised notice to the institution, before the defects of the original notice undermine the State agency's ability to prevail in a later administrative review hearing. Thus, the final rule will make no change to the requirement that the State agency notify its FNSRO at each stage of the serious deficiency process.

Finally, one State agency commenter noted technical errors at 226.6(c)(3)(iii)(B)(*1*)(*ii*) and 226.6(c)(3)(iii)(B)(*2*)(*iii*), where references to a "renewing" institution should instead read, "participating" institution. Accordingly, this final rule makes the corrections.

(2) The Serious Deficiency Process as it Relates to Applications Submitted by New or Renewing Institutions

The first interim rule added definitions of "new institution" and "renewing institution" to the CACFP regulations, and established new requirements for State agencies' handling of Program applications, as described in Part I(A) of this preamble. A number of attendees at training raised three different questions concerning the interaction of the serious deficiency process and the revised application process. All three of the questions relate to changes made by ARPA to the serious deficiency process. Each statutory change was structured to ensure that an institution be provided with the opportunity for an administrative review ("appeal") before its agreement is terminated and the institution and its responsible principals and individuals are disqualified.

The first question asked whether a new institution could appeal a State agency's denial of its application, if the denial was based on the State agency's determination that either the institution and/or one of its principals is on the NDL. The regulations at §§ 226.6(c)(7)(ii) and 226.6(c)(7)(iv) make clear that no institution which is on the NDL, and no institution having one or more of its principals on the NDL, is eligible to participate in CACFP. Given this requirement, the commenter saw no reason to offer the institution an appeal, since the regulations clearly forbid the institution's participation.

However, the regulations at § 226.6(k)(2)(i) also state that, whenever a new or renewing institution's application is denied, the institution must be given the opportunity to appeal the denial. This is true regardless of whether the new or renewing institution has submitted false information on its application (*e.g.,* a false certification concerning the institution's or principals' eligibility to participate in a publicly funded program), or whether the application included the information that demonstrated the institution's ineligibility (*e.g.,* the applicant stated on the application that the institution or one of its principals was ineligible to participate by virtue of its past performance).

To handle situations like this, the first interim rule established new procedures for an "abbreviated" appeal, as described in § 226.6(k)(9). The abbreviated appeal must be used when the institution appears to be ineligible by virtue of submitting false information on its application or due to any of three types of past performance issues (presence on

the NDL, termination from another publicly-funded program, or conviction for an offense related to business integrity). Consistent with ARPA, the abbreviated appeal ensures that the institution has an opportunity to contest the State agency's adverse action before it occurs, but shortens the appeal process by not permitting oral presentations before a hearing official. The abbreviated appeal gives the institution an opportunity to claim that the State agency had made an error, perhaps by confusing the names of the applicant institution or a principal with another, similarly-named, institution or person. Therefore, any applicant institution—whether new or renewing—must be given the opportunity for a regular or an abbreviated appeal, regardless of the circumstances.

The second question was whether a new institution could evade the potential consequences of a serious deficiency by withdrawing its application for Program participation. Although the regulations at §§ 226.6(c)(2)(iii)(A)(*6*) and (c)(3)(iii)(A)(*6*) clearly state that a renewing or participating institution's voluntary termination of its Program agreement does not put an end to the serious deficiency/disqualification process, similar language is lacking with regard to new institutions at § 226.6(c)(1)(iii)(A). The omission of similar language in the first interim rule was an oversight. That oversight is corrected by the addition of a new paragraph in this final rule, at § 226.6(c)(1)(iii)(A)(*7*), which clarifies that, after receiving a notice of serious deficiency, a new institution may not evade the potential consequences of its serious deficiency by withdrawing its application to participate.

Finally, the third question involves the State agency's conduct of the application or agreement renewal process when either occurs after an institution has been declared seriously deficient. Because all State agencies must require institutions to submit renewal applications no less frequently than every three years, an institution's application must sometimes be renewed while it is in the midst of the serious deficiency process. Similarly, depending on the State agency's policy regarding the duration of a Program agreement, the institution's Program agreement may also expire while it is in the midst of the serious deficiency process. When situations like these have arisen in the past, some State agencies have mistakenly believed that they were required to take no action on a renewal application, or that they were required to deny the institution's renewal application, because the institution has already been declared seriously deficient. Although these issues have been partially addressed in training and in guidance issued on November 7, 2005 ("CACFP Policy #03–2006: Questions and Answers on the Serious Deficiency Process in the Child and Adult Care Food Program"), they occur often enough to merit further discussion in this preamble, and further clarification in this final rule.

When a renewing institution's agreement expires during the serious deficiency process, the first interim rule at § 226.6(c)(2)(iii)(D)(*1*) made clear that the State agency must temporarily extend the institution's agreement until the conclusion of the serious deficiency process (whether the "conclusion" of the process comes as a result of successful corrective action, the institution's failure to appeal, or the end of the administrative appeal process). Extending the agreement facilitates continued payment of the valid claims submitted by the renewing institution during the resolution of its serious deficiency. However, the first interim rule did not explicitly state that the same principle would apply to a "participating institution" (*i.e.,* an institution whose serious deficiency is discovered during a review or audit) whose agreement expired while the institution was in the midst of the serious deficiency process. In fact, as with a "renewing institution," the participating institution's agreement must be extended through the conclusion of the serious deficiency process in order to facilitate the payment of valid claims submitted during the serious deficiency process. This final rule will revise § 226.6(c)(3)(iii)(D) to clarify this point.

In the case of a participating institution that is renewing its application during the serious deficiency process State agencies have several options for how to handle the institution's renewal application. First, the State agency may temporarily defer consideration of the renewal application. If the State agency makes this choice, it must continue to pay any valid claims submitted, based on the institution's most recent approved budget (and, in the case of a sponsoring organization, its management plan). Second, the State agency may choose to temporarily approve the institution's budget and/or management plan (provided, of course, that any unallowable costs cited in the serious deficiency notice were handled appropriately in the budget and/or management plan), pending the outcome of corrective action. If the State agency decides to temporarily approve the institution's budget and/or management plan, the institution would be permitted to provide legitimate cost-of-living increases to employees, and to make purchases approved in the new budget/management plan. In this situation, the State agency must carefully review the institution's renewal application (especially any proposed changes to the institution's budget/management plan) to ensure that the institution will continue to perform all of its required Program responsibilities while it is seriously deficient. In some cases, there may be compelling reasons for the State agency to approve portions of the proposed budget, or even the proposed budget as a whole, especially if the proposed budget shows that the institution will better perform its Program responsibilities by reallocating funds among several budget categories.

However, even if the State agency determines that timely and permanent corrective action was not taken by the institution, and denies the renewal application for that reason, it still needs to extend the institution's agreement and make payments for valid claims, based on the institution's most recent approved budget (and, in the case of a sponsoring organization, its management plan) until any pending administrative appeal is resolved. The most-recently approved budget would be used as the basis for determining claims payments until the end of the serious deficiency process. Therefore, this final rule further revises § 226.6(c)(3)(iii)(D) to clarify that, if a participating institution's renewal application must be submitted during the serious deficiency process, the State agency may either use the most recently-approved budget/management plan as the basis for determining the amount of valid claims to be paid, or it may approve part or all of the institution's proposed renewal budget. Of course, the State agency should only pursue this latter course if it is convinced that the institution will be capable of carrying out all of its Program responsibilities using the proposed budget.

Accordingly, this final rule will add a new paragraph, at § 226.6(c)(1)(iii)(A)(*7*), which clarifies that, after receiving a notice of serious deficiency, a new institution may not evade the potential consequences of its serious deficiency by withdrawing its application to participate. It also revises § 226.6(c)(3)(iii)(D) to clarify that a participating institution's agreement must be extended through the conclusion of the serious deficiency

process, in order to facilitate the payment of valid claims submitted during the serious deficiency process, and to clarify that, if a participating institution's application must be renewed during the serious deficiency process, the State agency may base valid claim payments on either the institution's most recently-approved budget/management plan or the budget/management plan submitted with the institution's renewal application. Finally, this final rule also revises § 226.6(c)(2)(iii)(D) to make this same clarification regarding the State agency's payment options when a renewing institution is declared seriously deficient.

(3) Corrective Action

The Department received three questions about the first interim rule's changes regarding a seriously deficient institution's obligation to take corrective action after being declared seriously deficient.

First, one commenter asked the Department to add regulatory language clarifying that an institution may not appeal the State agency's decision that the institution's corrective action is not complete and permanent. The Department agrees, and will add this clarification to the final rule. An institution must have one opportunity to complete corrective action and, failing that, must receive one opportunity to appeal the State agency's notice of intent to terminate and disqualify the institution and its responsible principals and individuals. If, in fact, the State agency errs in determining that the institution's corrective action was unsuccessful, the hearing official will overturn the State agency's notice of intent to terminate. In addition, the institution experiences no adverse effect, since it will continue to receive payment for valid claims submitted during its appeal. Appeal of the notice of intent to terminate and disqualify is the one and only appeal allowed during the serious deficiency process, unless the institution has been suspended (see Part I(B)(xx) of this preamble regarding a "suspension review"). Therefore, § 226.6(k)(3) will be amended to add to the list of actions that may not be appealed the State agency's determination that corrective action was not complete and permanent.

The Department will also act on a request from one State agency commenter and several training attendees that the regulatory language be modified where it states that, if the State agency deems the institution's corrective action permanent and complete, it must "rescind" its notice of serious deficiency. The intent of the first interim rule was that, if the State agency later discovered that the institution's corrective action was not permanent (*e.g.,* the institution failed to continue taking the actions which the State agency determined were necessary to completely and permanently correct the serious deficiency), the State agency could resume the serious deficiency process for that institution by immediately issuing a notice of intent to terminate and disqualify.

We have learned, however, that the word "rescind" is being interpreted by some hearing officials to preclude the possibility of "re-starting" the same serious deficiency process at the point of issuing a notice of intent to terminate. Instead, hearing officials have sometimes interpreted the word "rescind" to mean that, even if the institution's "corrective action" lasts for only a week, the State agency must begin the entire process over again. This could expose the government to additional loss if, for example, an institution was charging the Program for unallowable administrative expenses.

To rectify this, the Department will remove the word "rescind" at §§ 226.6(c)(1)(iii)(B)(*1*)(*i*), 226.6(c)(2)(iii)(B)(*1*)(*i*), 226.6(c)(3)(iii)(B)(*1*)(*i*), and 226.6(c)(6)(ii)(C)(*1*) and replace it with the words "temporarily defer." In addition, the Department will add new paragraphs at §§ 226.6(c)(1)(iii)(B)(*3*), 226.6(c)(2)(iii)(B)(*3*), 226.6(c)(3)(iii)(B)(*3*), and 226.6(c)(6)(ii)(C)(*3*) to state clearly that, if the State agency accepts the institution's corrective action, but later determines that the corrective action was not permanent or complete, the State agency must then move to the next step in the serious deficiency process, without re-starting the serious deficiency process.

Finally, in response to questions raised by training attendees, the Department will also amend the current regulatory language to help ensure that State agencies are able to submit all required information to FNS if an individual has been disqualified and is to be placed on the NDL. The current regulations at §§ 226.6(b)(1)(xv) and 226.6(b)(2)(v) require that, when it applies to participate, an institution's application must include the dates of birth of the executive director and the chairperson of the board of directors. However, in many instances, State agencies are disqualifying additional principals or individuals whose date of birth the State does not possess. The date of birth is the only means by which the Department will later be able to differentiate between disqualified individuals with the same or similar names. [**Note to readers:** Comments on the requirement to collect the dates of birth of institution officials and of family day care home providers are addressed in Part III of this preamble.]

To facilitate the collection of a date of birth for all responsible principals and individuals, this final rule further amends §§ 226.6(c)(1), 226.6(c)(2), and 226.6(c)(3) by adding new paragraphs §§ 226.6(c)(1)(iii)(A)(*8*), 226.6(c)(2)(iii)(A)(*7*), and 226.6(c)(3)(iii)(A)(*7*) to state that, if the State agency does not possess the date of birth for any individual named as a "responsible principal or individual" in the serious deficiency notice, it must make the submission of that person's date of birth a condition of corrective action for the institution and/or individual. Then, if that person is later disqualified and placed on the NDL, the State agency will be able to forward the person's date of birth to the Department at the time of disqualification.

Accordingly, this final rule will amend § 226.6(k)(3) to add to the list of actions that an institution may not appeal the State agency's determination that corrective action was not complete and permanent. It will also remove the word "rescind" at §§ 226.6(c)(1)(iii)(B)(*1*)(*i*), 226.6(c)(2)(iii)(B)(1)(*i*), 226.6(c)(3)(iii)(B)(1)(*i*), and 226.6(c)(6)(ii)(C)(1) and replace it with the words "temporarily defer". The final rule also adds new paragraphs at §§ 226.6(c)(1)(iii)(B)(3), 226.6(c)(2)(iii)(B)(3), 226.6(c)(3)(iii)(B)(*3*), and 226.6(c)(6)(i)(C)(*3*) to state that, if the State agency accepts the institution's corrective action, but later determines that the corrective action was not permanent or complete, the State agency must then issue a notice of intent to terminate and disqualify the institution and its responsible principals and individuals, without re-starting the serious deficiency process. Finally, the final rule will amend §§ 226.6(c)(1)(iii)(A), 226.6(c)(2)(iii)(A), and 226.6(c)(3)(iii)(A) to state that, if the State agency does not possess the date of birth for any individual named as a "responsible principal or individual" in the serious deficiency notice, it must make submission of that individual's date of birth a condition of corrective action for the institution and/or individual.

(4) Administrative Reviews ("Appeals")

The Department received ten comments (from nine State agencies and one advocacy group) regarding the

changes made to the institution appeals process in the first interim rule. All of these commenters believed that the 60-day timeframe for completing an institution's appeal (see § 226.6(k)(5)(ix) of the regulations) was too short, and suggested timeframes ranging from 90 to 180 days. Readers of this preamble should note that the 60-day timeframe begins when the State agency receives the institution's request for an appeal, which occurs after the State agency has sent the institution a notice of intent to terminate and disqualify, or has taken another adverse action against the institution, as set forth at § 226.6(k)(2). These commenters were especially concerned that, in States where an agency other than the State agency employs or contracts for the administrative review official, the State agency will be unable to comply with the 60-day timeframe.

The Department understands the difficulties faced by many State agencies in meeting the 60-day timeframe. However, "due process" is prompt process for this purpose. Institutions and responsible principals and individuals should be provided with a resolution of their proposed termination and disqualification as expeditiously as possible in the best interests of the Program. In addition, once an institution's attempt to correct a serious deficiency has been judged inadequate by the State agency, the Department has an obligation to minimize the possibility that public funds will continue to be improperly utilized. Although a State agency is expected to engage in a more meticulous review of an institution's claim once it has been given a notice of intent to terminate and disqualify, there will inevitably be increased risks of improper expenditures during this period. Therefore, this final rule does not alter the 60-day timeframe for completing an institution's appeal.

(5) Suspension of an Institution's Program Participation

As previously noted, section 17(d)(5) of the NSLA sets forth a specific process for suspending an institution's CACFP participation based on the institution's knowing submission of a false or fraudulent claim. Thus, although the law establishes procedural safeguards to ensure that institutions continued to receive payment for valid claims submitted, it also clarifies that there are two circumstances under which an institution may be prohibited from receiving Program payments from the outset of the serious deficiency process.

First, ARPA stated that, when an institution's conduct posed an imminent threat to the health or safety of children or the public (*e.g.,* when a child care center has been cited by State or local health or licensing officials for serious health or safety violations), the State agency *must* suspend the institution's CACFP participation. Second, § 307 the Grain Standards and Warehouse Inspection Act specified that, when a State agency determines that an institution has submitted false or fraudulent claims, it *may* suspend the institution's Program participation, subject to a suspension review that would precede the normal administrative review process. The Department received 11 written comments from State agencies concerning various aspects of the new suspension requirements for institutions.

A number of these commenters asked us to reconsider aspects of implementation that are mandated by law. For example, one State agency commenter recommended that States be permitted to offer a suspension review to institutions that had been suspended due to conduct that posed an imminent threat to public health or safety. However, this is inconsistent with ARPA's intent regarding suspension of an institution for conduct that poses an imminent threat to the health or safety of children or the public. When the State agency suspends an institution for conduct that poses an imminent threat to public health or safety, ARPA permits the institution to have only one appeal. In these circumstances, the institution's single appeal before a hearing official will involve all of the facts surrounding the State agency's suspension action and its notice of intent to terminate and disqualify the institution and its responsible principals and individuals.

Another commenter suggested that there be only one combined appeal of the proposed suspension and the notice of intent to terminate when the reason for suspension was the State agency's determination that the institution had knowingly submitted a false or fraudulent claim. However, in the case of a State agency's proposed suspension of an institution for knowing submission of a false or fraudulent claim, section 17(d)(5)(D)(ii)(II) of the NSLA clearly establishes that the suspension of payments and participation may only occur after a separate suspension review has occurred. In that review, the suspension review official must determine, based on a preponderance of evidence, whether the State agency's proposed suspension was appropriate. Thus, the Department is constrained by the NSLA to maintain the suspension procedures set forth in the first interim rule.

Similarly, another State agency commenter recommended that the Department add additional circumstances (*e.g.,* failure to address review findings, failure to attend mandatory training) under which a State agency would be permitted to suspend an institution's Program participation, including payments. However, this suggestion also contradicts the law. The ARPA specifically limited State agencies' ability to suspend an institution's program payments, prior to the resolution of its appeal, to two circumstances: conduct that poses an imminent threat to children's or the public's health or safety; and the State agency's determination that an institution knowingly submitted a false or fraudulent claim.

Two State agency commenters suggested that the Department lengthen the amount of time permitted by the interim rule during various stages of the suspension review process. The commenters suggested that institutions have 20 days (instead of 10 days, as specified at § 226.6(c)(5)(ii)(B)(*5*)) to submit materials to a suspension review official, and that suspension review officials have 30 days (instead of 10 days, as specified at § 226.6(c)(5)(ii)(C)(*3*)) during which to consider their decision to uphold or overturn the State agency's proposed suspension. However, the Department carefully considered these timeframes when developing the first interim rule, and will not modify them in this final rule. Because the institution receiving the suspension review has been suspended due to the State agency's determination that it knowingly submitted a false or fraudulent claim, the Department concluded that it is essential that the proposed suspension be resolved quickly, in order to minimize the institution's possible misuse of additional Program funds.

Two State agency commenters suggested that the first interim rule's requirement for the State agency to "take action" prior to the formal revocation of the institution's license may be unlawful in some States. The Department carefully considered this possibility as well when drafting the first interim rule. That is why § 226.6(c)(5)(i) requires the State agency to take different actions, depending on whether or not State or local licensing or health officials have "cited an institution for serious health or safety violations."

If a citation has been issued by health or licensing officials for conduct posing an "imminent threat" to children's health or safety, the regulations require the State agency immediately to

suspend the institution's CACFP participation. If ARPA had intended CACFP State agencies to wait until an institution's license was revoked, the wording of section 17(d)(5)(C)(ii) of the NSLA would have been meaningless, since unlicensed institutions are ineligible to participate in CACFP. Instead, the law gave the Secretary the authority to write regulations that required "the immediate suspension of operation of the program by an entity * * *, if the State agency determines that there is an imminent threat to the health or safety" of children or the public. We concluded that this wording recognizes a difference between State laws or regulations governing an institution's license to provide child care, and the Department's rules for participation in CACFP. The law expects—and the regulations at § 226.6(c)(5)(i)(B) require—that when an institution is cited by health or licensing officials for an offense that constitutes an "imminent threat" to children's or the public's health or safety, a State agency will immediately declare the institution seriously deficient, suspend the institution's CACFP participation, and provide notice of its intent to terminate and disqualify the institution and its responsible principals and individuals.

However, the Department realized that it might not be appropriate to take the same immediate actions if the State agency, rather than health or licensing officials, had discovered the conditions that might constitute an "imminent threat" to public health or safety. State agency staff are not trained licensors or health inspectors. For that reason, the first interim rule established a different standard for State agency conduct when the State agency—not the licensing or health department—discovered the potential threat to health and safety. Section 226.6(c)(5)(i) of the first interim rule requires the State agency to "notify the appropriate State or local licensing and health authorities and take action that is consistent with the recommendations and requirements of those authorities." The wording recognizes that, in this circumstance, it may be inadvisable for the State agency to take action related to the institution's CACFP participation until it has conferred with the appropriate health or licensing authorities and obtained their input.

In addition, three State agency commenters recommended that, if a suspension review official upheld the State agency's determination that a sponsoring organization's program payments be suspended for knowing submission of a false claim, the State agency should have the authority to suspend *all* Program payments, and not just the sponsor's administrative reimbursements. These commenters feared that, if facility meal payments continued to flow through a sponsoring organization that had submitted a false claim, there was a strong possibility that the sponsor would fail to provide full payment to providers, since its own administrative funding had been discontinued.

The first interim rule at § 226.6(c)(5)(ii)(E) required that, when a sponsor was suspended for submission of a false claim, the State agency must "ensure that sponsored facilities continue to receive reimbursement for eligible meals served." This language is based on section 17(d)(5)(D)(ii)(III)(ee) of the NSLA, which requires State agencies to ensure that payments for eligible meals served by facilities continue to be made during the period of their sponsor's suspension. The Department urges State agencies to make meal payments directly to sponsored facilities during the period of their sponsor's suspension, and invites State agencies to contact FNS for guidance in situations like these. However, if there is no other way to provide facilities with earned meal reimbursements than by passing payments through the sponsor, then the law requires these payments to continue. Such circumstances further underscore the need for State hearing officials to provide prompt determinations to CACFP appellants in these cases.

Finally, one State agency requested that the final rule clarify that a suspended institution may still operate, that only CACFP payment is suspended. As the previous discussion makes clear, the program "operation" of an institution must cease as soon as it is suspended, regardless of whether the institution is still licensed to provide child care. For example, if an independent center is suspended based on a licensing citation for an "imminent threat", it will receive no program payments for meals served during the period of suspension, regardless of whether the licensing citation resulted in the State's suspension of the center's license to operate. If an administrative review officer (hearing official) later rules in favor of the institution and overturns the State agency's proposed termination and disqualification, the institution could then submit claims for properly-documented meals served that met meal pattern requirements throughout the period of suspension.

If, on the other hand, a sponsoring organization is suspended for submission of false claims, it will not receive administrative reimbursement for the period of its suspension. If an administrative review officer (hearing official) later rules in favor of the sponsor and overturns the State agency's proposed termination and disqualification, the sponsor could then submit claims for properly-documented and allowable program administrative costs incurred during the period of suspension.

(6) National Disqualified List (NDL)

In the first interim rule, the Department developed new procedures and requirements for a "National Disqualified List", or NDL. These new requirements were designed to ensure that an institution or a day care home which failed to correct its serious deficiencies—as well as any principals and individuals responsible for the institution's or home's serious deficiencies—would not participate in the program for the next seven years (or longer if a Program debt remained unsatisfied). (Note to readers: the serious deficiency process for day care homes is dealt with in Part III of this preamble). The first interim rule also provided that, if an institution or a responsible principal or individual implements corrective action which, in the judgment of both the State agency and FNS, permanently and completely resolved the serious deficienc(ies), the institution or individual could be removed from the NDL. The Department received eight State agency comments concerning the process for placing institutions and responsible principals and individuals on the NDL, and/or for removing them from the NDL after successful corrective action.

Four State agencies commented on various aspects of the process by which an institution may re-enter the Program after having been placed on the NDL. Two of these commenters believed that placement on the NDL should completely remove an institution, responsible principal, or responsible individual's opportunity to re-enter CACFP for a period of seven years. When drafting the regulations to implement ARPA, the Department carefully considered various options regarding the length of time that an institution or responsible principal or individual would remain on the list and what opportunity, if any, they would have to be removed from the NDL. Like these commenters, the Department does not want institutions or responsible principals or individuals to routinely be removed from the NDL prior to the end of the seven-year disqualification period (or longer if they owe a debt to the Program). If such removals were to

become routine, it would partially undermine the premise stated in Part I(B)(3) of the preamble: That the period designated by the State agency for corrective action in its initial notice of serious deficiency provides the institution and its responsible principals and individuals with its primary opportunity to completely and permanently correct its serious deficiencies, prior to having its agreement terminated for cause and being placed on the NDL.

Nevertheless, the Department is also aware that, on occasion, an otherwise capable institution might fail to correct serious deficiencies in a timely manner due to the deficiencies of its current managers. Once these managers are removed from Program participation, it might be possible for the institution's board of directors to re-organize management in a way that would permit the institution to again provide Program benefits to children in a manner consistent with all Program requirements. It must also be stressed, as another State agency commenter noted, that if the institution takes these actions after it has been terminated and disqualified, the institution is in no way "entitled" to again participate in CACFP. The institution would again be required to re-apply for participation as a "new institution," and to meet all of the requirements for approval set forth at § 226.6(b)(1) of the regulations. The State agency must consider the institution's entire application and must find that the institution is fully capable of operating the Program in accordance with all requirements. It is possible that the institution's correction of its prior serious deficiencies will not, by itself, make its new application to participate approvable.

In addition, another State agency commenter requested that the Department emphasize that the decision to remove an institution or a responsible principal or individual from the NDL is a two-part process. The State must first determine that the corrective action taken after placement on the NDL has completely and permanently corrected the serious deficiencies that led to the disqualification. Then, FNS must concur with the State agency's decision. Furthermore, once an institution or a responsible principal or individual is placed on the NDL, it has forfeited its right to appeal the State agency or FNS's decision that its corrective action is inadequate. To underscore this point, this final rule will further amend § 226.6(k)(3) to clarify that an institution may not appeal the State agency's or FNS's determination that its corrective action is insufficient to justify removal from the NDL.

Another State agency commenter requested that the final regulation include stronger language to clarify the State agency's responsibility when an institution on the NDL submits an application to participate. In this situation, the State agency has only one responsibility: to determine whether the institution knowingly submitted false information on its application (in which case, consistent with § 226.6(c)(1), the State agency must initiate a serious deficiency process with an abbreviated appeal, so that the expiration of the institution's seven-year disqualification can be extended). Otherwise, the State agency may simply return the application, stating that the institution is not eligible to have its application considered until it has been removed from the NDL. To underscore this point, this final rule further amends § 226.6(k)(3) to state that an institution on the NDL may not appeal the State agency's refusal to consider its application to participate until the institution has been removed from the NDL, nor may an institution appeal if the State agency refuses to consider an application submitted on behalf of a sponsored facility that is on the NDL.

Finally, this final rule amends §§ 226.6(b)(1)(xii), 226.6(b)(2)(ii), and 226.6(c)(7) to modify current regulatory language stating that the State agency must "deny the application" of an institution or sponsored facility on the NDL, and that such institution "may not submit" an application for itself or on behalf of a sponsored facility on the NDL. Several State agency commenters correctly noted that it is impossible to prohibit any entity from "submitting" an application. The changes to the regulatory wording we are making in this final rule will more appropriately focus on the State agency's responsibility to not approve the application, and the institution's absence of appeal rights, in this circumstance.

Accordingly, this final rule further amends § 226.6(k)(3) by adding § 226.6(k)(3)(vi) to state that an institution may not appeal the State agency or FNS's decision that an institution's corrective action is inadequate to be removed from the NDL, and by adding § 226.6(k)(3)(vii) to state that an institution on the NDL may not appeal the State agency's refusal to consider an application to participate until it, or a sponsored facility on whose behalf the institution has applied, has been removed from the NDL. In addition, this final rule amends §§ 226.6(b)(1)(xii), 226.6(b)(2)(ii), and 226.6(c)(7) to modify current regulatory language stating that the State agency must "deny the application" of an institution or facility on the NDL, and that such institution and facility "may not submit" an application. Instead, the regulatory language will be amended to state that the State agency may not approve an application submitted by an institution on the NDL, or an application submitted by an institution on behalf of a sponsored facility that is on the NDL, and that a State agency's refusal to consider an application in this circumstance is not subject to administrative review.

Part II. State Agency and Institution Review and Oversight Requirements

Introduction

Sections 243(a) and (b) of ARPA added three statutory requirements which affected the regulatory requirements for State agency monitoring of institutions and sponsoring organizations' monitoring of their sponsored facilities. These changes were designed to improve Program management and integrity by strengthening the requirements affecting the review and oversight functions performed by State agencies and sponsoring organizations participating in the CACFP. These three changes were discussed in Part II of the interim rule published on June 27, 2002, which implemented all of the changes mandated by ARPA in the CACFP regulations.

In addition, a number of additional regulatory changes affecting State agency and sponsor monitoring and oversight were suggested by the "Operation Kiddie Care" report, issued by the United States Department of Agriculture's Office of Inspector General (OIG) in August of 1999. On September 12, 2000, the Department issued a proposed rule that addressed most of the changes to review and oversight requirements suggested in the Kiddie Care report. After analyzing public comments on this proposed rule, the Department published a second interim rule on September 1, 2004, which implemented these changes to State and sponsor review and oversight requirements in the CACFP regulations. These changes were addressed in Part II of the second interim rule, published on September 1, 2004.

In total, the two interim rules addressed twelve different aspects of CACFP review and oversight requirements, as follows:

- Unannounced reviews conducted by sponsoring organizations and State agencies;

- The minimum number of sponsor organization staff devoted to performance of the monitoring function;
- The frequency of State agency reviews of institutions (referred to as "the State agency review cycle");
- Enrollment form requirements for children participating in CACFP facilities;
- The minimum content of State agency reviews of institutions (referred to as "State agency review elements");
- The minimum content of sponsor reviews of facilities (referred to as "sponsoring organization review elements");
- Requirements for monthly State agency and sponsoring organization edit checks of meal claims submitted by institutions and facilities;
- Requirements for sponsoring organizations and State agencies to conduct "household contacts" to the families of children participating in CACFP;
- The frequency of facility reviews conducted by sponsoring organizations (referred to as "the sponsoring organization review cycle");
- State agency disallowance of fraudulent or otherwise unlawful facility meal claims;
- The rules governing audits of institutions participating in CACFP; and
- Requirements concerning family day care home providers who qualify for tier I reimbursements on the basis of their receipt of benefits under the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program.

The Department received public comments on all but two of the above items: State agency disallowance of fraudulent or otherwise unlawful facility meal claims, and the changes to the Department's rules governing audits at 7 CFR Part 3052. On several other items, comments focused solely on one aspect of the new requirements (*e.g.,* all comments concerning edit checks had to do with the Department's requirement that sponsoring organizations implement an edit check that would identify "block claims" submitted by their facilities). As in Part I of this preamble, a number of the issues raised by commenters have already been addressed in guidance or training, and do not require extensive discussion in this preamble.

A. Unannounced Reviews

Prior to the issuance of the first interim rule, the CACFP regulations required that most sponsoring organizations make three reviews of each of their facilities each year, but did not specify whether these reviews should be announced or unannounced. Common practice, prior to the first interim rule, was to make most provider reviews announced (*i.e.,* the sponsor would schedule the review with the provider in advance). However, the OIG's "Operation Kiddie Care" report strongly recommended that sponsor reviews be unannounced, and Section 243(b)(2) of ARPA amended section 17(d)(2) of the NSLA by requiring that some State agency and sponsor reviews be unannounced. Consequently, the first interim rule continued to require that each sponsor conduct three reviews per facility per year, but added the requirements that two of the three reviews be unannounced, and that one of the unannounced reviews include a review of a meal service. The first interim rule encouraged State agencies to conduct unannounced reviews of problem-prone institutions, and required that, when conducting a review of a sponsoring organization, at least 15 percent of the facility reviews conducted by State agency staff must be unannounced.

Furthermore, the rule established certain requirements for notifying facilities of these new requirements, and for sponsor staff to have photo identification—to demonstrate that they are sponsor employees—when conducting unannounced reviews. Finally, in response to sponsor concerns that unannounced reviews would increase costs due to a provider's absence at the time of the review, the Department also added a requirement that providers must notify sponsors in advance whenever the provider planned to be out of the home with the children in care during a scheduled period of meal service.

The Department received 366 comments regarding the required frequency of unannounced sponsor reviews of facilities. Of these, 320 were from family day care home providers, 37 from institutions, four from State agencies, four from advocacy groups, and one with no identifiable affiliation. Twelve (12) commenters supported the provision as written. The remaining commenters offered a wide variety of alternative suggestions for the frequency with which unannounced reviews must be conducted. The most common alternative suggested (by 306 commenters) was that the Department should require one unannounced and two announced reviews of each facility each year. Seventeen providers opposed any requirement that sponsors conduct unannounced reviews, while the remaining 31 commenters suggested ways in which the Department could either lower the total number of required reviews below three per year and/or permit sponsors to focus more reviews on providers with suspicious claiming patterns.

Based on the results of the CCAP, the Department remains convinced that the requirement for two unannounced reviews per facility per year is appropriate. The results of the CCAP report suggested that, although there has been improvement in some areas of program management following publication of the two interim rules, significant problems still remain with regard to the accuracy of family day care home provider meal counts. There are two CCAP findings which relate directly to this issue. First, of all visits completed during CCAP, over one-fourth of providers' meal and/or menu records were not up-to-date at the time of the assessment team's visit. Unfortunately, this problem was not confined to particular sponsors: for over 80 percent of the sponsors assessed, more than 20 percent of homes lacked up-to-date meal and/or menu records on the day of the CCAP assessment. Second, on other days of the month in which the CCAP was conducted, more than 40 percent of providers' meal counts were, on average, one or more meals higher than the number of meals observed for the same meal service on the day of the assessment team's visit.

While these findings do not prove the existence or frequency of misreporting on provider claims, taken together, they suggest that meal count integrity is in need of improvement among family day care homes participating in CACFP. Unannounced sponsor reviews should be an excellent tool for identifying these issues. Therefore, the rule continues to require that two unannounced reviews must be made to each facility each year, as set forth in the first interim rule. In addition, as discussed further in Part II(H), commenters should note that the second interim rule did provide a new approach to "review averaging," which provides sponsoring organizations with greater flexibility to focus their review efforts on new or "problem" facilities.

In addition, the Department received 671 comments concerning the requirement that providers notify sponsors in advance whenever the provider planned to be claim a meal served outside of the home to children in care during a scheduled period of meal service. A total of 278 comments (from 240 institutions, 22 advocates, one provider, four State agencies, and 11 commenters with no clear affiliation) recommended that the requirement be made optional, at the discretion of the sponsoring organization. Some of the sponsor commenters felt that they

already had reasonable provider "call-in" requirements in place, and that such requirements needed to be individualized for each sponsor. A total of 386 other commenters (361 providers, 16 institutions, one State agency, one advocacy group, and seven with no organizational affiliation) were opposed to the requirement, and believed it should not be addressed at all in the Federal regulations governing CACFP. These commenters felt it would be difficult for providers to remember the requirement when they were preparing the children to leave the home.

The Department wishes to correct a misunderstanding that has frequently been expressed about this requirement—namely, that it requires a CACFP provider to call the sponsor any time she leaves her home with the children in her care. In fact, providers are required to contact the sponsor only if they plan to be out of the home during a scheduled meal service. This provision was promulgated as a way to address the issue of inflated meal counts. Often, sponsors would report that their unannounced visits were unsuccessful because providers were not at home during the specified time of meal service. These same providers would often claim that reimbursable meals were served at another location (*e.g.*, a nearby park) during the same time of meal service. Sponsors were frustrated by their inability to address suspicious meal claims in these circumstances.

Thus, the regulatory language that required providers to notify the sponsor when they would be out of the home and provide a reimbursable meal to enrolled children was intended to give sponsors the clear authority to disallow meal claims when the provider had not given such notification. In addition, it was hoped that the call-in requirement would minimize sponsors' costs in instances where sponsor monitors had to travel a great distance to conduct an unannounced review, and where providers were so geographically dispersed that the monitor might find it difficult to return to an absent provider's home on the same day. Removing the call-in requirement would impair our ongoing efforts to improve the integrity of provider meal counts, and might place a special hardship on sponsors of day care homes that are widely dispersed and located in rural areas.

B. Sponsoring Organization Monitoring Staff ("Monitor-Staff Ratio")

Section 243(a)(8) of ARPA amended section 17(a)(6) of the NSLA to require that, in order to be eligible to participate in CACFP, a sponsoring organization must employ an appropriate number of monitoring staff, based on the number and type of facilities it sponsors. Based on that statutory language, the first interim rule established different ratios of facilities to full-time monitor staff that sponsors of homes or centers must employ. The rule provided a range of facilities (50 to 150 for day care homes, 25 to 150 for sponsored centers) which the State agency could use in determining whether the sponsor's management plan documented employment of enough staff to properly monitor the number and type of homes it administered. Establishing ranges was intended to provide State agencies with the flexibility to take into account such factors as whether the sponsor's facilities were rural or urban, the facilities' geographic dispersion, and the monitors' proximity to the facilities. It is the Department's understanding that few if any State agencies have taken advantage of this opportunity to "customize" the staff-monitor ratio for sponsors with differing circumstances, opting instead to determine only whether the sponsoring organization's management plan documents that the sponsor meets or exceeds the ratio of one full-time equivalent monitor for each 150 facilities administered. The Department required sponsors to comply by July 29, 2003, one year after the effective date of the first interim rule, but later extended the deadline to October 1, 2003.

A total of 772 comments (including multiple comments about different aspects of this requirement) were received from 435 institutions, 298 providers, 17 State agencies, 8 advocates, and 14 others with no clear organizational affiliation. One group of 240 respondents focused their comments on the numerical range of facilities (50–150 homes or 25–150 centers) for which § 226.16(b)(1) requires a sponsor to employ one "full-time equivalent" staff. These commenters suggested that the high end of the range of facilities per monitor should be raised (to 200, 250, or even 300), that the requirement should be abolished, or that the rule should only be applied "for cause," when sponsoring organizations were found to have serious monitoring problems.

The regulatory requirement cannot be abolished, since it is based on the previously-mentioned statutory language describing the minimum requirements for sponsor eligibility. The Department has concluded that this provision is not restricted to sponsors with documented monitoring problems. The provision's greatest value may be to prevent the development of serious monitoring problems, by ensuring that each sponsor devotes adequate human resources to the monitoring function.

Furthermore, we are concerned that many of these comments may have been developed without benefit of the information provided in the extensive implementation guidance for this provision that was issued on February 21, 2003. That guidance established procedures for State agencies to use to request a waiver for the upper limit of facilities per monitor, if the State agency determined that a sponsor that did not meet the upper limit was effectively monitoring and managing the CACFP, and was already devoting a reasonable portion of its budget to monitoring. The Department implemented this waiver policy well before the monitor-staff requirements became effective on October 1, 2003, but has not received any requests for waivers. A second group of 259 comments focused on the methods State agencies must use to calculate whether a sponsor employs sufficient staff to meet the monitor-staff standards specified at § 226.16(b) of the regulations. Of these, 226 commenters reminded the Department that staff persons with the title of "monitor" also perform other functions, and that these functions should also be counted towards the sponsor's fulfillment of the monitor-facility ratio.

This issue was thoroughly addressed in the guidance issued by the Department on February 21, 2003. It clarified that not every duty performed by an employee with the title of "monitor" is monitoring-related, but that monitoring-related functions performed by any employee, regardless of title, should be counted towards the sponsor's number of full-time monitoring equivalents. For example, that portion of clerical staff time devoted to the preparation of monitoring-related correspondence, or that portion of supervisory staff time dedicated to quality control or other oversight of monitors and reviews, should also be counted in calculating the sponsor's full-time monitoring equivalents. The 2003 guidance contained a list of the tasks that should and should not be counted as "monitoring-related," and readers are urged to consult this guidance whenever questions arise.

Another group of commenters questioned the number of hours that the Department used in estimating the time necessary to perform three reviews for one facility over the course of a year. In the preamble to the first interim rule, the Department estimated that a sponsor would need to devote 12 to 15 hours per

facility to conduct all monitoring-related activities for that facility. Thirty-three commenters stated that the Department had greatly overestimated the amount of time spent by monitors on a typical review. However, as explained in the 2003 guidance, that per-facility estimate included not only the time a reviewer spends conducting three onsite reviews (adjusted upward to account for new regulatory requirements such as unannounced reviews, five-day reconciliations, annual enrollment updates, and other monitoring-related functions), but also all of the other aspects of the monitoring process, including travel time, planning, follow-up report writing, the time needed to conduct household contacts and, if necessary, the time required to conduct the serious deficiency process established for day care homes in the first interim rule.

Finally, 273 providers submitted comments questioning why the Department was "micro-managing" sponsors' program management. The Department implemented a statutory requirement that a sponsor employ adequate staff to perform all of the monitoring-related activities that are now required following publication of the two interim rules. Responsibility for the implementation is not, therefore, "micro-managing".These commenters are also reminded that ARPA required the Department to establish a method of determining whether sponsors employed enough staff to perform adequate monitoring, taking into account the number and type of facilities in which the sponsor administered the Program. The Department chose this particular approach after considering a number of other alternatives, as fully explained in the preamble to the first interim rule.

C. State Agency Review Cycle

Section 243(b)(2) of ARPA amended the requirements at section 17(d)(2) of the NSLA for State agency reviews of institutions (*i.e.*, independent centers and sponsoring organizations). Prior to ARPA, State agencies were required to review all institutions no less than once every four years. As a result of the change made by ARPA, State agencies were required to review each institution no less frequently than once every three years, in order to "identify and prevent management deficiencies and fraud and abuse under the Program."

The Department implemented these required changes at § 226.6(m)(4) of the first interim rule. In addition, consistent with the amendment's requirement to identify and prevent fraud and abuse, the Department added a requirement at § 226.6(m)(2) that, in establishing its review priorities, State agencies must target for more frequent review those institutions in which the prior review had included a finding of serious deficiency. Finally, the Department elected to modify one other aspect of the former State agency review requirements in the first interim rule, by requiring that all sponsors of more than 100 facilities (the threshold had previously been 200 facilities) be reviewed by the State agency no less than every other year.

The Department received five comments on these changes, four from State agencies and one from an advocacy group. Three commenters believed that State agencies would be unable to increase their reviews from once every four years to once every three years. However, this change was required by ARPA, and may only be altered by amendment to Federal law. Two other commenters believed that, in order to meet the amendment's minimum requirements, the Department should simply require that each State agency review one-third of all participating institutions each year. Although this would provide a simple way of meeting the law's numerical requirements for institution reviews, the Department strongly believes that the large percentage of Program expenses utilized by sponsors of over 100 facilities justifies the requirement that State agencies review them every other year.

D. Updating Children's Enrollment in CACFP and Other Enrollment-Related Requirements

The CACFP regulations have always required that, in order for meals to be reimbursed under the Program, the children receiving the meals must be "enrolled for child care" in a day care facility that meets the licensing or approval requirements set forth at § 226.6(d) of the regulations. Prior to the publication of the Kiddie Care report, the frequency of collecting enrollment forms and the content of those forms were not addressed in the regulations. Enrollment requirements were established by each State's licensing agency, and thus were specific to each State.

Although these State licensing requirements for children's enrollment remain in effect, the findings of the Kiddie Care audits showed that, in order to ensure the integrity of Program funds, the Department needed to establish CACFP-specific enrollment requirements that established minimum requirements for all States. Specifically, the Kiddie Care audits uncovered instances in which enrolled children were being claimed for meal reimbursement long after the child had left the CACFP facility. To address these improper claims, OIG recommended that the Department establish requirements regarding the updating and content of children's enrollment forms.

In response, the second interim rule established the requirement that children's enrollment forms must be updated annually, and that the form must be signed by a parent or guardian. These changes were primarily made to help sponsor monitors, quickly identify "old" enrollments for children no longer in care, and to reduce the number of improperly claimed meals by having parents or guardians annually update the form.

In addition, the second interim rule required that the enrollment form indicate each child's days and hours of care and the meals the child normally receives while in care. For example, a toddler in care might normally be present five days a week and receive breakfast, lunch, and an AM snack each day, whereas a child attending a pre-kindergarten program would normally have different hours and receive different meals for those days on which he/she attended preschool. School-age children would usually have the same schedule of care every day, but might normally be in care only after school and receive a PM snack only. Requiring that the enrollment form include information on each child's normal days and hours of care and the meals he/she received was intended to help sponsors determine the validity of facility claims, and especially to assist sponsor monitors in conducting five-day reconciliations, which the second interim rule required to be conducted as a part of each facility review (see Part II(E) of this preamble).

To facilitate this provision's implementation, the Department included several accommodating provisions in the second interim rule and in guidance. First, to accommodate larger sponsors (some of which handle many thousands of enrollment forms every year), full implementation of this requirement was delayed until April 1, 2005, so that sponsors could phase in the requirement over a period of time. This delay permitted larger sponsors to "stagger" the end date of enrollments and to spread their enrollment workload over a longer period of time. In addition, although new enrollment forms collected on or after April 1, 2005 were required to comply, the Department permitted the enrollments of then currently-participating children to be

updated later (by no later than September 30, 2005).

Second, in response to concerns from States in which only the State licensing agency could make changes to the State-required enrollment form, the delayed implementation gave State agencies more time to coordinate with their counterparts in the State licensing agency concerning these changes. In addition, if it proved impossible for State licensing to effect these changes by the required deadline, guidance issued with the second interim rule provided State agencies with the option of capturing this "enrollment" information on a CACFP income eligibility form.

Third, in response to concerns expressed by State agencies in States where parents were required by licensing to sign children in and out of care each day, the Department issued guidance on March 11, 2005, which relieved such States of the requirement to collect each child's days and hours of care on the enrollment form, since the child's presence or absence at the facility is clearly documented on the sign-in/sign-out sheet. Finally, recognizing that not all States require enrollment for children in all types of facilities that participate in CACFP, the second interim rule exempted outside-school-hours care centers, at-risk afterschool snack programs, and emergency shelters from the child enrollment requirement. Of course, if State licensing rules require any of these types of facilities to be licensed, the facilities would have to be licensed in order to be eligible to participate in CACFP.

The Department received 156 comments on the enrollment form requirements promulgated in the second interim rule, from 141 institutions, seven advocacy groups, four State agencies, and four providers. Eight commenters fully approved of the changes to enrollment requirements, and 17 opposed them, either partially or in their entirety. Among other commenters, 88 asked for flexibility in permitting sponsors to "stagger" the due dates of enrollment forms throughout the year. As noted above, this flexibility was addressed in guidance issued on December 23, 2004, and in the training the Department conducted on the interim rule in 2005.

In addition, 43 commenters suggested that the Department permit enrollments to be updated every 14 months, to avoid the possibility that providers or centers would lose reimbursement for families that were late in turning in their enrollment forms. The Department recognizes that, for any number of reasons, enrollment forms may not be updated exactly on a 12-month cycle. This was addressed in guidance (questions and answers) issued on February 23, 2006, which permitted State agencies to allow a "rule of reason" about the enrollment deadline. Although that guidance did not specify a maximum period of time that could elapse between enrollments, it did provide the example of an enrollment form first collected on September 7, 2005, which could be considered valid through the end of September 2006. The Department expects State agencies and "sponsoring organizations" to use this flexibility responsibly, consistent with the regulatory requirement at §§ 226.15(e)(2) and (e)(3), 226.17(b)(7), and 226.18(e) to collect enrollment forms "annually."

E. Required State Agency and Sponsor Review Elements

The second interim rule established specific requirements for the content of sponsoring organization reviews of facilities and State agency reviews of institutions. Prior to this, the CACFP regulations had simply mandated the timing and number of facility and institution reviews to be conducted, not their content.

The changes were initially presented in a proposed rule issued on September 12, 2000, and implemented in the second interim rule. These proposed changes elicited widespread support, and were adjusted only slightly in the second interim rule, based on comments submitted in response to the Department's proposed rule of September 12, 2000. Comments were received on two aspects of the interim rule's State and sponsor review elements: The requirement that both State agencies and sponsoring organizations conduct a "five-day reconciliation" as a part of each facility review they conducted; and, the requirements pertaining to the State agency's conduct of unannounced reviews of a meal service.

The second interim rule required that every State agency review of a sponsor (which also includes reviews of a representative sample of the sponsor's facilities), and every sponsor review of facilities must include a "five-day reconciliation." Five-day reconciliation requirements were included as a sponsor review element in the second interim rule as a means for a sponsor to "spot check" the accuracy of facility claims. They were required to be included in State agency reviews of sponsors' facilities in order to again check the accuracy of the facility's meal counts, and to "spot check" the effectiveness of the sponsor reviewers' conduct of five-day reconciliations.

The theory and practice of five-day reconciliations is simple. Reviewers must check enrollment, attendance and meal counts in the facility for a five-day period to see if they match, or "reconcile." If they do, it is more likely that the facility is keeping accurate enrollment and attendance records and is accurately reporting the number of meals served each day. If they do not, the reviewer must attempt to determine the reason(s) for the discrepancies, and decide whether an overclaim should be established.

Nine comments were received on the five-day reconciliation requirement implemented in the second interim rule: Four from institutions; four from State agencies, and one from an advocacy group. One State agency commenter suggested that meal counts be reconciled to enrollment only, while the other eight commenters suggested that meal counts be reconciled to attendance alone. The regulations at §§ 226.15(e)(2), (3), and (4), and at § 226.18(e) require that all participating facilities have both types of records, except in those types of facilities in which enrollment forms are not required (outside-school-hours care centers, at-risk afterschool programs, and emergency shelters). Thus, the Department believes that comparing both enrollment and attendance records to five days of facility meal counts will ensure that the meal claimed was served to a child who was enrolled for care and who was in attendance at the time of the meal service.

In order to minimize the possibility of future misunderstanding of these requirements, the Department will make one minor change in this final rule to the language governing five-day reconciliations at §§ 226.6(m)(4) and 226.16(d)(4)(ii). As currently written, § 226.6(m)(4) states that State agency facility reviews must compare "available" enrollment and attendance records to five days of meal counts. The current language at § 226.16(d)(4)(ii) states that sponsor reviews must compare five days of facility meal counts to "enrollment and/or attendance" records. In both cases, the wording was meant to recognize the previously-mentioned exception to formal enrollment requirements for outside-school-hours care centers, at-risk afterschool programs, and emergency shelters. However, the Department is concerned that this language might be misconstrued to provide sponsors with the option to use either enrollment or attendance records, rather than both, even in facilities where

both types of records are required, and in outside-school-hours care centers, where the free and reduced price application form is often used as a type of "enrollment" form and can be compared to attendance records.

Finally, the Department will make one technical correction to the second interim rule's regulatory language governing the five-day reconciliation. In instructing sponsors on how to conduct a five-day reconciliation in a sponsored facility, § 226.16(d)(4)(ii) states in part that "For each day examined, reviewers must use enrollment and/or attendance records to determine the number of children in care * * *," and later refers to "children in care." Although the five-day reconciliation is a required part of all facility reviews conducted by all sponsors, the use of the words "children in care" could be misread to limit this provision to child care centers only, when in fact it applies to adult day care centers as well. This final rule will amend § 226.16(d)(4)(ii) to substitute the word "participants" for the word "children" both times it occurs.

Accordingly, this final rule amends §§ 226.6(m)(4) and 226.16(d)(4)(ii) to further clarify that five-day reconciliations must include a comparison of meal counts to both attendance and enrollment records, except in those facilities (outside-school-hours care centers, at-risk afterschool programs, and emergency shelters) in which enrollments are not required by the CACFP regulations. It also substitutes the word "participant" for the word "children" both times it occurs at § 226.16(d)(4)(ii).

The second aspect of these requirements about which we received comment involved State agency observations of meal services during reviews. The second interim rule at § 226.6(m)(3)(vii) required that each State agency review of an independent center include an observation of the center's meal service. By contrast, the second interim rule did not require that each State agency review of a sponsored facility (*i.e.,* a review conducted of a sponsored center or a family day care as part of the State agency's review of a sponsoring organization) include the observation of a meal service. Three commenters (two State agencies and one advocacy organization) suggested an expansion of the required State agency review elements, to require that each State agency review of a sponsored facility include an observation of a meal service.

The apparent logic behind this suggestion is sound: The Department requires State agencies to conduct five-day reconciliations when reviewing sponsored facilities, in part as a means of checking on the adequacy of the sponsoring organization's conduct of five-day reconciliations. The State agency's observation of a meal service would be a means of checking the adequacy of the sponsor monitors' review of the facilities' meal service.

Ideally, the Department would like each State agency review of a facility to cover every aspect of the facility review conducted by the sponsor, including the observation of a meal service. However, the Department was reluctant to add too many requirements to the content of State reviews of facility. The State agency's primary responsibility, in reviewing a sponsor, is determining the adequacy of the sponsor's policies, procedures, and internal controls to ensure effective operation of the program and compliance with program requirements by both the sponsors and its facilities. We strongly encourage State agencies to observe a meal service whenever possible when conducting facility reviews. However, in this final rule, we will not require that a meal service observation always take place, as we do for State agency reviews of independent centers, where no other entity reviews the center's meal service for program compliance.

Finally, the Department will make one technical correction pertaining to sponsor review elements in this final rule. The second interim rule clarified at § 226.15(e)(4) that meal counts may be recorded at the end of the day in family day care homes, as opposed to centers, which are required to record the meal count at the "time of service." However, § 226.11(c)(1) still implies incorrectly that all meals must be recorded at the time of the meal service.

Accordingly, this final rule amends § 226.11(c)(1) to clarify that reimbursements to day care home providers are calculated based on daily meal counts, as opposed to time of service meal counts.

F. State Agency and Sponsor Edit Checks, Including Block Claim Edit Check

The second interim rule amended the CACFP regulations to require that both State agencies and sponsoring organizations establish monthly edit checks to improve the accuracy of claims payments to institutions and facilities, respectively. Prior to this time, the regulations did not require either State agencies or sponsoring organizations to have particular monthly edit checks built into their payment systems. Nevertheless, most State agencies and sponsoring organizations already had some monthly edit checks in place in their payment systems, and OIG's suggestion to add two specific edit checks to the CACFP regulations generated little controversy after being proposed in September of 2000.

The one edit check that did generate opposition was that requiring sponsoring organizations to identify "block claims," defined in the second interim rule as any claim submitted by a facility on which the number of meals claimed, for one or more meal type, is identical for 15 consecutive days within a claiming period (generally one calendar month). In addition, the rule required that, once a facility submitted a block claim, a sponsoring organization must conduct an unannounced review of that facility within the next 60 days. In order to provide adequate time for sponsoring organizations to modify their edit checks and review protocols, the Department delayed implementation for 13 months, until October 1, 2005.

In most cases, the Department concluded that this requirement would result in sponsors conducting an additional (fourth) review of a facility during a review year. If the monitor could document a compelling reason for the block claim, no further "60-day follow-up reviews" would be required for the remainder of the review year. In addition, since sponsors were already required to conduct three reviews per year, at least two of which were unannounced, the Department anticipated that the largest impact of this provision—and one that was entirely desirable, from the Department's standpoint—was that sponsoring organizations would need to regularly re-adjust their review schedules, offsetting some sponsors' tendency to conduct reviews of the same facility on approximately the same schedule every year. The Department received 397 comments about the definition of a block claim added to § 226.2 by the second interim rule, and 443 additional comments concerning the requirement that sponsors conduct an unannounced follow-up review within 60 days of a block claim's submission.

Of the 397 comments received concerning the definition of a block claim, 361 were submitted by sponsoring organizations, 14 by providers, and 11 each by State agencies and advocacy groups. All 397 commenters suggested some type of change(s) to the regulatory definition, with most suggesting that the period of the block claim either be revised from 15 days to one full month of claiming the same number of one or more meal types, or that a block claim be defined

as the submission of identical meal counts for all meal services (instead of one or more meal services) over a 15-day period.

Of the 443 comments received concerning the unannounced follow-up review requirement, 417 were from institutions, 18 from advocacy groups, 6 from providers, and 2 from others with no clear affiliation. Four ideas for changing the provision were made in these comments:

- 149 commenters suggested that the time allowed for the conduct of an unannounced followup review should be extended to 90 days following the block claim's submission;
- 94 commenters suggested that, after block claims were identified, sponsors should be required to review a sample of 10 percent of the facilities identified as having submitted such claims (as opposed to reviewing all facilities submitting block claims within 60 days);
- 42 commenters suggested that block claims identified by a monitor during a facility review could be verified during a review, as opposed to requiring a separate follow-up visit (which the Department permitted in guidance issued on July 1, 2005 and May 23, 2006, and made permanent on August 27, 2007); and
- 136 suggested the permanent implementation of a temporary policy permitted by the Department in guidance issued on July 1, 2005 and May 23, 2006, which stated that block claims verified during the last two months of the current review year would eliminate the need to conduct any unannounced followup reviews in the next review year (the Department made this change permanent on August 27, 2007).

Based on the CCAP results, the Department remains very concerned about meal claim integrity in the CACFP. However, based on feedback we have received in comments on the second interim rule and through feedback in other forums, we are now convinced that this particular approach to improving claim integrity has been ineffective. It appears that, when questioning providers about the submission of a block claim after the fact, sponsor monitors do not have enough information to confirm or refute the providers' explanations of the reasons for their block claims. Therefore, this final rule eliminates all reference to block claims and unannounced follow-up reviews at §§ 226.2 and 226.10(c)(3). The Department will continue to explore more effective means of monitoring erroneous meal claims, especially in the family day care home portion of the CACFP. Readers of this preamble should note that this change is consistent with section 331(b) of Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010, which was enacted on December 13, 2010.

Accordingly, this final rule removes the definition of "block claim" at § 226.2 of the CACFP regulations and all of § 226.10(c)(3), which described the block claim edit check and the 60-day follow-up review requirement. However, readers should note that, given the evidence in CCAP that a substantial minority of providers continue to be out of compliance with recordkeeping and daily meal counting requirements, the Department will continue to try to develop an efficient and effective means of identifying improper payments by family day care homes and sponsored centers. Ultimately, the Department is required by the Improper Payments Information Act of 2002 to establish a means of measuring facility error in CACFP. If our efforts indicate the need for sponsors to take other actions to minimize improper facility claims, the Department will issue a proposed rulemaking at that time.

G. Household Contacts

Based on the results of the Kiddie Care report, the Department proposed in 2000 to require that sponsors make "household contacts" if they detected block claims submitted by their providers. Commenters on the proposed rule were strongly opposed to this, and in the second interim rule published in 2004, requirements pertaining to both block claims and household contacts were quite different than what had been proposed in 2000. Commenters' responses to the block claim edit check requirements promulgated in the second interim rule were discussed in Part II(F) of this preamble. This part of the preamble addresses commenters' responses to the new household contact requirements established in the second interim rule.

After having attempted, in the proposed rule published in 2000, to provide detailed guidance on when and how household conducts should be made, the Department adopted a very different approach in the second interim rule. We still believed that the OIG report had presented a compelling case for the use of household contacts as an oversight tool—whether by sponsoring organizations, State agencies, or both—as a means of confirming children's attendance at and enrollment for child care, which is critical to ensuring the integrity of facility meal counts in CACFP. However, we adopted commenters' suggestion that the Department should not attempt to describe and require all of the elements of a household contact system. Instead, the second interim rule required State agencies to develop (by April 1, 2005) a system which defined the circumstances under which the State agency and sponsoring organizations would be required to make household contacts. State agencies were also required to review and evaluate sponsors' implementation of the State agency's system during every review of the sponsor.

The Department received 213 comments on this aspect of the second interim rule. Ninety-eight (98) commenters (93 institutions, 4 advocacy groups, and one State agency) stated that sponsors should have the flexibility to define their own household contact systems, rather than having the State agency develop a household contact system for all sponsors in the State. The Department made a deliberate choice to provide this authority to State agencies, rather than sponsors. Although we expected and wanted State agencies to consult with sponsors in developing these systems, the Department believed it would be inappropriate to permit sponsoring organizations to define the way this oversight tool would be used, since it would have a direct impact on their workload and, if not properly established and implemented, would not yield meaningful results.

In addition, 15 provider commenters expressed concern that vindictive parents could abuse a household contact system, by deliberately providing false information to the sponsor or State representative making the contact. While we acknowledge that this is a possibility, the Department believes that it is a remote possibility. Parents who are dissatisfied with their child's day care home provider tend to change providers, making it less likely that a "vindictive" parent would deliberately provide false information. Meanwhile, in our training on this provision, we emphasized that sponsors should consider multiple sources of information when attempting to discern whether their providers were submitting accurate meal counts. A household contact is one way—but certainly not the only way—of establishing the accuracy and integrity of provider meal counts.

Finally, 98 commenters (93 institutions, 4 advocacy groups, and one State agency) stated that State agencies' household contact systems should never link the submission of block claims to the requirement to conduct a household

contact. The Department notes that, although this final rule removes all Federal requirements pertaining to block claims, it does not affect a State agency's ability to link household contact requirements to block claims. Each State agency will have its own approach to defining the circumstances under which sponsors must conduct household contacts, and the Department will not attempt to limit State agencies' options in this regard. We expect that, in establishing and modifying household contact systems, a State agency will devise a system that it believes is best suited to the particular management challenges to proper implementation of CACFP in their State.

H. Sponsoring Organization Review Cycle

The second interim rule implemented several changes to the cycle for sponsoring organizations' conduct of facility reviews. Several small differences that previously existed between the review cycle for different types of facilities were eliminated in the interim rule, which now requires sponsors to review each facility (regardless of whether it is a home or any type of center) three times a year, with two of these visits being unannounced and at least one unannounced review being conducted of the facility's meal service. Having uniform review requirements for all types of facilities had been positively received by commenters on the original proposed rule issued in 2000, and no further comments on this aspect of the review cycle changes were received. The only aspect of the review cycle about which comments were received was the change made to the provisions governing sponsors' use of "review averaging."

Prior to the second interim rule, sponsoring organizations could "average" their facility reviews only with the approval of the State agency. "Review averaging" simply means that a sponsoring organization with 100 facilities, must still conduct 300 reviews, but does not have to review each of its 100 facilities three times each. This flexibility has always been intended to permit sponsoring organizations to devote more time reviewing facilities that are new, or that have a history of problems with program compliance.

Given the two interim rules' emphasis on targeting problem institutions and facilities for more oversight, and given the number of new oversight requirements that sponsors would have to perform, the Department decided that sponsoring organizations should have the flexibility to decide (without prior State agency approval) whether or not to use review averaging as a management tool. In this way, sponsors would be able to review high-performing facilities less frequently and error-prone facilities more frequently.

The second interim rule placed several limits on sponsors' use of review averaging. First, for those facilities not being reviewed three times in a review year, the Department required that sponsors still conduct two unannounced reviews. Second, no facility could be reviewed only two times in a review year if it was determined seriously deficient in one of the reviews, or if it submitted a block claim at any time during the review year. Finally, regardless of the sponsor's use of review averaging, individual facility reviews would have to occur no more than nine months apart from one another.

The Department received 208 comments on its implementation of review averaging, including 195 from institutions, five from advocacy groups, one from a State agency, and seven from commenters whose affiliation could not be determined. These commenters asked for slightly more flexibility for sponsors in utilizing this provision. Specifically, they requested that the concept of "averaging" be extended from the total number of reviews to the averaging of unannounced reviews as well. In other words, the sponsor of 100 facilities would still have to conduct 300 reviews, 200 of which would be unannounced, but could distribute the unannounced reviews in any manner it saw fit.

The Department largely agrees with this proposal, but does want to ensure that each facility receives at least one unannounced review each year. This will give sponsors more flexibility than they currently have in targeting review resources to error-prone facilities, but will continue to ensure that each sponsored center or family day care home receives one or more unannounced reviews each year.

Accordingly, the Department will make the appropriate changes to § 226.16(d)(4)(iv), including the elimination of the last sentence, which previously limited the provision's applicability when a facility had submitted a block claim. Because the block claim requirements have been removed in this final rule, the last sentence of § 226.16(d)(4)(iv) is no longer relevant, and will be removed.

I. Requirements Pertaining to Family Day Care Home Providers Who Qualify for Tier I Reimbursements on the Basis of Their Receipt of Benefits Under the Supplemental Nutrition Assistance Program (SNAP)

The second interim rule included new requirements for oversight of a family day care home provider who established eligibility for tier I meal reimbursements on the basis of the provider's household's participation in the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. Our attention was called to this issue by the OIG's Kiddie Care report, which found that some of these providers were not revealing, or were understating, the amount of income they received as child care providers when applying for SNAP benefits. In so doing, the provider either received a larger SNAP allotment than she was entitled to receive, or was incorrectly determined eligible for SNAP. In some cases, a full accounting of household income would also have made the day care home provider ineligible to receive CACFP reimbursement for meals served to her own child(ren).

To deal with this problem, the second interim rule required that sponsoring organizations provide to the CACFP State agency a list of day care home providers who qualified for tier I eligibility on the basis of the household's SNAP participation. The CACFP State agency, in turn, was required within 30 days to provide this information to the agency of State government responsible for administering SNAP. After receipt of the information, the SNAP State agency was required, consistent with 7 CFR Part 273.12(c), to consider this information in determining the household's SNAP eligibility.

The Department received 138 comments on these provisions of the second interim rule. Of these, 92 commenters (88 institutions and 4 advocacy groups) recommended that the Department monitor the impact of this provision to ensure that providers on the list were not "unfairly targeted" for investigation by State or local SNAP offices. Forty-six (46) other commenters (including 43 institutions, one State agency, and two advocacy groups) stated that the onus for gathering this information should be on State and local SNAP offices and not on the sponsors and State agencies responsible for administering the CACFP.

As an agency, the FNS is responsible for administering both SNAP and the CACFP. While we encourage

participation by eligible individuals in both programs, we must also ensure that those receiving the programs' benefits meet the statutory requirements for eligibility. Specifically, we must ensure that providers accurately report their household income, including the income they receive for providing child care, in order to determine that accurate benefits are being provided under both CACFP and SNAP. The OIG report raised concerns about providers' self-employment income which FNS could not ignore, and we addressed these concerns in a way that would provide the information necessary to the State agencies responsible for administering these programs under agreements entered into with FNS. As stated in our implementation guidance of March 29, 2005, the inclusion of a provider on this list does not demonstrate noncompliant activity, and State or local SNAP offices receiving the list would not use it to "target" individuals for inappropriate review.

Part III. Training and Other Operational Requirements

Introduction

Sections 243(c), (d), (e), and (f) of ARPA added statutory provisions which affected various aspects of State agencies and sponsoring organizations' operation of the Program. These changes were designed to improve Program management and integrity by establishing requirements concerning:

- Center sponsors' use of administrative funds;
- Family day care homes' ability to transfer from one sponsor to another;
- State agencies' recovery of funds disbursed to institutions; and
- Serious deficiency, termination, and appeals procedures for family day care homes participating in the Program.

The changes made to these aspects of Program operations were discussed in Part III of the interim rule published on June 27, 2002, which implemented all of the changes mandated by ARPA in the CACFP regulations. Comments were received on three of these changes, and are discussed below.

As part of the discussion of the serious deficiency process for family day care homes, this section of the preamble will also include a discussion of the requirement that sponsors collect each provider's date of birth on the provider's Program application, and that the sponsor report the provider's date of birth to the Department whenever a provider is added to the NDL. As in Parts I and II of this preamble, a number of the issues raised by commenters have already been addressed in guidance or training, and do not require extensive discussion in this preamble.

A. Ceiling on Administrative Reimbursements for Sponsors of Centers

Section 243(e) of ARPA established a fifteen (15) percent limit on the amount of meal reimbursement that sponsors of centers could retain to cover their administrative costs. This statutory limit grew out of OIG audit and State review findings that showed some sponsors of centers retaining 50 percent or more of the meal reimbursement for administrative costs. Because administrative costs for monitoring may be higher when a center sponsor administers CACFP in widely dispersed rural centers (especially if many of the children served in those centers do not qualify for free or reduced price meals), the law permitted a center sponsor to apply to the State agency for a waiver of the 15 percent "ceiling," if warranted.

The Department received 152 comments on these provisions from 7 State agencies, 119 institutions, 19 advocates, and 7 commenters whose institutional affiliation could not be identified. Many of these commenters (106) believed that the ceiling on administrative costs would significantly increase administrative burden for center sponsors, and that administrative reimbursement rates should be adjusted accordingly. However, as there is no separate administrative reimbursement rate for sponsors of centers, it appears that these commenters may have been suggesting that the "ceiling" on the amount that sponsors of centers could retain for their administrative costs should be increased above 15 percent. Because the ceiling is set by law, the Department is not in a position to modify it. Furthermore, the Department believes that the 15 percent ceiling—which is roughly comparable to the separate administrative rate received by sponsors of family day care homes—is adequate to cover center sponsors' administrative expenses, especially since sponsors have the ability to request a waiver when unusual circumstances might cause them to exceed the 15 percent ceiling.

Forty (40) other commenters stated that, in order to implement this provision more easily, center sponsors should simply receive 15 percent of their centers' total meal reimbursement, However, the Department reminds commenters that the law stated that center sponsors should be allowed to retain "up to 15 percent" of the meal reimbursement earned by their centers. This wording makes clear that Congress expected a sponsor with documented, Program-related administrative costs that totaled only 10 percent of its centers' meal reimbursements would receive that amount (10 percent), and not more. Even if the statute had not included the words "up to," a system under which center sponsors simply received 15 percent of the meal reimbursements earned by their sponsored centers each month would potentially expose these sponsors to large overclaims. If the State agency later reviewed the sponsors' financial records and found inadequate documentation to support the reasonableness, necessity, and allowability of all administrative costs being charged to the program, the State agency would be required to establish an overclaim against the sponsor.

Finally, six State agencies submitted other comments related to these provisions. Three State agencies stated that the provision should apply only to sponsors of "unaffiliated" centers (*i.e.,* centers that are not owned by the sponsoring organization). As this idea has been explained to us in meetings, these State agencies believe that a for-profit sponsor that owns sponsored centers can "do what it pleases" with regard to the funding that is targeted to the sponsored centers. While this may be true for other aspects of a for-profit sponsor's operation of the centers it owns, it is the Department's intent that all CACFP sponsors—regardless of whether they are nonprofit or for-profit in nature—operate the program principally for the benefit of children. The law makes no distinction between affiliated and unaffiliated centers, and therefore requires us to apply the 15 percent ceiling to all center sponsors.

One State agency recommended that the waiver option be removed, or that State agencies' decisions regarding a waiver not be subject to administrative appeal. The Department notes that section 17(f)(2)(C)(ii) of the NSLA establishes these waivers, and the Department may not remove the waiver provision without a change to the law. Furthermore, section 17(e) of the law requires that institutions be provided with the opportunity for an administrative hearing whenever an action taken by the State agency affects the institution's claim for reimbursement.

One State agency recommended that a higher rate be established for sponsors of centers located in rural areas. Again, there is no administrative "rate," *per se,* for sponsors of centers. The law establishes a "ceiling" on the amount of the sponsored centers' meal reimbursement that the sponsor may retain for its Program-related administrative expenses. In describing

the waiver provision in the preamble to the first interim rule, the Department specifically discussed the possible need for waivers when sponsors operated CACFP in rural areas, especially when its rural centers were geographically dispersed and/or served large numbers of children whose meals were not eligible for free or reduced price reimbursement.

Finally, one State agency recommended that the 15 percent ceiling apply only to sponsors of centers, and not to the individual centers being sponsored. As explained in the preamble to the first interim rule, the Department anticipates that centers choosing to be sponsored (as opposed to independent centers, which take responsibility for all aspects of Program operation and sign an agreement to do so with the State agency) do so only when they feel they are not capable of taking on the administrative challenges of CACFP and, therefore, anticipate that their sponsor will handle all Program-related administrative tasks. The Department believes that requiring the sponsor to account separately for administrative tasks performed by sponsored centers is necessary to discourage center sponsors that might be tempted to pass some Program-related administrative responsibilities to their sponsored centers, but still retain 15 percent of the centers' meal reimbursement.

B. Procedures for Recovering Funds Disbursed to Institutions

Section 243(d) of ARPA added provisions to the NSLA affecting the recovery of funds already disbursed to institutions. The statute amended section 17(f)(1)(B) of the NSLA to permit State agencies to establish "payment schedules" that allowed institutions to repay claims over a period of one or more years; clarified that institutions may not repay Program claims out of funds intended for meal reimbursement; and underscored that institutions must be provided the opportunity to appeal when claims were established. Despite permitting payment schedules, the law did not waive normal debt collection procedures, and the Department added language in the first interim rule to clarify that, when claims were not repaid promptly, interest would accrue on the outstanding debt until it was paid in full.

The Department received eight State agency comments on its implementation of these provisions in the first interim rule. All of these comments concerned the inclusion of regulatory language regarding the collection of interest from institutions owing a debt to the government. Commenters stated that the collection of interest in CACFP imposed a special burden unlike other child nutrition programs. They also requested instructions on how to calculate interest owed and suggested that interest be calculated as of 30 days from the due date, not from the date of the claim notice.

Calculation of interest follows the annually-update "current value of funds rate," which is available at *http://www.fms.treas.gov/cvfr/index.html*. However, the Department does believe that it erred in promulgating regulatory language stating that "the State agency must assess interest beginning with the initial demand for remittance." This language will be amended in this final rule, to require the collection of interest if the debt is not paid by the date stipulated in the State agency's demand letter, or 30 days after the date of the demand letter, whichever date is later.

Accordingly, § 226.14(a) is amended to include the change to the language regarding the assessment of interest as described immediately above.

C. The Serious Deficiency Process for Family Day Care Homes (FDCH)

As mentioned above, ARPA added to the NSLA a requirement that the Department establish a serious deficiency process for FDCH providers. Prior to this, some State agencies had established their own serious deficiency processes for providers, and had compiled lists of providers whose Program participation had been terminated for cause. Section 243(c) of ARPA amended section 17(d)(5) of the NSLA to require that the Department establish a nationwide serious deficiency process for providers and that, if disqualified from CACFP, these providers would be placed on the NDL, just like institutions that failed to correct their serious deficiencies.

The Department received 595 comments on its implementation of ARPA's provision establishing a serious deficiency process for providers. The vast majority of these comments (487) were submitted by institutions. Other comments came from advocacy groups (55), State agencies (2), providers (2), and persons for whom an institutional affiliation could not be determined (49).

Of these, 40 commenters stated that they were pleased with the change to the statute and the way that FNS implemented the law's provisions in the first interim rule. Another 278 commenters (236 institutions, 22 advocates, one provider, and 19 "others") believed that the regulatory language used in the interim rule was not specific enough. Most of these (273 of 278) believed that the regulatory language should be changed to require that a sponsor declare a provider seriously deficient only when the provider, in the words of ARPA, "substantially fails to fulfill the terms of its agreement." These commenters believed that, as written, the second interim rule would force sponsors to declare providers seriously deficient whenever an error was made, regardless of the frequency or severity of the error.

Since that time, the Department has provided extensive training to State agencies on implementing the first interim rule and State agencies, in turn, have provided extensive training to sponsoring organizations. Throughout its training on the serious deficiency process for providers, the Department has emphasized that, in determining whether a declaration of serious deficiency is warranted, sponsoring organizations should assess the frequency and severity of the errors committed by providers. In the years since the first interim rule was published, the Department has encountered few, if any, instances of sponsoring organizations interpreting the regulations too narrowly, and declaring providers seriously deficient for minor clerical errors. In fact, the CCAP report more strongly suggests that too many sponsors may be slow to require providers to implement meaningful corrective action when serious problems with meal counting occur, and overly-reluctant to employ the serious deficiency process.

In addition, the Department received 275 comments concerning the amount of time given providers to resolve serious deficiencies. All but one of these commenters stated that providers should be given more than 30 days to correct a serious deficiency. In the first interim rule, institutions were given varying lengths of time to resolve such issues, depending on the nature of the serious deficiency. Providers, on the other hand, always have a maximum of 30 days to fully correct any serious deficiency. The Department understands that this disparity may appear to be detrimental or unfair to providers. However, giving institutions and providers different periods of time to correct a serious deficiency is necessary because of the nature of sponsors' monitoring of providers and the financial incentives that sponsors have to retain providers in the Program.

Sponsors conduct three reviews of each provider each year, two of which are unannounced. Unless the monitor finds an egregious problem involving intentional over-claiming of meals or serious non-compliance with the

Program meal pattern, the sponsor usually does not declare the provider seriously deficient when the problem is first discovered. More typically, the monitor requires that the provider take corrective action without finding the provider seriously deficient, then returns for the next review three to four months later to determine whether the provider has fully implemented the corrective action. Unfortunately, even if a monitor continues to find serious problems with the provider's operation of the Program, some sponsors are still very reluctant to issue a declaration of serious deficiency unless there is clear proof that the provider has falsified its meal claims. By the time a serious deficiency is declared, almost all providers will have already had one or more chances (in other words, given the interval between the monitor's reviews of that provider, three to nine months) to implement effective corrective action. Once a sponsor reaches the point of issuing a notice of serious deficiency to a provider, then it is imperative that the sponsor require the provider to quickly correct the deficiency, knowing that if the provider does not, the sponsor will propose to terminate Program participation in 30 days or less.

Two State agency commenters also made suggestions for changes to the first interim rule. One suggested that the State agency option to hear provider appeals be removed; the other suggested that sponsors of centers should also be required to establish a serious deficiency process for their sponsored centers. After consideration, we concluded that it is unnecessary to remove an option that a small number of State agencies have chosen to exercise. If the State agency in question wishes to decline hearing provider appeals, it may do so. It should assist sponsors in establishing a sponsor-level appeals process, and then turn the process over to sponsors once it is in place.

With regard to a serious deficiency process for centers, the Department has taken every opportunity to recommend that State agencies or center sponsors establish a serious deficiency and appeals process for sponsored centers. Section 17(d)(5) of the NSLA requires the process to be established for institutions (and by extension, those responsible principals and individuals from institutions that are proposed for disqualification) and for family day care home providers, but does not mention sponsored centers. Therefore, the requirement for such a process for sponsored centers was not included in the first interim rule. Nevertheless, we believe that establishing such a process for sponsored centers is an excellent management practice. We again urge State agencies or sponsors to establish a serious deficiency process for sponsored centers, and we will consider proposing such a change, and soliciting public comment, in future rulemakings.

Finally, the Department received 264 comments concerning the first interim rule's requirement at 226.18(b) that a provider must submit her date of birth as part of the sponsor's agreement with the provider. **[Please note that the first interim rule also required that the executive director and the chairperson of the institution's board of directors must submit their dates of birth on the institution's application. Several of the comments discussed below pertain to that requirement, as opposed to the provider date of birth requirement.]** Most of these comments (223) requested more time to implement this requirement, which now has been fully implemented. Among the other 41 comments, 25 (6 State agencies, 9 institutions, 7 providers, and 3 advocates) stated that the date of birth requirement should be eliminated because it was not verifiable and because it is an "invasion of privacy." Three other State agencies believed that the provision of a date of birth made providers on the National Disqualified List (NDL) more likely to be the victims of identity theft.

In order to ensure that those using the NDL could differentiate between multiple individuals with the same name, the Department needed to include a unique identifier for each name on the list. This was especially important after the law expanded the number of names that could be placed on the list by including FDCH providers. Although the Department is permitted by law to collect Social Security Numbers on household applications for child nutrition benefits, ARPA law did not provide such authority as part of requiring that providers be placed on the NDL. Therefore, the Department needed to obtain an identifier that would differentiate between persons with the same name who appear on the NDL. The Department is very sensitive to Program participants' concerns regarding identity theft, and has allowed access to the NDL only to those Program personnel who must determine institution or provider eligibility. Therefore, we are convinced that the provider's date of birth is the best identifier available for this purpose.

Six other State agency staff suggested that collection of the date of birth be optional; that State agencies should be allowed to make exceptions to these requirements for good cause; or that it be required only after a provider or institution is determined seriously deficient. Because, as explained above, the Department determined that this is the best identifier available for this purpose, none of these changes will be made.

The Department received two comments from State agencies on the collection of a date of birth from an institution's executive director or board chair. One commenter suggested that the date of birth should be collected from all "responsible staff" at the time of the institution's application; the other suggested that the owners of for-profit independent centers (who are neither the "executive director" nor the "board chair" of their organization) should also be required to submit their date of birth.

With regard to the first comment, the Department will not expand the date of birth requirement beyond the executive director and board chair in this final rule. We do wish to point out, however, that consistent with § 226.25(b), any State agency wishing to require that more dates of birth for additional personnel be collected on an institution's application may establish that requirement. With regard to the second comment, the Department will clarify in this final rule that the regulation at §§ 226.6(b)(1)(xv) and 226.6(b)(2)(v) should be construed to require that State agencies collect dates of birth from owners of for-profit independent centers at the time of the center's application.

Accordingly, this final rule amends §§ 226.6(b)(1)(xv) and 226.6(b)(2)(v) to clarify that for-profit owners, and other individuals with overall responsibility for an institution's management of the CACFP, regardless of title, must submit a date of birth on the institution's Program application.

Finally, to clarify the word "rescind," as was done in Part I(B) of the preamble, the Department will remove the word "rescind" at § 226.16(l)(3)(ii) and replace it with the words "temporarily defer." In addition, the Department will add a new sentence to § 226.6(l)(3)(ii) to state clearly that, if the sponsor accepts the provider's corrective action, but later determines that the corrective action was not permanent or complete, the sponsor must then move to the next step in the serious deficiency process (*i.e.,* proposed termination and disqualification), without re-starting the serious deficiency process.

Accordingly, this final rule makes the changes to § 226.16(l)(3)(ii) described in the preceding paragraph.

D. Technical Corrections

This final rule also corrects five technical errors relating to the regulations dealing with training and other operational requirements, and updates the mailing address for the Agency's Western Regional Office in 7 CFR parts 210, 215, 220, 225, 226, and 245.

First, the second interim rule included language at § 226.16(l)(3)(i)(F) that states that a day care home will be terminated "by the State institution." This should instead read, "by the sponsor." The final rule also clarifies references to the "institution" in §§ 226.16(l)(3)(i)(E) and (F) by substituting the words "sponsoring organization."

Second, the regulations at § 226.15(e)(2) state that, because of the nature of care provided, outside-school-hours care centers, emergency shelters, and at-risk after-school care centers are exempt from the requirement to enroll each child in care, and maintain and update annually documentation of that enrollment. However, the definition of "claiming percentage" at § 226.2 still states that a claiming percentage is calculated based on the number of "enrolled" participants. This final rule amends the definition by adding a second sentence describing how outside-school-hours care centers may calculate a claiming percentage.

Third, when printing the CFR, errors were made in transcribing the amended text of §§ 226.18(a)(1), 226.18(a)(2), 226.18(b)(1), and 226.18(b)(2) as it was submitted in the first interim rule. This final rule corrects the errors, which will result in a corrected text in the CFR.

Fourth, in amending the regulations at § 226.15(e)(14), the second interim rule did not make clear that sponsor monitors are to be trained annually. Even though § 226.16(d)(3) stated that all of a sponsor's "key staff" must be trained annually, we believe that § 226.15(e)(14) should be amended to make clear that monitors are among the "key staff" who must be trained annually.

Fifth, this final rule corrects an error in the first sentence of § 226.23(d) by inserting two words ("public release") inadvertently dropped from that sentence in a previous rule.

Finally, this rule updates the address of the FNS's Western Regional Office in §§ 210.30(e), 215.17(f), 220.21(e), 225.19 (g), and 226.26(g).

Accordingly, this final rule makes changes to § 226.16(l)(3)(i)(F); the definition of "claiming percentage" at § 226.2; §§ 226.18(a)(1), 226.18(a)(2), 226.18(b)(1), 226.18(b)(2); § 226.15(e)(14); § 226.23(d); and §§ 210.30(e), 215.17(f), 220.21(e), 225.19 (g), and 226.26(g), as described immediately above.

Part IV. Non-Discretionary Changes Required by PRWORA, the Healthy Meals Act, and the Goodling Act

In addition to the changes discussed in parts I–III of this preamble, the second interim rule also included a number of nondiscretionary changes from statutes other than ARPA. Non-discretionary changes are those that are specifically mandated by Congress, and, therefore, must be included in the Program regulations. Although nondiscretionary changes may be issued without first soliciting public comment, we included these provisions in the second interim rule both as a matter of convenience and as a means of gathering comments on the manner in which we implemented the provisions.

The Department received public comments on three of the non-discretionary changes included in part IV of the preamble to the second interim rule: the issuance of advances to institutions participating in CACFP; the provision of information on the WIC Program; and the provision of audit funding to State agencies. We received no comment on any other changes made in part IV of the preamble of the second interim rule and, therefore, all of those provisions are adopted without change in this final regulation.

A. Issuance of Advances to Institutions Participating in the CACFP

Prior to passage of the Public Law 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), State agencies were required to issue advance payments to CACFP institutions that requested them. Section 708(f) of the PRWORA, however, amended section 17(f) of the NSLA (42 U.S.C. 1766(f)) to make the issuance of advances optional. To implement this statutory requirement, the second interim rule amended the Program regulations to make clear that issuance of advances is at the discretion of the State agency. In the preamble to that rule, and in previous guidance issued in 1997, we had clarified that State agencies may elect to issue advances to all institutions, no institutions, specific types of institutions, or institutions with records of adequate Program administration. Only when a State agency denies an advance to an institution based on the institution's Program performance is it necessary to offer an appeal of the State agency's decision.

We received a total of 133 comments on this provision. Of those, 88 sponsors and 2 advocacy groups recommended that we encourage State agencies to continue issuing advances. The comments suggested that denying advance payments would have a negative impact on participation in CACFP. Additionally, 38 sponsors and 4 advocacy groups urged us to request that Congress eliminate the State agency option with regard to administrative advances and, instead, reinstate the requirement that State agencies make administrative advances available to all sponsors upon request. One State agency submitted a comment in support of the proposed changes.

Congress has required that the issuance of advances be at the discretion of the States. We have provided States with guidelines on the appropriate means for providing advances should they decide to do so. It would be inappropriate for us to encourage or discourage advances when Congress clearly left this decision up to the States. Accordingly, the final regulation is unchanged.

B. Provision of Information on the WIC Program

Section 107(i) of Public Law 105–336, the William F. Goodling Child Nutrition Reauthorization Act (Goodling Act), required the Department to provide information to State agencies regarding the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Program. In the interim rule, we amended § 226.6(r) to require that State agencies distribute this information to each participating institution and § 226.15(n) to require that institutions make this information available to parents of enrolled children. (Since the publication of the interim rule, additional revisions have been made to § 226.15, and the provision relating to providing WIC information is now located at § 226.15(o).)

We received six comments on this provision. One sponsor and one advocacy organization recommended that the WIC notification be a one-time requirement when a family enrolls in CACFP. However, the statute requires the State agency to ensure that participating family and group day care homes and child care centers receive periodic updates of WIC information and that the information is provided to parents of enrolled children. Therefore, WIC information must be provided to parents upon enrollment, and additional updates must be provided when there are changes to the way in which households may obtain information

about WIC or when there are changes to the WIC Program's eligibility rules.

Of the remaining comments, one State agency and two sponsors suggested that the WIC State agency bear the cost of the WIC notification materials, rather than the sponsors, and one sponsor suggested that WIC agencies be required to distribute CACFP outreach materials. These requirements were not included in the legislation and may not be imposed through this final rule.

Finally, this regulation makes technical corrections to the WIC provision in the interim rule. In our prior implementation of this statutory requirement, § 226.6(r) requires State agencies to provide WIC information to "participating institutions," which would include all institutions participating in CACFP. Additionally, § 226.15(n) [now § 226.15(o)] required institutions to provide information to the parents of all "enrolled children." However, the statutory language limited this provision to family and group day care homes and child care centers and specifically excluded institutions providing care to school children outside school hours. Therefore, the regulation should have exempted from this requirement those institutions participating in CACFP as outside school hours care centers, at-risk afterschool snack programs, homeless shelters, and adult day care centers.

Accordingly, this final regulation is amended at §§ 226.6(r) and 226.15(o) to clarify that WIC information must only be distributed to the parents of children enrolled in family and group day care homes and in traditional child care centers.

C. Audit Funding for State Agencies

Section 107(e) of the Goodling Act amended section 17(i) of the NSLA (42 U.S.C. 1766(i)) by reducing the amount of audit funding available to State agencies. Prior to this change, State agencies received an amount equal to two percent of Program expenditures during the second preceding fiscal year in order to conduct program audits. In 1999, this was reduced to one and one-half percent of Program expenditures and to one percent for fiscal years 2005 to 2007. In the interim rule, we amended § 226.4(h) to include these reductions. (Since the publication of the interim rule, additional revisions have been made to § 226.4, and the provision relating to audit funds is now located at § 226.4(j).)

We received 136 comments on this provision, all of which supported the restoration of State audit funds to the two percent level. Because the Goodling Act called for the reduction, the final regulation incorporates the reduction to the one and one-half percent level. However, the reference in the interim rule to the one percent level of funding for fiscal years 2005 to 2007 is no longer necessary as this period has expired and the funding level has returned to one and one-half percent.

Accordingly, § 226.4(j) is amended in the final regulation to remove the reference to the one percent funding level for fiscal years 2005 to 2007.

Part V. Procedural Matters

Executive Order 12866 and Executive Order 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). It has been certified that this rule will not have a significant economic impact on a substantial number of small entities.

The CACFP is administered by State agencies and by over 21,000 institutions (sponsoring organizations and independent centers) in over 194,000 facilities (independent and sponsored centers and family day care homes). The vast majority of institutions and facilities participating in CACFP are "small entities". Nevertheless, the changes implemented in this rule will not have a significant economic impact on most of them. This rule finalizes requirements in the two interim rules that institutions seeking to operate CACFP provide in their applications information related to past performance, financial viability, administrative capability, and internal controls to ensure accountability, and some additional recordkeeping and reporting requirements. These represented marginal increases in the application burden for almost all of these institutions.

This rule finalizes requirements that primarily affect the procedures used by State agencies in reviewing institutions' applications to participate in CACFP and in monitoring participating institutions' performance. These changes will have a major impact on institutions which are unable to operate CACFP under the new application requirements, or on institutions and facilities which are terminated from CACFP participation as a result of improved monitoring procedures by the State agency or sponsoring organization. However, this occurred for only a small proportion (roughly 2 percent or less) of CACFP institutions and facilities when the requirements were implemented under the interim rules.

In short, there will be little or no adverse impact on those entities administering the CACFP in accordance with Program requirements, since almost all of these changes were implemented in the two previously-issued interim rules in order to improve compliance with existing regulations and in accordance with statutory changes to Program operations.

Regulatory Impact Analysis

A regulatory impact analysis was completed as part of the development of this final rule. Copies of this analysis may be requested from Ms. Julie Brewer or Ms. Tina Namian at 3101 Park Center Drive, Room 634, Alexandria, VA 22302–1594, or by telephone at (703) 305–2590.

This final rule implements a number of clarifications and changes to existing Program regulations, as implemented in the two interim rules published at 67 FR 43447 (June 27, 2002) and at 69 FR 53501 (September 1, 2004). These changes will affect all entities involved in administering the CACFP. Those most affected will be State agencies, institutions, and facilities.

Despite the conduct of numerous OIG audits, State and FNS reviews, and the Department's own Child Care Assessment Project (CCAP), there is no Nationally-representative information available on the prevalence of meal counting or other errors that impact CACFP integrity. OIG reports have focused on purposely-selected institutions and facilities. Reviews conducted by State agencies and "management evaluations" conducted by FNS are not designed to capture information for the purpose of developing Nationally valid estimates of fraud or mismanagement. The CCAP data collection was limited to family

day care home sponsors operating CACFP in 200 or more homes.

While all of these reports indicate that there are weaknesses in parts of the Program, and that there have been significant weaknesses in oversight by some State agencies and sponsoring organizations, none of these reports can fully estimate the prevalence or magnitude of Program errors. This lack of information makes it difficult for us to estimate with any precision the amount of CACFP reimbursement lost due to fraud, abuse, or mismanagement.

Nevertheless, we are confident that the overall impact of this final rule will be to strengthen program management and integrity in the CACFP:

- By helping to ensure that service providers with inadequate administrative capacity or financial controls or serious management deficiencies are prevented from participating in the program, the rule eliminates important risks of erroneous payments;
- By increasing and improving State oversight of sponsors and providers, the rule helps to ensure that integrity risks are identified and addressed early; and
- By increasing reporting of negative findings by States to USDA, the rule strengthens the Department's ability to identify problem trends and emerging issues and take action.

While the CCAP findings demonstrated that some State and local Program administrators have not fully implemented all of the provisions in the first and second interim rules, they also demonstrated that the rules have helped to eliminate some of the worst types of program fraud uncovered by the Department's Office of Inspector General in the late 1990s. This final rule's further refinement of some of the provisions in those interim rules will continue to improve safeguards against fraud, waste, and abuse, and will result in the more efficient use of Program funds.

Executive Order 12372

The Child and Adult Care Food Program is listed in the Catalog of Federal Domestic Assistance under No. 10.558. For the reasons set forth in the final rule in 7 CFR Part 3015, subpart V and related Notice published at 48 FR 29114, June 24, 1983, this Program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have "federalism implications," agencies are directed to provide a statement for inclusion in the preamble to the regulation describing the agency's considerations in terms of the three categories enumerated in § 6(a)(B) of Executive Order 13132:

Prior Consultation With State Officials

Prior to drafting this final rule, the Department analyzed more than 1,000 comments submitted in response to the two interim rules. In addition, the Department receives a great deal of ongoing input from State and local agencies.

Since the CACFP is a State administered, Federally funded program, our regional offices regularly have formal and informal discussions with State and local officials regarding Program implementation and performance. This allows State and local agencies to contribute input that may inform our rulemaking, the implementation of statutory provisions, and even our own Departmental legislative proposals. In addition, over the past fourteen years, our headquarters staff has informally consulted with State administering agencies, Program sponsors, and CACFP advocates on ways to improve Program management and integrity in the CACFP. Discussions with State agencies took place in the joint Management Improvement Task Force meetings held between 1995 and 2000; in seven biennial National meetings of State and Federal Program administrators (Seattle in 1996, New Orleans in 1998, Chicago in 2000, New York in 2002, Madison, Wisconsin, in 2004, Orlando in 2006, and Phoenix in 2008); at the December 1999 meeting of the State Child Nutrition Program administrators in New Orleans, and in a variety of other small- and large-group meetings. Discussions with Program advocates and sponsors occurred in the Management Improvement Task Force meetings held in 1999–2000; in annual National meetings of The Sponsors Association, the CACFP Sponsors Forum, and the Western Regional Office-Child Care Food Program Roundtable from 1995 to the present; and in a variety of other small- and large-group meetings.

Nature of Concerns and Need To Issue this Rule

The issuance of a regulation is necessary to improve Program management and, more specifically, to respond to management problems identified by State and local Program administrators and by OIG. Many of the interim rule's provisions were discussed in the meetings with State and local cooperators mentioned above. The Department attempted to address in this final rule many of the concerns expressed by commenters on the two interim rules.

Extent to Which We Meet Those Concerns

FNS has considered the impact of these changes on State and local administering agencies, and has attempted to balance Program integrity concerns with the need to maintain Program access for capable institutions and family day care homes, and to ensure that improvements in accountability do not place undue burdens on State and local Program administrators. The preamble above contains a more detailed discussion of our attempt to balance integrity and access concerns, while implementing these provisions in a manner consistent with both the letter and the intent of the NSLA. Adjustments made by this final rule in response to public comment are discussed at length in the preamble.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, requires Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Food and Nutrition Service must usually prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in new annual expenditures of $100 million or more by State, local, or tribal governments or the private sector. When such a statement is needed, section 205 of the UMRA requires the Food and Nutrition Service to identify and consider regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objective of the rule.

This rule contains no Federal mandates (as defined in title II of the UMRA) that would lead to new annual expenditures exceeding $100 million for State, local, or tribal governments or the private sector. Therefore, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations, or

policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the **DATES** section of the preamble of the final rule. All available administrative procedures must be exhausted prior to any judicial challenge to the provisions of this rule or the application of its provisions. This includes any administrative procedures provided by State or local governments. In the CACFP, the administrative procedures are set forth at: (1) §§ 226.6(k), 226.6(l), and 226.16(l) which establish administrative review procedures for institutions, individuals, and day care homes; and (2) § 226.22 and 7 CFR parts 3016 and 3019, which address administrative review procedures for disputes involving procurement by State agencies and institutions.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with Department Regulation 4300–4, "Civil Rights Impact Analysis," to identify any major civil rights impacts this rule might have on children on the basis of age, race, color, national origin, sex, or disability. A careful review of the rule revealed that the rule's intent does not affect the participation of protected individuals in CACFP.

Executive Order 13175

USDA will undertake, within 6 months after this rule becomes effective, a series of Tribal consultation sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35, see 5 CFR 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This final rule incorporates into the Child and Adult Care Food Program regulations modifications, clarifications, and technical changes to the two interim rules published by the Department on June 27, 2002 and September 1, 2004. Interim rules have the force of law, and the changes in these two interim rules are fully implemented. Thus, information collection requirements for this final rule were included in the renewal of OMB No. 0584–0055 and were approved by OMB on August 3, 2010, with an expiration date of August 31, 2013. During the renewal of OMB No. 0584–0055, information collection requirements were adjusted from the previously reported collection requirements to reflect changes in the number of respondents, time required to respond due to automation and technology enhancements by respondents and removal of obsolete or erroneous burdens listings.

This final rule contains information collection requirements that are subject to review and approval by OMB. FNS will publish a document in the Federal Register once these requirements have been approved. The recordkeeping and reporting burden contained in this final rule have been previously reviewed by OMB, as discussed above. The final rule removes the requirement at 226.10(c)(3) that, "If block claiming is detected, the sponsoring organization must not include that facility among those facilities receiving less than three reviews during the current year, in accordance with § 226.16(d)(4), and must ensure that any facility submitting a block claim receives an unannounced review within 60 days of the discovery of the block claim. If, in the course of conducting this review, the sponsoring organization determines that there is a logical explanation for the facility to regularly submit a block claim, the sponsoring organization must note this in the facility's review file and is not required to conduct an unannounced visit after other block claims detected during the current year." The deletion of this provision results in a reduction of 23,498.40 hours in the reporting and 2,937.30 hours in the recordkeeping burden hours in the currently approved OMB No. 0584–0055, with an expiration date of August 31, 2013. No burden hours were assigned to the State agency since this is primarily a sponsor requirement. FNS is decreasing the burden hours from 7,032,870.18 to 7,006,434.482.

Reporting

Estimated number of respondents: 2,200,066.

Estimated Number of Responses per Respondent: 2.229056

Estimated Number of Annual Responses: 4,904,071

Estimated hours per response: 1.279542

Estimated Total Annual Response: 6,274,963.604

Recordkeeping

Estimated number of respondents: 183,120

Estimated Number of Responses per Respondent: 3.586

Estimated Number of Annual Responses: 656,731

Estimated hours per response: 1.11381

Estimated Total Annual Response: 731,470.878

E-Government Act Compliance

FNS is committed to compliance with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 210

Children, Commodity School Program, Food assistance programs, Grants programs-social programs, National School Lunch Program, Nutrition, Reporting and recordkeeping requirements, Surplus agricultural commodities.

7 CFR Part 215

Food assistance programs, Grant programs-education, Grant programs-health, Infants and children, Milk, Reporting and recordkeeping requirements.

7 CFR Part 220

Grant programs-education, Grant programs-health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs

7 CFR Part 225

Food assistance programs, Grant programs—health, Infants and children, Labeling, Reporting and recordkeeping requirements.

7 CFR Part 226

Accounting, Aged, Day care, Food assistance programs, Grant programs, Grant programs—health, American

Indians, Individuals with disabilities, Infants and children, Intergovernmental relations, Loan programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR parts 210, 215, 220, 225, and 226 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

§ 210.30 [Amended]

■ 2. Section 210.30(e) is amended by removing the words "550 Kearny Street, Room 400, San Francisco, California 94108", and adding in their place the words "90 Seventh Street, Suite 10–100, San Francisco, California 94103–6701".

PART 215—SPECIAL MILK PROGRAM FOR CHILDREN

■ 1. The authority citation for part 215 continues to read as follows:

Authority: 42 U.S.C. 1772 and 1779.

§ 215.17 [Amended]

■ 2. Section 215.17(f) is amended by removing the words "550 Kearny Street, Room 400, San Francisco, California 94108", and adding in their place the words "90 Seventh Street, Suite 10–100, San Francisco, California 94103–6701".

PART 220—SCHOOL BREAKFAST PROGRAM

■ 1. The authority citation for part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779, unless otherwise noted.

§ 220.21 [Amended]

■ 2. Section 220.21 (e) is amended by removing the words "550 Kearny Street, Room 400, San Francisco, California 94108", and adding in their place the words "90 Seventh Street, Suite 10–100, San Francisco, California 94103–6701".

PART 225—SUMMER FOOD SERVICE PROGRAM

■ 1. The authority citation for part 225 continues to read as follows:

Authority: Secs. 9, 13 and 14, Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1758, 1761 and 1762a)

§ 225.19 [Amended]

■ 2. Section 225.19(g) is amended by removing the words "550 Kearney Street, Room 400, San Francisco, California 94108–2518", and adding in their place the words "90 Seventh Street, Suite 10–100, San Francisco, California 94103–6701".

PART 226—CHILD AND ADULT CARE FOOD PROGRAM

■ 1. The authority citation for part 226 continues to read as follows:

Authority: Secs. 9, 11, 14, 16, and 17, National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

■ 2. Section 226.2 is amended by removing the definition of *Block Claim,* amending the definition of *Claiming percentage* by adding a second sentence, and by adding a new definition of *Independent board of directors.*

The revision and addition specified above read as follows:

§ 226.2 Definitions.

* * * * *

Claiming percentage * * *. In the case of an outside-school-hours care center that is not required to collect enrollment forms from each participating child, a claiming percentage is the ratio of the number of children in each reimbursement category (free, reduced-price or paid) to the total number of children participating in the program in that center.

* * * * *

Independent governing board of directors means, in the case of a nonprofit organization, or in the case of a for-profit institution required to have a board of directors, a governing board which meets regularly and has the authority to hire and fire the institution's executive director.

* * * * *

§ 226.4 [Amended]

■ 3. Section 226.4(j) is amended by removing the second sentence.

■ 4. Section 226.6 is amended as follows:

■ a. Revise paragraph (b)(1)(xii).

■ b. Amend paragraph (b)(1)(xv) by adding, after the words "board of directors", the words "or, in the case of a for-profit center that does not have an executive director or is not required to have a board of directors, the owner of the for-profit center".

■ c. Amend paragraph (b)(1)(xviii) introductory text by adding a sentence at the end.

■ d. Revise paragraphs (b)(1)(xviii)(A)(*2*), (b)(1)(xviii)(C)(*1*), (b)(2)(ii), and (b)(2)(iii)(B)(*1*).

■ e. Amend paragraph (b)(2)(v) by adding, after the words "board of directors", the words "or, in the case of a for-profit center that does not have an executive director or is not required to have a board of directors, the owner of the for-profit center".

■ f. Amend paragraph (b)(2)(vii) introductory text by adding a sentence at the end.

■ g. Revise paragraphs (b)(2)(vii)(A)(*2*) and (b)(2)(vii)(C)(*1*).

■ h. Amend paragraph (c)(1)(iii)(A)(*5*) by removing the word "and" after the semicolon and amend paragraph (c)(1)(iii)(A)(*6*) by removing the period at the end and adding in its place "; and".

■ i. Add paragraphs (c)(1)(iii)(A)(*7*) and (c)(1)(iii)(A)(*8*).

■ j. In paragraph (c)(1)(iii)(B)(*1*)(*i*), remove the word "rescinded" and add in its place the words "temporarily defer".

■ k. Add paragraph (c)(1)(iii)(B)(*3*).

■ l. Amend paragraph (c)(2)(iii)(A)(*5*) by removing the word "and" after the semicolon, and amend paragraph (c)(2)(iii)(A)(*6*) by removing the period at the end and adding in its place "; and";

■ m. Add new paragraph (c)(2)(iii)(A)(*7*).

■ n. In paragraph (c)(2)(iii)(B)(*1*)(*i*), remove the word "rescinded" and add in its place the words "temporarily defer".

■ o. Add paragraph (c)(2)(iii)(B)(*3*).

■ p–q. Revise paragraph (c)(2)(iii)(D).

■ r. Amend paragraph (c)(3)(iii)(A)(*5*) by removing the word "and" after the semicolon, and amend paragraph (c)(3)(iii)(A)(*6*) by removing the period at the end and adding in its place "; and".

■ s. Add new paragraph (c)(3)(iii)(A)(*7*).

■ t. In paragraph (c)(3)(iii)(B)(*1*)(*i*), remove the word "rescinded" and add in its place the words "temporarily defer".

■ u. In paragraphs (c)(3)(iii)(B)(*1*)(*ii*) and (c)(3)(iii)(B)(*2*)(*iii*), remove the word "renewing" and add in its place the word "participating".

■ v. Add paragraph (c)(3)(iii)(B)(*3*).

■ w. Revise paragraph (c)(3)(iii)(D).

■ x. In paragraph (c)(6)(ii)(C)(*1*), remove the word "rescinded" and add in its place the words "temporarily defer".

■ y. Add paragraph (c)(6)(ii)(C)(*3*).

■ z. In paragraph (c)(7), remove the word "deny" and add in its place the words "must not approve".

■ aa. Redesignate paragraphs (k)(3)(iii) and (k)(3)(iv) as paragraphs (k)(3)(iv) and (k)(3)(v), respectively, and add a new paragraph (k)(3)(iii).

■ bb. In newly redesignated paragraph (k)(3)(iv), remove the word "or" after the semicolon; in newly redesignated paragraph (k)(3)(v), remove the period at the end and add in its place a semicolon;

■ cc. Add paragraphs (k)(3)(vi) and (vii).

■ dd. In paragraph (m)(4), remove the words "available enrollment and

attendance records" and add in their place the words "enrollment and attendance records (except in those outside-school-hours care centers, at-risk afterschool care centers, and emergency shelters where enrollment records are not required".

■ ee. In the first sentence of paragraph (r), add after the word "institution" the words "(other than outside-school-hours care centers, at-risk afterschool care centers, emergency shelters, and adult day care centers)".

The additions and revisions read as follows:

§ 226.6 State agency administrative responsibilities.

* * * * *

(b) * * *.

(1) * * *

(xii) *Presence on the National disqualified list.* If an institution or one of its principals is on the National disqualified list and submits an application, the State agency may not approve the application. If a sponsoring organization submits an application on behalf of a facility, and either the facility or any of its principals is on the National disqualified list, the State agency may not approve the application. In accordance with paragraph (k)(3)(vii) of this section, in this circumstance, the State agency's refusal to consider the application is not subject to administrative review.

* * * * *

(xviii) * * * In ensuring compliance with these performance standards, the State agency should use its discretion in determining whether the institution's application, in conjunction with its past performance in CACFP, establishes to the State agency's satisfaction that the institution meets the performance standards.

(A) * * *

(2) Fiscal resources and financial history. A new institution must demonstrate that it has adequate financial resources to operate the CACFP on a daily basis, has adequate sources of funds to continue to pay employees and suppliers during periods of temporary interruptions in Program payments and/or to pay debts when fiscal claims have been assessed against the institution, and can document financial viability (for example, through audits, financial statements, etc.); and

* * * * *

(C) * * *.

(*1*) *Governing board of directors.* Has adequate oversight of the Program by an independent governing board of directors as defined at § 226.2;

* * * * *

(2) * * *.

(ii) *Presence on the National disqualified list.* If, during the State agency's review of its application, a renewing institution or one of its principals is determined to be on the National disqualified list, the State agency may not approve the application. If a renewing sponsoring organization submits an application on behalf of a facility, and the State agency determines that either the facility or any of its principals is on the National disqualified list, the State agency may not approve the application. In accordance with paragraph (k)(3)(vii) of this section, in this circumstance, the State agency's refusal to consider the application is not subject to an administrative review.

(iii) * * *.

(B) * * *.

(*1*) A statement listing any publicly funded programs in which the institution and its principals have begun to participate since the institution's previous application; and

* * * * *

(vii) * * * In ensuring compliance with these performance standards, the State agency should use its discretion in determining whether the institution's application, in conjunction with its past performance in CACFP, establishes to the State agency's satisfaction that the institution meets the standards.

(A) * * *

(*2*) *Fiscal resources and financial history.* A renewing institution must demonstrate that it has adequate financial resources to operate the CACFP on a daily basis, has adequate sources of funds to continue to pay employees and suppliers during periods of temporary interruptions in Program payments and/or to pay debts when fiscal claims have been assessed against the institution, and can document financial viability (for example, through audits, financial statements, etc.); and

* * * * *

(C) * * *.

(*1*) *Governing board of directors.* Has adequate oversight of the Program by an independent governing board of directors as defined at § 226.2;

* * * * *

(c) * * *

(1) * * *

(iii) * * *

(A) * * *

(*7*) That the institution's withdrawal of its application, after having been notified that it is seriously deficient, will still result in the institution's formal termination by the State agency and placement of the institution and its responsible principals and individuals on the National disqualified list; and

(*8*) That, if the State agency does not possess the date of birth for any individual named as a "responsible principal or individual" in the serious deficiency notice, the submission of that person's date of birth is a condition of corrective action for the institution and/or individual.

(B) * * *

(*3*) If the State agency initially determines that the institution's corrective action is complete, but later determines that the serious deficiency(ies) has recurred, the State agency must move immediately to issue a notice of intent to terminate and disqualify the institution, in accordance with paragraph (c)(1)(iii)(C) of this section.

* * * * *

(2) * * *

(iii) * * *

(A) * * *

(*7*) That, if the State agency does not possess the date of birth for any individual named as a "responsible principal or individual" in the serious deficiency notice, the submission of that person's date of birth is a condition of corrective action for the institution and/or individual.

(B) * * *

(*3*) If the State agency initially determines that the institution's corrective action is complete, but later determines that the serious deficiency(ies) have recurred, the state agency must move immediately to issue a notice of intent to terminate and disqualify the institution, in accordance with paragraph (c)(2)(iii)(C) of this section.

* * * * *

(D) *Program payments.* If the renewing institution's agreement expires before the end of the time allotted for corrective action and/or the conclusion of any administrative review requested by the participating institution:

(*1*) The State agency must temporarily extend its current agreement with the renewing institution and continue to pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative expenses incurred; and

(*2*) During this period, the State agency may base administrative payments to the institution on the institution's previous approved budget, or may base administrative payments to the institution on the budget submitted by the institution as part of its renewal application; and

(*3*) The actions set forth in paragraphs (c)(3)(iii)(D)(*1*) and (c)(3)(iii)(D)(*2*) of this section must be taken either until

the serious deficiency(ies) is corrected or until the institution's agreement is terminated, including the period of any administrative review;

* * * * *

(3) * * *.

(iii) * * *

(A) * * *.

(*7*) That, if the State agency does not possess the date of birth for any individual named as a "responsible principal or individual" in the serious deficiency notice, the submission of that person's date of birth is a condition of corrective action for the institution and/or individual.

(B) * * *.

(*3*) If the State agency initially determines that the institution's corrective action is complete, but later determines that the serious deficiency(ies) has recurred, the State agency must move immediately to issue a notice of intent to terminate and disqualify the institution, in accordance with paragraph (c)(1)(iii)(C) of this section.

* * * * *

(D) *Program payments and extended agreement.* If the participating institution must renew its application, or its agreement expires, before the end of the time allotted for corrective action and/or the conclusion of any administrative review requested by the participating institution:

(*1*) The State agency must temporarily extend its current agreement with the participating institution and continue to pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative expenses incurred; and

(*2*) During this period, the State agency may base administrative payments to the institution on the institution's previous approved budget, or may base administrative payments to the institution on the budget submitted by the institution as part of its renewal application; and

(*3*) The actions set forth in paragraphs (c)(3)(iii)(D)(*1*) and (c)(3)(iii)(D)(*2*) of this section must be taken either until the serious deficiency(ies) is corrected or until the institution's agreement is terminated, including the period of any administrative review;

* * * * *

(6) * * *

(ii) * * *

(C) * * *

(*3*) If FNS initially determines that the institution's corrective action is complete, but later determines that the serious deficiency(ies) has recurred, FNS will move immediately to issue a notice of intent to terminate and disqualify the institution, in accordance with paragraph (c)(6)(ii)(D) of this section.

* * * * *

(k) * * *

(3) * * *.

(iii) *State agency determination that corrective action is inadequate.* A determination by the State agency that the corrective action taken by an institution or by a responsible principal or individual does not completely and permanently correct a serious deficiency;

* * * * *

(vi) *State agency or FNS decision regarding removal from the National disqualified list.* A determination, by either the State agency or by FNS, that the corrective action taken by an institution or a responsible principal or individual is not adequate to warrant the removal of the institution or the responsible principal or individual from the National disqualified list; or

(vii) *State agency's refusal to consider an application submitted by an institution or facility on the National disqualified list.* The State agency's refusal to consider an institution's application when either the institution or one of its principals is on the National disqualified list, or the State agency's refusal to consider an institution's submission of an application on behalf of a facility when either the facility or one of its principals is on the National disqualified list.

* * * * *

■ 5. Section 226.7(g) is amended by adding a new fifth and sixth sentence to read as follows:

§ 226.7 State agency responsibilities for financial management.

* * * * *

(g) * * * If the institution does not intend to use non-CACFP funds to support any required CACFP functions, the institution's budget must identify a source of non-Program funds that could be used to pay overclaims or other unallowable costs. If the institution intends to use any non-Program resources to meet CACFP requirements, these non-Program funds should be accounted for in the institution's budget, and the institution's budget must identify a source of non-Program funds that could be used to pay overclaims or other unallowable costs. * * *

* * * * *

§ 226.10 [Amended]

■ 6. Section 226.10(c) is amended in paragraph (c)(1) by adding the word "and" after the semicolon at the end of the sentence, in paragraph (c)(2) by removing the semicolon and the word "and" and adding a period in their place, and by removing paragraph (c)(3).

■ 7. Section 226.11(c)(1) is amended by removing the word "institution" both times it appears and by adding in its place the word "center", and by adding a new last sentence to read as follows:

§ 226.11 Program payments for centers.

* * * * *

(c) * * *.

(1) * * * In the case of a sponsoring organization of family day care homes, each State agency must base reimbursement to each approved family day care home on daily meal counts recorded by the provider.

* * * * *

§ 226.14 [Amended]

■ 8. In § 226.14, paragraph (a) introductory text is amended in the fourth sentence by removing the words "with the initial demand for remittance" and by adding in their place the words "with the date stipulated in the State agency's demand letter, or 30 days after the date of the demand letter, whichever date is later".

§ 226.15 [Amended]

■ 9. Section 226.15 is amended in the first sentence of paragraph (e)(14) by adding the word "annual" after the word "at" and in paragraph (o) by adding the words "(other than outside-school-hours care centers, at-risk afterschool care centers, emergency shelters, and adult day care centers)" after the words "Each institution".

■ 10. Section 226.16 is amended as follows:

■ a. Paragraph (d)(4)(ii) by removing the words "enrollment and/or attendance records" and adding in their place "enrollment and attendance records (except in those outside-school-hours care centers, at-risk afterschool care centers, and emergency shelters where enrollment records are not required)" and by removing the word "children" both times it appears, and by adding the word "participants" in its place.

■ b. Revise paragraph (d)(4)(iv).

■ c. Paragraph (l)(3)(i)(E) by removing "institution's" and adding in its place "sponsoring organization".

■ d. Paragraph (l)(3)(i)(F) by removing "institution" the first time it appears and adding in its place "sponsoring organization" and by removing the words "State institution" and adding in their place the words "sponsoring organization".

■ e. Paragraph (l)(3)(ii) by removing "rescinded" and adding in its place

"temporarily defer" and by adding a new sentence to the end of the paragraph.

The revision and addition read as follows:

§ 226.16 Sponsoring organization provisions.

* * * * *

(d) * * *

(4) * * *

(iv) *Averaging of required reviews.* If a sponsoring organization conducts one unannounced review of a facility in a year and finds no serious deficiencies (as described in paragraph (l)(2) of this section, regardless of the type of facility), the sponsoring organization may choose not to conduct a third review of the facility that year, and may make its second review announced, provided that the sponsoring organization conducts an average of three reviews of all of its facilities that year, and that it conducts an average of two unannounced reviews of all of its facilities that year. When the sponsoring organization uses this averaging provision, and a specific facility receives two reviews in one review year, its first review in the next review year must occur no more than nine months after the previous review.

* * * * *

(l) * * *

(3) * * *

(ii) *Successful corrective action.* * * *. However, if the sponsoring organization accepts the provider's corrective action, but later determines that the corrective action was not permanent or complete, the sponsoring organization must then propose to terminate the provider's Program agreement and disqualify the provider, as set forth in paragraph (l)(3)(iii) of this section.

* * * * *

■ 11. Section 226.18 is amended by revising paragraphs (a)(1) and (b)(1) to read as follows:

§ 226.18 Day care home provisions.

* * * * *

(a) * * *

(1) It receives title XX funds for providing child care; or

* * * * *

(b) * * *

(1) The right of the sponsoring organization, the State agency, the Department, and other State and Federal officials to make announced or unannounced reviews of the day care home's operations and to have access to its meal service and records during normal hours of operation.

* * * * *

§ 226.23 [Amended]

■ 12. Section 226.23 is amended by adding to the first sentence of paragraph (d) the words "public release" after the word "a" the first time it appears.

§ 226.26 [Amended]

■ 13. Section 226.26 is amended in paragraph (g) by removing the words "550 Kearney Street, Room 400, San Francisco, California 94108", and adding in their place the words "90 Seventh Street, Suite 10–100, San Francisco, California 94103–6701".

Dated: May 25, 2011.

Kevin Concannon,

Under Secretary for Food, Nutrition, and Consumer Services.

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