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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 946

[Doc. No. AMS–FV–11–0024; FV11–946–3 FIR]

Irish Potatoes Grown in Washington; Modifications of the Rules and Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: The Department of Agriculture is adopting, as a final rule, without change, an interim rule that extended the one-year suspension of the minimum quality, maturity, pack, marking, and inspection requirements prescribed for russet potato varieties under the Washington potato marketing order for the 2011–2012 and subsequent fiscal periods. The interim rule also extended the reporting requirement for russet potato handlers for the purpose of obtaining information necessary for administering the marketing order. This change is expected to reduce overall industry expenses and increase net returns to producers and handlers while allowing the industry the opportunity to continue exploring alternative marketing strategies.

DATES: Effective August 10, 2011.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, *Telephone:* (503) 326–2724, *Fax:* (503) 326–7440, or *E-mail: Teresa.Hutchinson@ams.usda.gov* or *GaryD.Olson@ams.usda.gov.*

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide;* or 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 rule is issued under Marketing Order No. 946, as amended (7 CFR part 946), regulating the handling of Irish potatoes grown in Washington, 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 Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

The handling of potatoes grown in Washington is regulated by 7 CFR part 946. This rule continues in effect the interim rule that extended the one-year suspension of the order's handling regulation for russet potato varieties for the 2011–2012 and subsequent fiscal periods. This change also extended the reporting requirement for russet potato handlers to obtain information necessary for the collection of assessments and statistical data. This change allows the Washington potato industry to continue marketing russet potatoes without regard to the minimum quality, maturity, pack, marking, and inspection requirements prescribed under the Washington potato marketing order.

In an interim rule published in the **Federal Register** on May 13, 2011, and effective on July 1, 2011, (76 FR 27850, Doc. No. AMS–FV–11–0024, FV11–946–3 IR), the introductory text of §§ 946.143 and 946.336 were amended by removing text referring to the temporary suspension and replacing it with text referring to a permanent suspension.

Final 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 final 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 43 handlers of Washington potatoes subject to regulation under the order (inclusive of the 33 russet potato handlers) and approximately 267 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

During the 2009–2010 fiscal period, the Committee reports that 9,765,131 hundredweight of Washington potatoes were shipped into the fresh market. Based on average f.o.b. prices estimated by the USDA's Economic Research Service and Committee data on individual handler shipments, the Committee estimates that 42, or approximately 98 percent of the handlers, had annual receipts of less than $7,000,000.

In addition, based on information provided by the National Agricultural Statistics Service, the average producer price for Washington potatoes for 2010 was $7.55 per hundredweight. The average gross annual producer revenue for each of the 267 Washington potato producers is therefore calculated to be approximately $276,130. In view of the foregoing, the majority of Washington potato producers and handlers may be classified as small entities.

This rule continues in effect the action that extended the one-year suspension of the handling regulation for russet potato varieties for the 2011–2012 and subsequent fiscal periods. This rule also continues in effect the action that extended the reporting requirement for russet potato handlers to obtain information necessary to administer the order. This change is expected to reduce overall industry expenses while providing the industry with the opportunity to continue exploring alternative marketing strategies. This rule amends the

introductory text in §§ 946.143 and 946.336. Authority for the change in the order's rules and regulations is provided for in §§ 946.70 and 946.52, respectively.

This action is not expected to increase costs associated with the order requirements. Rather, this action represents a cost savings for handlers and has the potential to increase industry returns. This change extends the one-year suspension of minimum quality, maturity, pack, marking, and inspection requirements indefinitely. Though inspections will not be mandated for russet potatoes handled under the order, handlers may at their discretion choose to have their potatoes inspected. Handlers are thus able to control costs—which are generally passed on to producers—based on the demands of their customers. The opportunities and benefits of this rule are equally available to all Washington potato handlers and growers, regardless of their size.

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. 0581–0178 (Vegetable and Specialty Crop Marketing Orders). No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This change continues the monthly reporting requirement for russet potato handlers. The reports provide the Committee with information necessary to track shipments and collect assessments. 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.

Further, the Committee's meeting was widely publicized throughout the Washington potato industry and all interested persons were invited to participate in Committee deliberations. Like all Committee meetings, the January 26, 2011, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

Comments on the interim rule were required to be received on or before July 12, 2011. No comments were received. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule, without change.

To view the interim rule, go to: *http://www.regulations.gov/#!documentDetail;D=AMS-FV-11-0024-0001.*

This action also affirms information contained in the interim rule concerning Executive Orders 12866 and 12988, the Paperwork Reduction Act (44 U.S.C. Chapter 35), and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (76 FR 27850, May 13, 2011) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 946

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

Accordingly, the interim rule that amended 7 CFR 946.143 and 946.336 and that was published at 76 FR 27850 on May 13, 2011, is adopted as a final rule, without change.

Dated: August 3, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–20124 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 520, 522, and 524

[Docket No. FDA–2011–N–0003]

New Animal Drugs; Change of Sponsor; Moxidectin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for three approved new animal drug applications (NADAs) for dosage form products containing moxidectin from Fort Dodge Animal Health, Division of Wyeth, a wholly owned subsidiary of Pfizer, Inc., to Boehringer Ingelheim Vetmedica, Inc.

DATES: This rule is effective August 9, 2011.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8300, e-mail: *steven.vaughn@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Fort Dodge Animal Health, Division of Wyeth, a wholly owned subsidiary of Pfizer, Inc., 235 East 42d St., New York, NY 10017 has informed FDA that it has transferred ownership of, and all rights and interest in, the following three approved NADAs for dosage form products containing moxidectin to Boehringer Ingelheim Vetmedica, Inc., 2621 North Belt Highway, St. Joseph, MO 64506–2002: NADA 141–099, NADA 141–220, and NADA 141–247. Accordingly, the Agency is amending the regulations in 21 CFR parts 520, 522, and 524 to reflect the transfer of ownership.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Parts 520, 522, and 524

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 520, 522, and 524 are amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. In § 520.1454, revise paragraphs (b) and (d) to read as follows:

§ 520.1454 Moxidectin solution.

* * * * *

(b) *Sponsor.* See No. 000010 in § 510.600(c) of this chapter.

* * * * *

(d) *Special considerations.* See § 500.25 of this chapter.

* * * * *

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 4. In § 522.1450, redesignate paragraph (d) as paragraph (e); add new paragraph (d); and revise paragraph (b)

and newly redesignated paragraphs (e)(1) and (e)(3) to read as follows:

§ 522.1450 Moxidectin solution.

* * * * *

(b) *Sponsor.* See No. 000010 in § 510.600(c) of this chapter.

* * * * *

(d) *Special considerations.* See § 500.25 of this chapter.

(e) * * *

(1) *Amount.* Administer 0.2 mg/kg of body weight (0.2 mg/2.2 pound) as a single, subcutaneous injection.

* * * * *

(3) *Limitations.* Do not slaughter cattle within 21 days of treatment. Because a withholding time for milk has not been established, do not use in female dairy cattle 20 months of age and older. A withdrawal period has not been established for pre-ruminating calves. Do not use in calves to be processed for veal.

PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS

■ 5. The authority citation for 21 CFR part 524 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 524.1451 [Redesignated as § 524.1450 and Amended]

■ 6. Redesignate § 524.1451 as § 524.1450 and revise paragraphs (a), (b), and (e)(1) to read as follows:

§ 524.1450 Moxidectin.

(a) *Specifications.* Each milliliter contains 5 milligrams (mg) moxidectin (0.5 percent solution).

(b) *Sponsor.* See No. 000010 in § 510.600(c) of this chapter.

* * * * *

(e) * * *

(1) *Amount.* Administer topically 0.5 mg per kilogram of body weight.

* * * * *

Dated: August 3, 2011.

Elizabeth Rettie,

Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 2011–20182 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 866

[Docket No. FDA–2010–N–0429]

Immunology and Microbiology Devices; Reclassification of the Herpes Simplex Virus Serological Assay Device

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the special controls for the herpes simplex virus (HSV) serological assay device type, which is classified as class II (special controls). These device types are devices that consist of antigens and antisera used in various serological tests to identify antibodies to herpes simplex virus in serum, and the devices that consist of herpes simplex virus antisera conjugated with a fluorescent dye (immunofluorescent assays) used to identify herpes simplex virus directly from clinical specimens or tissue culture isolates derived from clinical specimens.

DATES: This rule is effective September 8, 2011.

FOR FURTHER INFORMATION CONTACT: Haja Sittana El Mubarak, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg 66, Rm. 5519, Silver Spring, MD 20993–0002, 301–796–6193.

SUPPLEMENTARY INFORMATION:

I. Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (the 1976 amendments) (Pub. L. 94–295), Safe Medical Devices Act (SMDA) (Pub. L. 101–629), Food and Drug Administration Modernization Act (FDAMA) (Pub. L. 105–115), and the Medical Device User Fee and Modernization Act (MDUFMA) (Pub. L. 107–250), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, defined by the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the FD&C Act, FDA refers to devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), as preamendments devices. FDA classifies these devices after it takes the following steps: (1) Receives a recommendation from a device classification panel (an FDA advisory committee); (2) publishes the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) publishes a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution before May 28, 1976, generally referred to as postamendments devices are classified automatically by statute (section 513(f) of the FD&C Act) into class III without any FDA rulemaking process. Those devices remain in class III until FDA does the following: (1) Reclassifies the device into class I or II; (2) issues an order classifying the device into class I or II in accordance with section 513(f)(2) of the FD&C Act; or (3) issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a legally marketed device that has been classified into class I or class II. The agency determines whether new devices are substantially equivalent to previously marketed devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

Under the 1976 amendments, class II devices were defined as devices for which there was insufficient information to show that general controls themselves would provide reasonable assurance of safety and effectiveness, but for which there was sufficient information to establish performance standards to provide such assurance. SMDA broadened the definition of class II devices to mean those devices for which the general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but for which there is sufficient information to establish special controls to provide such assurance, including performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines, recommendations, and any other appropriate actions the agency deems necessary (section 513(a)(1)(B) of the FD&C Act).

Elsewhere in this issue of the **Federal Register**, FDA is announcing the

availability of the revised guidance document entitled ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays'' that will serve as the special control for the device. Because FDA is amending the special control for this device type, the agency is publishing the final rule that designates the revised guidance document as the special control for HSV serological devices.

II. Regulatory Background of the Device

As a preamendments device, HSV 1 and 2 serological assays were classified into class III in a final rule in the **Federal Register** of November 9, 1982 (47 FR 50823) following the receipt of a classification recommendation from a classification panel and the issuance of a proposed rule as required by section 513(b) of the FD&C Act. In the **Federal Register** of April 3, 2007 (72 FR 15829), FDA published a final rule to reclassify HSV 1 and 2 serological assays into class II. These assays are used as an aid in the clinical laboratory diagnosis of diseases caused by HSV 1 and 2. FDA identified the guidance document entitled ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays'' as the special control. Since April 3, 2007, FDA believed it had become aware of sufficient additional safety and efficacy profile information to justify revision of the special controls to better provide assurance of the safety and effectiveness of the device. Accordingly, in the **Federal Register** of September 28, 2010 (75 FR 59670), FDA issued a proposed rule to amend the special controls guidance for the device and replace it with a new guidance of the same name. FDA invited interested persons to comment on the proposed rule by November 29, 2010. No comments germane to this rule were received by the agency.

III. Summary of the Reasons for Revising Special Controls

The final rule revises the special controls for HSV 1 and 2 serological assays because the new special controls, in addition to general controls, provide reasonable assurance of the safety and effectiveness of the device. FDA believes there is sufficient additional safety and efficacy profile information to justify this revision of the special controls to better provide such assurance. We revised the existing guidance by rewriting the method comparison section and the sample selection inclusion and exclusion criteria section. The revisions defined and differentiated the required studies and the study populations for the assessment of the safety and effectiveness of the different types of HSV1 and HSV2 serological assays. Additionally, we made several corrections and clarifications throughout the document to ensure accuracy, consistency, and ease of reading.

IV. Special Controls

In addition to general controls, FDA believes that the revised guidance document entitled ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays'' (the class II special controls guidance document) is a special control that is adequate to address the risks to health associated with the use of the device. FDA believes that the revised class II special controls guidance document, which incorporates voluntary consensus standards and describes labeling recommendations, in addition to general controls, provides reasonable assurance of the safety and effectiveness of the device.

Following the effective date of this final rule, any firm submitting a 510(k) for HSV 1 and 2 serological assays will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurances of safety and effectiveness.

V. FDA's Findings

As discussed previously in this document, FDA believes HSV 1 and 2 serological assays should be classified into class II because special controls, in addition to general controls, provide reasonable assurance of the safety and effectiveness of the device and because there is sufficient information to establish special controls to provide such assurance. FDA, therefore, is finalizing the establishment of the revised class II special controls guidance document as a special control for the device.

Section 510(m) of the FD&C Act provides that a class II device may be exempt from the premarket notification requirements under section 510(k) of the FD&C Act, if the agency determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this device, FDA believes that premarket notification is necessary to provide reasonable assurance of safety and effectiveness and, therefore, is not exempting the device from the premarket notification requirements.

VI. Environmental Impact

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

VII. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Agency believes that this final rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the changes to the guidance are minimal, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $136 million, using the most current (2010) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

The changes to the guidance include adding specific recommendations on appropriate comparators for tests for antibodies and antigens, as well as recommendations for sample selection inclusion and exclusion criteria to define the target populations for HSV 1 and HSV 2 serological assays. These recommended changes increase the usefulness of the guidance while imposing a minimal burden.

VIII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Federal law includes an express preemption provision that preempts certain state requirements ''different from or in addition to'' certain Federal requirements applicable to devices. 21 U.S.C. 360k; See *Medtronic Inc.,* v. *Lohr* 518 U.S. 470 (1996); *Riegel* v. *Medtronic, Inc.,* 552 U.S. 312 (2008). The special controls established by this final rule create ''requirements'' for specific medical devices under 21 U.S.C. 360k, even though products sponsors have some flexibility in how they meet those requirements. Cf. Papike v. Tambrands, Inc., 107 F. 3d 737, 740–742 (9th Cir. 1991).

IX. Paperwork Reduction Act of 1995

This final rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520) is not required. This final rule establishes as special controls a guidance document that refers to currently approved collections of information found in other FDA regulations. These collections of information are subject to review by OMB under the PRA. The analysis of the paperwork burden for the guidance document is included in its notice of availability.

List of Subjects in 21 CFR Part 866

Biologics, Laboratory, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES

■ 1. The authority citation for 21 CFR part 866 continues to read as follows:

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

■ 2. Section 866.3305 is amended by revising paragraph (b) to read as follows:

§ 866.3305 Herpes simplex virus serological assays.

* * * * *

(b) *Classification.* Class II (special controls). The device is classified as class II (special controls). The special control for the device is FDA's revised guidance document entitled ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays.'' For availability of the guidance revised document, see § 866.1(e).

Dated: August 3, 2011.

Nancy K. Stade,

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

[FR Doc. 2011–20115 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0759]

Drawbridge Operation Regulations; Long Island, New York Inland Waterway From East Rockaway Inlet to Shinnecock Canal, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Loop Parkway Bridge, mile 0.7, across Long Creek, and the Captree State Parkway (Robert Moses Causeway) Bridge, mile 30.7, across the State Boat Channel, at Long Island, New York. This deviation is necessary to facilitate the 2011 March of Dimes Motorcycle Run. The deviation allows the two bridges listed above to remain in the closed position during this public event.

DATES: This deviation is effective from 10:51 a.m. through 1:49 p.m. on September 25, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0759 and are available online at *http://www.regulations.gov,* inserting USCG–2011–0759 in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 668–7165, *judy.k.leung-yee@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

The Loop Parkway Bridge, mile 0.7, across Long Creek has a vertical clearance in the closed position of 21 feet at mean high water and 25 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.799(f).

The Captree State Parkway (Robert Moses Causeway) Bridge, mile 30.7, across the State Boat Channel has a vertical clearance in the closed position of 29 feet at mean high water and 31 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.799(i).

Long Creek and the State Boat Channel both are both transited by commercial fishing and recreational vessel traffic.

The owner of the two bridges, the State New York Department of Transportation, requested bridge closures to facilitate a public event, the March of Dimes Charity Motorcycle Run.

Under this temporary deviation the Loop Parkway Bridge may remain in the closed position from 10:51 a.m. through 11:49 a.m. and from 12:21 p.m. through 1:49 p.m. on September 25, 2011, and the Captree State Parkway Bridge (Robert Moses Causeway) may remain in the closed position from 11 a.m. through 1 p.m. on September 25, 2011, to facilitate a public event, the 2011 March of Dimes Motorcycle Run.

Vessels that can pass under the closed draws during each respective closure may do so at any time.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: July 29, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–20092 Filed 8–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0578]

RIN 1625–AA00

Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Navy Pier Southeast Safety Zone in Chicago Harbor from September 3, 2011 through September 24, 2011. This action is necessary and intended to ensure safety of life on the navigable waters of the United States immediately prior to, during, and immediately after fireworks events. During the aforementioned period, restrictions will be enforced upon, and control movement of, vessels in a specified area immediately prior to, during, and immediately after fireworks events. During the enforcement period, no person or vessel may enter the safety zones without permission of the Captain of the Port, Sector Lake Michigan.

DATES: The regulations in 33 CFR 165.931 will be enforced at various times and on various dates between 10 p.m. on September 3, 2011 to 10:30 p.m. on September 24, 2011.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail BM1 Adam Kraft, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at 414–747–7154, e-mail *Adam.D.Kraft@uscg.mil.*

SUPPLEMENTARY INFORMATION:

The Coast Guard will enforce the Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL listed in 33 CFR 165.931 for the following events:

(1) *Navy Pier Fireworks;* on September 3, 2011 from 10 p.m. through 10:30 p.m.; on September 17, 2011 from 8:45 p.m. through 9:15 p.m.; and on September 24, 2011 from 8:45 p.m. through 9:15 p.m.

All vessels must obtain permission from the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative to enter, move within or exit the safety zone. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.931 and 5 U.S.C. 552 (a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port, Sector Lake Michigan, will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is suspended. If the Captain of the Port, Sector Lake Michigan, determines that the safety zone need not be enforced for the full duration stated in this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the safety zone. The Captain of the Port, Sector Lake Michigan, or his or her on-scene representative may be contacted via VHF Channel 16.

Dated: July 25, 2011.

M.W. Sibley,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. 2011–20090 Filed 8–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0688]

RIN 1625–AA00

Safety Zones; August Fireworks Displays and Swim Events in the Captain of the Port New York Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing four temporary safety zones for marine events within the Coast Guard Captain of the Port (COTP) New York Zone for fireworks displays and swim events. This action is necessary to provide for the safety of life on navigable waters during the events. Entry into, transit through, mooring or anchoring within these zones is prohibited unless authorized by the COTP New York.

DATES: This rule is effective in the CFR on August 9, 2011 to 11:59 p.m. August 27, 2011. This rule is effective with actual notice for purpose of enforcement beginning at 12 p.m. August 6, 2011 to 11:59 p.m. August 27, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0688 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0688 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, call or e-mail LT Eunice James, Coast Guard Sector New York Waterways Management Division; 718–354–4163, e-mail *Eunice.A.James@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 any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest, since immediate action is needed to provide for the safety of life and property on navigable waters from the hazards associated with fireworks including unexpected detonation and burning debris; also immediate action is needed to provide for the safety of life and property on navigable waters from the hazards associated with swimmers in the water in or near navigable channels. We spoke with each event sponsor and each indicated they were unable and unwilling to move their event date to a later time. Sponsors for the Ocean Breeze Fishing Pier Fireworks Display stated they are unwilling to reschedule this event because it is being held in conjunction with a prescheduled concert sponsored by the Staten Island Borough President's Office. Changing the date would cause numerous cancelations and hurt small businesses. Rescheduling would not be

a viable option because the event venue, venders, and artists have fully booked summer schedules making rescheduling nearly impossible. Sponsors for the Annual Newburgh to Beacon Swim, Swim Across America, and the Rose Pintoff Centennial Swim stated they are unwilling to reschedule these events because the dates of each swim event were chosen based on optimal tide, current, and weather conditions needed to promote the safety of swim participants. In addition, any change to the dates of the events would cause economic hardship on the marine event sponsors, negatively impacting other activities being held in conjunction with these events, potentially cause numerous event participant cancellations, and create unsafe event conditions.

Additionally, due to the dangers posed by the pyrotechnics used in fireworks displays and the hazards associated with swim events, the safety zones are necessary to provide for the safety of event participants, spectator crafts, and other vessels operating near the event areas. For the safety concerns noted, it is in the public interest to have this regulation in effect during these events.

These fireworks displays and swim events are all reoccurring marine events with a proposed permanent rule currently in a public comment period under docket number USCG–2010–1001 titled, Special Local Regulations and Safety Zones; Recurring Events in Captain of the Port New York Zone. Additionally, the Coast Guard has ordered safety zones or special local regulations for all of these areas for past events and has not received public comments or concerns regarding establishment of waterways restrictions.

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**. The rule must become effective on the dates specified in Table 1 and Table 2 in order to provide for the safety of the public including spectators and vessels operating in the area near these events. Delaying the effective date of this rule until after 30 days have elapsed after publication is impractical and would expose spectators, vessels, and other property to the hazards associated with these marine events.

Basis and Purpose

The legal basis for the temporary rule is 33 U.S.C. 1226, 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define safety zones.

The fireworks display and swim events are being held during the month of August on the navigable waters within the COTP New York Zone. In the past, the Coast Guard has established safety zones for these events on a case by case basis to ensure the protection of the maritime public and event participants from the hazards associated with these events. The Coast Guard has not received public comments or concerns regarding the impact to waterway traffic from these events.

This temporary final rule will apprise the public in a timely manner through publication in the **Federal Register**.

These events pose significant risk to participants, spectators and the maritime public because of hazardous conditions associated with fireworks displays and swim events. These temporary safety zones are necessary to ensure the safety of participants, spectators and vessels.

Discussion of Rule

This rule establishes temporary safety zones on the waters of the COTP New York zone. These temporary safety zones will encompass various locations, listed in Table 1 and Table 2 below.

All persons and vessels shall comply with the instructions of the COTP New York or the designated on-scene representative. Entry into, transiting, or anchoring within the temporary safety zones are prohibited unless authorized by the COTP New York, or the designated representative. The COTP New York or the designated representative may be reached on VHF Channel 16.

Because large numbers of spectator vessels are expected to congregate around the location of these events, the regulated areas are needed to protect both spectators and participants from the safety hazards created by fireworks displays and swimmers in the water. During the enforcement period of the regulated areas, persons and vessels are prohibited from entering, transiting through, remaining, anchoring or mooring within the zone unless specifically authorized by the COTP or the designated representatives. The Coast Guard may be assisted by other federal, state and local agencies in the enforcement of these regulated areas.

The Coast Guard determined that these regulated areas will not have a significant impact on vessel traffic due to their temporary nature and limited size and the fact that vessels are allowed to transit the navigable waters outside of the regulated areas. Additionally, the Coast Guard has ordered safety zones for all of these four areas for past events and has not received public comments or concerns regarding the impact to waterway traffic from events.

Advanced public notifications will also be made to the local maritime community by the Local Notice to Mariners as well as Broadcast Notice to Mariners.

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.

Executive Order 12866 and Executive Order 13563

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563, 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.

The Coast Guard's implementation of these temporary safety zones will be of short duration and designed to minimize the impact to vessel traffic on the navigable waters. These safety zones will only be enforced for a short duration. Furthermore, vessels may be authorized to transit the zones with permission of the COTP New York or the designated on-scene representative.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in a portion of the navigable waterway in the vicinity of these marine events during the effective period.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic can

safely transit around these safety zones or through the zones with permission of the COTP New York or the designated on-scene representative. Before the effective period, we will issue maritime advisories widely available to users of the waterway. This rule will be in effect for a short duration at various times from August 06, 2011 until August 27, 2011.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions 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 temporary safety zones. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0688 to read as follows:

§ 165.T01–0688 Safety Zones; August Fireworks Displays and Swim Events in the Captain of the Port New York Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the fireworks displays and swim events listed in Table 1 and Table 2 of § 165.T01–0688. These regulations

will be enforced for the duration of each event. Notifications of exact dates and times of the enforcement period will be made to the local maritime community through the Local Notice to Mariners, and Broadcast Notice to Mariners. First Coast Guard District Local Notice to Mariners can be found at *http://www.navcen.uscg.gov/*.

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the COTP, Sector New York to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official patrol vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the designated representative via VHF channel 16 or 718–354–4353 (Sector New York command center) to obtain permission to do so.

(d) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or designated on-scene representative.

(e) Upon being hailed by a U.S. Coast Guard vessel or the designated representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The COTP or the designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(g) The regulated area for all fireworks displays listed in Table 1 is that area of navigable waters within a 360 yard radius of the launch platform or launch site for each fireworks display, unless otherwise noted in Table 1 or modified in USCG First District Local Notice to Mariners at: *http://www.navcen.uscg.gov/*.

(h) Fireworks barges used in these locations will also have a sign on their port and starboard side labeled ''Fireworks—Stay Away''. This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white background. Shore sites used in these locations will display a sign labeled ''Fireworks—Stay Away'' with the same dimensions.

TABLE 1 OF § 165.T01–0688

1.0	New York Harbor	
1.1	Ocean Breeze Fishing Pier, Staten Island Safety Zone.	• Date: August 26, 2011. • Rain Date: August 27, 2011. • Time: 8:30 p.m. to 10 p.m. • Launch site: A barge located in approximate position 40°34′46.3″ N 074°04′02.0″ W (NAD 1983), approximately 1150 yards west of Hoffman Island. This Safety Zone is a 360-yard radius from the barge.

TABLE 2 OF § 165.T01–0688

1.0	Western Long Island Sound	
1.1	Swim Across America	• Date: August 13, 2011. • Rain Date: NA. • Time: 6 a.m. to 11 a.m. • Location site: Participants will swim from Larchmont, New York to Glen Cove, New York. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
2.0	Hudson River	
2.1	Newburgh Beacon Swim	• Date: August 6, 2011. • Rain Date: August 7, 2011. • Time: 1 p.m. to 3 p.m. • Rain Date Time: 2 p.m. to 4 p.m. • Location site: Participants will cross the Hudson River between Newburgh and Beacon, New York approximately 1300 yards south of the Newburgh-Beacon Bridge. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
2.2	Rose Pitonof Swim	• Date: August 13, 2011. • Rain Date: NA. • Time: 8 a.m. to 8 p.m. • Location: Participants will swim between Manhattan, New York and the shore of Coney Island, New York transiting through the Upper New York Bay, under the Verrazano-Narrows Bridge and south in the Lower New York Bay. The route direction is determined by the predicted tide state and direction of current on the scheduled day of the event.

TABLE 2 OF § 165.T01–0688—Continued

• This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.

Dated: July 25, 2011.

G.P. Hitchen,

Captain, U.S. Coast Guard, Captain of the Port New York (Acting).

[FR Doc. 2011–20093 Filed 8–8–11; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR PART 111

Domestic Mail Manual; Incorporation by Reference

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service announces the issuance of DMM 300, dated July 5, 2011, of the *Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM®)*, and its incorporation by reference in the *Code of Federal Regulations.*

DATES: *Effective Date:* This final rule is effective on August 9, 2011. The incorporation by reference of Issue 300, July 5, 2011, of the DMM is approved by the Director of the Federal Register as of August 9, 2011.

FOR FURTHER INFORMATION CONTACT: Lizbeth Dobbins (202) 268–3789.

SUPPLEMENTARY INFORMATION: The most recent Issue 300 of the *Domestic Mail Manual* (DMM) was issued on July 5, 2011. This Issue of the DMM contains all Postal Service domestic mailing standards. This issue continues to: (1) Increase the user's ability to find information; (2) increase confidence that users have found all the information they need; and (3) reduce the need to consult multiple chapters of the Manual to locate necessary information. Issue 300, dated July 5, 2011, set forth specific changes, such as new standards throughout the DMM to support the standards and mail preparation changes implemented since the May 11, 2009 version.

Changes to mailing standards will continue to be published through **Federal Register** notices and the Postal Bulletin, and will appear in the next online version available via the Postal Explorer® Web site at: *http://pe.usps.com.*

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Incorporation by reference.

In view of the considerations discussed above, the Postal Service hereby amends 39 CFR Part 111 as follows:

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Amend § 111.3(f) by adding the following new entry at the end of the table: § 111.3 Amendments to the Mailing Standards of the United States Postal Service, Domestic Mail Manual.

* * * * *

(f) * * *

Transmittal letter for issue	Dated	**Federal Register** publication
* * *	* *	* *
Issue 300	May 7, 2008	73 FR 25508
Issue 300	May 11, 2009	75 FR 31702
DMM 300	July 5, 2011	[Insert FR citation for this Final Rule].

■ 3. Amend § 111.4 by removing ''June 4, 2010'' and adding ''August 9, 2011.''

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2011–20078 Filed 8–8–11; 8:45 am]

BILLING CODE 7710–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2011–0027; MO 92210–0–0008 B2]

RIN 1018–AV85

Endangered and Threatened Wildlife and Plants; Endangered Status for the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status for the Cumberland darter (*Etheostoma susanae*), rush darter (*Etheostoma phytophilum*), yellowcheek darter (*Etheostoma moorei*), chucky madtom (*Noturus crypticus*), and laurel dace (*Chrosomus saylori*) under the Endangered Species Act of 1973, as amended (Act). This final rule implements the Federal protections provided by the Act for these species throughout their ranges, including Cumberland darter in Kentucky and Tennessee, rush darter in Alabama, yellowcheek darter in Arkansas, and chucky madtom and laurel dace in Tennessee. We intend to propose critical habitat in an upcoming rulemaking, which is expected within the next few months.

DATES: This rule becomes effective September 8, 2011.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2010–0027. Comments and materials received, as well as supporting documentation used in the preparation of this rule, will be

available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501; telephone 931–528–6481; facsimile 931–528–7075.

FOR FURTHER INFORMATION CONTACT: For information regarding the Cumberland darter, contact Lee Andrews, Field Supervisor, U.S. Fish and Wildlife Service, Kentucky Ecological Services Field Office, J.C. Watts Federal Building, 330 W. Broadway Rm. 265, Frankfort, KY 40601; telephone 502–695–0468; facsimile 502–695–1024.

For information regarding the rush darter, contact Stephen Ricks, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Suite A, Jackson, MS 39213; telephone 601–965–4900; facsimile 601–965–4340 or Bill Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office, 1208–B Main Street, Daphne, AL 36526; telephone 251–441–5181; fax 251–441–6222.

For information regarding the yellowcheek darter, contact Jim Boggs, Field Supervisor, U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office, 110 South Amity Road, Suite 300, Conway, AR 72032; telephone 501–513–4470; facsimile 501–513–4480.

For information regarding the chucky madtom and laurel dace, contact Mary Jennings, Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501; telephone 931–528–6481; facsimile 931–528–7075.

If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

This document consists of a final rule to list the Cumberland darter (*Etheostoma susanae*), rush darter (*Etheostoma phytophilum*), yellowcheek darter (*Etheostoma moorei*), chucky madtom (*Noturus crypticus*), and laurel dace (*Chrosomus saylori*) as endangered under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act). The Act requires that we identify species of wildlife and plants that are endangered or threatened, based on the best available scientific and commercial information. As defined in section 3 of the Act, an endangered species is any species which is in danger of extinction throughout all or a significant portion of its range, and a threatened species is any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Through the Federal rulemaking process, we add species that meet these definitions to the List of Endangered and Threatened Wildlife at 50 CFR 17.11 or the List of Endangered and Threatened Plants at 50 CFR 17.12. As part of this program, we maintain a list of species that we regard as candidates for listing. We call this list the Candidate Notice of Review (CNOR). A candidate species is one for which we have on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher priority listing actions. We may identify a species as a candidate for listing based on an evaluation of its status that we conducted on our own initiative, or as a result of making a finding on a petition to list a species that listing is warranted but precluded by other higher priority listing action. Table 1 includes the citation information for the CNORs mentioned in the following paragraphs, which discuss the previous candidate status of each of the five species being listed as endangered in this rule.

TABLE 1—FEDERAL REGISTER CITATION INFORMATION FOR CERTAIN CANDIDATE NOTICES OF REVIEW ISSUED BY THE U.S. FISH AND WILDLIFE SERVICE SINCE 1985

Year	**Federal Register** volume and page number	Date of publication in the **Federal Register**
1985	50 FR 37958	September 18, 1985.
1989	54 FR 554	January 6, 1989.
1991	56 FR 58804	November 21, 1991.
1994	59 FR 58982	November 15, 1994.
1996	61 FR 7596	February 28, 1996.
1999	64 FR 57533	October 25, 1999.
2001	66 FR 54807	October 30, 2001.
2002	67 FR 40657	June 13, 2002.
2004	69 FR 24875	May 4, 2004.
2005	70 FR 24869	May 11, 2005.
2006	71 FR 53755	September 12, 2006.
2007	72 FR 69034	December 6, 2007.
2008	73 FR 75176	December 10, 2008.
2009	74 FR 57804	November 9, 2009.
2010	75 FR 69222	November 10, 2010.

Previous Federal Action

Cumberland Darter

The Cumberland darter was first identified as a candidate for listing in the 1985 CNOR. It was assigned a Category 2 status, which was given to those species for which the Service possessed information indicating that proposing to list as endangered or threatened was possibly appropriate, but for which conclusive data on biological vulnerability and threat was not currently available to support proposed rules. The Cumberland darter retained the Category 2 status in the 1989, 1991, and 1994 CNORs.

Assigning categories to candidate species was discontinued in 1996, and only species for which the Service had sufficient information on biological vulnerability and threats to support issuance of a proposed rule were regarded as candidate species. Candidate species were also assigned listing priority numbers based on immediacy and the magnitude of threat, as well as their taxonomic status. In the 1999, 2001, 2002, and 2004 CNORs, the Cumberland darter was identified as a

listing priority 6 candidate species. We published a petition finding for Cumberland darter in the 2005 CNOR in response to a petition received on May 11, 2004, stating the darter would retain a listing priority of 6.

In the 2006 CNOR, we changed the listing priority number for Cumberland darter from 6 to 5, because it was formally described as a distinct species. Based on new molecular evidence, the subspecies *Etheostoma nigrum susanae* was elevated to specific status, *Etheostoma susanae*. In the 2007, 2008, 2009, and 2010 CNORs, the Cumberland darter retained a listing priority of 5. On June 24, 2010 (75 FR 36035) we published a proposed rule to list the Cumberland darter as endangered.

Rush Darter

We first identified the rush darter as a candidate for listing in the 2002 CNOR. The rush darter was assigned a listing priority number of 5. In the 2004 CNOR, the rush darter retained a listing priority number of 5. We published a petition finding for rush darter in the 2005 CNOR in response to a petition received on May 11, 2004, stating the darter would retain a listing priority of 5.

In 2006, we changed the listing priority number of the rush darter from 5 to 2 based on the imminent threat of water quality deterioration (i.e., increased sedimentation due to urbanization, road maintenance, and silviculture practices). In the 2007, 2008, 2009, and 2010 CNORs, the rush darter retained a listing priority of 2. We proposed to list the rush darter as endangered on June 24, 2010 (75 FR 36035).

Yellowcheek Darter

We first identified the yellowcheek darter as a candidate for listing in the 2001 CNOR with a listing priority of 2. The yellowcheek darter retained a listing priority number of 2 in the 2002 and 2004 CNORs. We published a petition finding for yellowcheek darter in the 2005 CNOR in response to a petition received on May 11, 2004, stating the darter would retain a listing priority of 2.

In the 2006, 2007, 2008, 2009, and 2010 CNORs, the yellowcheek darter retained a listing priority of 2. The yellowcheek darter is covered by a 2007 programmatic Candidate Conservation Agreement with Assurances (71 FR 53129) that covers the entire range of the species. We proposed to list the yellowcheek darter as endangered on June 24, 2010 (75 FR 36035).

Chucky Madtom

We first identified the chucky madtom as a candidate for listing in the 1994 CNOR with a Category 2 status. In the 2002 and 2004 CNORs, the chucky madtom was identified as a listing priority 2 candidate species. We published a petition finding for chucky madtom in the 2005 CNOR in response to a petition received on May 11, 2004, stating the madtom would retain a listing priority of 2. In the 2006, 2007, 2008, 2009, and 2010 CNORs, the chucky madtom retained a listing priority of 2.

In 1994, the chucky madtom was first added to the candidate list as *Noturus* sp. Subsequently, and based on morphological and molecular evidence, the chucky madtom was formally described as a distinct species, *Noturus crypticus* (Burr *et al.* 2005). We included this new information in the 2006 CNOR. We proposed to list the chucky madtom as endangered on June 24, 2010 (75 FR 36035).

Laurel Dace

We first identified the laurel dace as a new candidate for listing in the 2007 CNOR. New candidates are those taxa for which we have sufficient information on biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing regulation is precluded by other higher priority listing activities.

In the 2007 CNOR, we assigned the laurel dace a listing priority of 5. The laurel dace retained a listing priority of 5 in the 2008, 2009, and 2010 CNORs. We proposed to list the laurel dace as endangered on June 24, 2010 (75 FR 36035).

Species Information

Cumberland Darter

The Cumberland darter (*Etheostoma (Boleosoma) susanae* (Jordan and Swain)) is a medium-sized member of the fish tribe Etheostomatini (family Percidae) that reaches over 5.5 centimeters (cm) (2 inches (in)) standard length (SL) (length from tip of snout to start of the caudal peduncle (slender region extending from behind the anal fin to the base of the caudal fin)) (Etnier and Starnes 1993, p. 512). The species has a straw-yellow background body color with brown markings that form six evenly spaced dorsal (back) saddles and a series of X-, C-, or W-shaped markings on its sides (Etnier and Starnes 1993, p. 510). During spawning season, the overall body color of breeding males darkens, and the side markings become obscure or appear as a series of blotches (Etnier and Starnes 1993, p. 510).

The Cumberland darter was first described as *Boleosoma susanae* by Jordan and Swain (1883, pp. 249–250) from tributaries of the Clear Fork of the Cumberland River, Kentucky. Subsequent studies by Kuhne (1939, p. 92) and Cole (1967, p. 29) formerly recognized the taxon as a subspecies (*Etheostoma nigrum susanae*) of *E. n. nigrum* (Johnny darter). Starnes and Starnes (1979, p. 427) clarified the subspecific status of the Cumberland darter, differentiating it from the Johnny darter by several diagnostic characteristics. Strange (1998, p. 101) elevated *E. n. susanae* to full species status based on analyses of mitochondrial DNA *for E. n. susanae* and *E. n. nigrum.*

The Cumberland darter inhabits pools or shallow runs of low- to moderate-gradient sections of streams with stable sand, silt, or sand-covered bedrock substrates (O'Bara 1988, pp. 10–11; O'Bara 1991, p. 10; Thomas 2007, p. 4). Thomas (2007, p. 4) did not encounter the species in high-gradient sections of streams or areas dominated by cobble or boulder substrates. Thomas (2007, p. 4) reported that streams inhabited by Cumberland darters were second to fourth order, with widths ranging from 4 to 9 meters (m) (11 to 30 feet (ft)) and depths ranging from 20 to 76 cm (8 to 30 in).

Little is known regarding the reproductive habits of the Cumberland darter. Thomas (2007, p. 4) reported the collection of males in breeding condition in April and May, with water temperatures ranging from 15 to 18 degrees Celsius (°C) (59 to 64 degrees Fahrenheit (°F)). Extensive searches by Thomas (2007, p. 4) produced no evidence of nests or eggs at these sites. Species commonly associated with the Cumberland darter during surveys by Thomas (2007, pp. 4–5) were creek chub (*Semotilus atromaculatus*), northern hogsucker (*Hypentelium nigricans*), stripetail darter (*E. kennicotti*), and Cumberland arrow darter (*E. sagitta sagitta*). Feeding habits are unknown but are likely similar to that of the closely related species, the Johnny darter (*E. nigrum*). Johnny darters are sight feeders, with prey items consisting of midge larvae, mayfly nymphs, caddisfly larvae, and microcrustaceans (Etnier and Starnes 1993, p. 511). Thomas (2007, p. 5) collected individuals of the Federally threatened blackside dace (*Chrosomus cumberlandensis*), from three streams that also supported Cumberland darters.

The Cumberland darter is endemic to the upper Cumberland River system

above Cumberland Falls in Kentucky and Tennessee (O'Bara 1988, p. 1; O'Bara 1991, p. 9; Etnier and Starnes 1993, p. 511). The earliest known collections of the species were made by Jordan and Swain (1883, pp. 249–250), who recorded it as abundant in tributaries of Clear Fork of the Cumberland River, Kentucky. The species was later reported from Gum Fork, Scott County, Tennessee, by Shoup and Peyton (1940, p. 11), and seven additional tributaries of the Cumberland River by Burr and Warren (1986, p. 310). More exhaustive surveys by O'Bara (1988, p. 6; 1991, pp. 9–10) and Laudermilk and Cicerello (1998; pp. 83–233, 303–408) determined that the Cumberland darter was restricted to short reaches of 20 small streams (23 sites) in the upper Cumberland River system in Whitley and McCreary Counties, Kentucky, and Campbell and Scott Counties, Tennessee. These studies suggested the extirpation of the species from Little Wolf Creek in Whitley County, Kentucky, and Gum Fork in Scott County, Tennessee. Preliminary reports of disjunct populations in the Poor Fork Cumberland River and Martins Fork in Letcher and Harlan Counties, Kentucky (Starnes and Starnes 1979, p. 427; O'Bara 1988, p. 6; O'Bara 1991, pp. 9–10), were evaluated genetically and determined to be the Johnny darter (Strange 1998, p. 101).

Thomas (2007, p. 3) provided the most recent information on status and distribution of the species through completion of a range-wide status assessment in the upper Cumberland River drainage in Kentucky. Between June 2005 and April 2007, a total of 47 sites were sampled qualitatively in the upper Cumberland River drainage. All Kentucky sites with historic records were surveyed (20 sites), as well as 27 others having potentially suitable habitat. Surveys by Thomas (2007, p. 3) produced a total of 51 specimens from 13 localities (12 streams). Only one of the localities represented a new occurrence record for the species.

In 2008, the Kentucky Department of Fish and Wildlife Resources (KDFWR) initiated a propagation and reintroduction project for the Cumberland darter in the upper Cumberland River drainage (Thomas *et al.* 2010, p. 107). Utilizing State Wildlife Grant funds from the Service, KDFWR worked cooperatively with Conservation Fisheries, Inc. (CFI) of Knoxville, Tennessee, to develop captive propagation protocols for the species and to produce juvenile Cumberland darters that could be reintroduced within the species' historic range. Cogur Fork, a tributary to Indian Creek in McCreary County, Kentucky, was chosen by KDFWR as a suitable reintroduction site. Cumberland darters were released into Cogur Fork in August 2009 and September 2010. Surveys in November 2010 resulted in recaptures of individuals released in 2009 and 2010, as well as captures of four individuals without tags (possibly native individuals) (Thomas pers. comm. 2010). Based on these results, it appears that reintroduction efforts have been effective, with Cumberland darters persisting within Cogur Fork since 2009. Furthermore, captures of untagged individuals in 2009 and 2010 suggest that Cogur Fork also supports a small, native population of the species.

Currently, the Cumberland darter is known from 15 localities in a total of 13 streams in Kentucky (McCreary and Whitley Counties) and Tennessee (Campbell and Scott Counties). All 15 extant occurrences of the Cumberland darter are restricted to short stream reaches, with the majority believed to be restricted to less than 1.6 kilometers (km) (1 mile (mi)) of stream (O'Bara 1991, pp. 9–10; Thomas 2007, p. 3). These occurrences are thought to form six population clusters (Bunches Creek, Indian Creek, Marsh Creek, Jellico Creek, Clear Fork, and Youngs Creek), which are geographically separated from one another by an average distance of 30.5 stream km (19 stream mi) (O'Bara 1988, p. 12; O'Bara 1991, p. 10; Thomas 2007, p. 3). Based on collection efforts by O'Bara (1991, pp. 9–10), Laudermilk and Cicerello (1998; pp. 83–233, 303–408), and Thomas (2007, p. 3), the species appears to be extirpated from 11 historical collection sites and a total of 9 streams: Cumberland River mainstem, near the mouth of Bunches Creek and Cumberland Falls (Whitley County); Sanders Creek (Whitley County); Brier Creek (Whitley County); Kilburn Fork of Indian Creek (McCreary County); Bridge Fork (McCreary County); Marsh Creek, near mouth of Big Branch and Caddell Branch (McCreary County); Cal Creek (McCreary County); Little Wolf Creek (Whitley County); and Gum Fork (Scott County). No population estimates or status trends are available for the Cumberland darter; however, survey results by Thomas (2007, p. 3) suggest that the species is uncommon or occurs in low densities across its range (Thomas 2007, p. 3).

The Cumberland darter is ranked by the Kentucky State Nature Preserves Commission (KSNPC) (2009, p. 38) and the Tennessee Department of Environment and Conservation (TDEC) (2009, p. 53) as a G1G2S1 species: critically imperiled or imperiled globally and critically imperiled in Kentucky and Tennessee. The KDFWR State Wildlife Action Plan identified the Cumberland darter as a species of Greatest Conservation Need (GCN) and identified several top conservation actions for it and other species in its Aquatic Guild (Upland Headwater Streams in Pools), including: Acquisition or conservation easements for critical habitat, development of financial incentives to protect riparian (land adjacent to stream channel) corridors, development and implementation of best management practices, and restoration of degraded habitats through various State and Federal programs (KDFWR 2005, p. 2.2.2). The Cumberland darter is designated as a Tier 1 GCN species in the Tennessee Comprehensive Wildlife Conservation Strategy (CWCS) (TWRA 2005, pp. 44, 49).

Rush Darter

The rush darter (*Etheostoma phytophilum*) is a medium-sized darter in the family Percidae, tribe Etheostomatini, and subgenus *Fuscatelum.* The species reaches an average size of 5 cm (2 in) SL (Bart and Taylor 1999, p. 28; Johnston and Kleiner 2001, p. 3). The rush darter was described by Bart and Taylor in 1999 (pp. 27–33), and is closely related to the goldstripe darter (*E. parvipinne*), a drab-colored species with a thin golden stripe along the lateral line (canal along the side of a fish with sensory capabilities) that is surrounded by heavily mottled or stippled sides (Shaw 1996, p. 85). However, the distinct golden stripe characteristic of goldstripe darters is not well developed in rush darters (Bart and Taylor 1999, p. 29). Also, the brown pigment on the sides of the rush darter is usually not as intense as in the goldstripe darter. Other characteristics of the rush darter are described in Bart and Taylor (1999, p. 28).

Rush darters have been collected from various habitats (Stiles and Mills 2008, pp. 1–4; Bart 2002, p. 1; Johnston and Kleiner 2001, pp. 3–4; Stiles and Blanchard 2001, pp. 1–4; Bart and Taylor 1999, p. 32), including root masses of emergent vegetation along the margins of spring-fed streams in very shallow, clear, cool, and flowing water; and from both small clumps and dense stands of bur reed (*Sparganium* sp.), coontail (*Ceratophyllum* sp.), watercress (*Nasturtium officinale*), and rush (*Juncus* sp.) in streams with substrates of silt, sand, sand and silt, muck and sand or some gravel with sand, and bedrock. Rush darters appear to prefer springs and spring-fed reaches of relatively low-gradient small streams,

which are generally influenced by springs (Stiles and Mills 2008, pp. 1–4; Fluker *et al.* 2007, p. 1; Bart 2002, p. 1; Johnston and Kleiner 2001, pp. 3–4; Stiles and Blanchard 2001, pp. 1–4; Bart and Taylor 1999, p. 32). Rush darters have also been collected in wetland pools (Stiles and Mills 2008; pp. 2–3). Water depth at collection sites ranged from 3.0 cm to 0.5 m (0.1 ft to 1.6 ft), with moderate water velocity in riffles and no flow or low flow in pools. Rush darters have not been found in higher gradient streams with bedrock substrates and sparse vegetation (Stiles and Mills 2008, pp. 1–4; Bart 2002, p. 1; Johnston and Kleiner 2001, pp. 3–4; Stiles and Blanchard 2001, pp. 1–4; Bart and Taylor 1999, p. 32).

Stiles and Mills (2008, p. 2) found gravid rush darter females in February and fry (newly hatched larval fish) in late April from a wetland pool in the Mill Creek watershed (Winston County, Alabama). These pools act as nursery areas for the fry (Stiles and Mills 2008, p. 5). While little is known specifically about the life history of the rush darter, this information is available for the goldstripe darter, a related species in the *Etheostoma* genus. Spawning of the goldstripe darter in Alabama occurs from mid-March through June (Mettee *et al.* 1996, p. 655). Preferred food items for the goldstripe darter include midge larvae, mayfly nymphs, blackfly larvae, beetles, and microcrustaceans (Mettee *et al.* 1996, p. 655). The lifespan of the goldstripe darter is estimated to be 2 to 3 years.

The rush darter currently has a restricted distribution (Johnston and Kleiner 2001, p. 1). All rush darter populations are located above the Fall Line (the inland boundary of the Coastal Plain physiographic region) and in other ''highland regions'' where topography and elevation changes are observed presenting a barrier for fish movement (Boshung and Mayden 2004, p. 18) in the Black Warrior River drainage in portions of the Appalachian Plateau and Valley and Ridge physiographic provinces of Alabama (Boshung and Mayden 2004, pp. 16–17; Warren *et al.* 2000, pp. 9, 10, 24). The closely related goldstripe darter in Alabama occurs essentially below the Fall Line in all major systems except the Coosa system (Boshung and Mayden 2004, p. 550). Reports of goldstripe darters from the 1960s and 1970s in Winston and Jefferson Counties, Alabama (Caldwell 1965, pp. 13–14; Barclay 1971, p. 38; Dycus and Howell 1974, pp. 21–24; Mettee *et al.* 1989, pp. 13, 61, 64), which are above the Fall Line, were made prior to the description of the rush darter, but are now considered to be rush darters (Kuhajda pers. comm. 2008).

Historically, rush darters have been found in three distinct watersheds in Alabama: Doe Branch, Wildcat Branch, and Mill Creek of the Clear Creek drainage in Winston County; an unnamed spring run of Beaver Creek and Penny Springs of the Turkey Creek drainage in Jefferson County; and Cove Spring (Little Cove Creek system) and Bristow Creek of the Locust Fork drainage in Etowah County. Fluker *et al.* (2007, p. 10) suggests that the unique topographic and geologic influences in the three distinct population groups likely produced different selective pressures, genetic isolation, genetic drift, and divergence during the species' evolution.

Currently, the three rush darter populations occur in the same watersheds but in a more limited distribution. One population is located in Wildcat Branch and Mill Creek in the Clear Creek drainage in Winston County (Johnston and Kleiner 2001, p. 4; Stiles and Mills 2008, pp. 1–3); the second is located in an unnamed spring run to Beaver Creek, portions of Beaver Creek, and an unnamed tributary to Turkey Creek in the Turkey Creek drainage in Jefferson County (Stiles and Blanchard 2001, p. 2; Drennen pers. obsv. 2006–2010; Kuhajda pers. comm. 2009); and the third is in the Little Cove Creek drainage (Bart and Taylor 1999, p. 28; Bart 2002, p. 7; Kuhajda pers. comm. 2008–2009; Spadgenski pers. comm. 2008–2009).

Rush darter populations are separated from each other geographically, and individual rush darters are only sporadically collected at a particular site within their range. Where it occurs, the rush darter is apparently an uncommon species that is usually collected in low numbers (compiled from Bart and Taylor 1999, pp. 31–32; Johnston and Kleiner 2001, pp. 2–4; Stiles and Blanchard 2001, pp. 1–4; Johnston 2003, pp. 1–3; Stiles and Mills 2008, pp. 1–3; Rakes pers. comm. 2010; Drennen pers. obsv. 2006–2010; Kuhajda pers. comm. 2009); however, there are no population estimates at this time.

Cumulatively, the rush darter is only known from localized collection sites within approximately 14.5 km (9 mi) of streams in the Clear Creek; Little Cove and Bristow Creek; and Turkey Creek drainages in Winston, Etowah, and Jefferson Counties, respectively. Currently, about 3 km (2 mi) of stream, or about 22 percent of the rush darter's known range, is not occupied.

Within the Clear Creek drainage, the rush darter has been collected in Wildcat Branch, Mill Creek, and Doe Creek, which represents about 13 km (9 mi) of stream or about 89 percent of the species' total cumulative range. Recent surveys (Stiles and Mills 2008, pp. 1–4; Johnston and Kleiner 2001, p. 3) have failed to document the absence of the rush darter in Doe Creek, indicating a potential reduction of the species' known range within the Clear Creek drainage by about 3 km (2 mi) of stream or 22 percent. However, rush darters were collected in 2005, 2008, and 2009 in the Little Cove Creek drainage (Cove Spring run), after a 30 year period of not finding the species. This rediscovery of the species confirms the continued existence of the species in Etowah County and Cove Spring. However, the Little Cove Creek drainage constitutes an increase of only 0.05 km (0.02 mi) of occupied stream habitat or a 0.22 percent addition to the total range of the species. No collections of the species have occurred at Bristow Creek since 1997. Bristow Creek has since been channelized (straightened and deepened to increase water velocity). In the Turkey Creek drainage, rush darters have been collected sporadically within Penny Springs and at the type locality for the species (an unnamed spring run in Jefferson County, Alabama) (Bart and Taylor 1999, pp. 28, 33). However, the rush darter is likely extirpated from Penny and Tapawingo Springs due to introductions of the watercress darter (*E. nuchale*) (George *et al.* 2009, p. 532). The species can still be found in portions of an unnamed tributary of Beaver Creek and an unnamed spring to Beaver Creek (Kuhajda pers. comm. 2009). This area contains about 1.6 km (1 mi) of occupied stream habitat or approximately 11 percent of the rush darter's total range.

The rush darter is ranked by the Alabama Department of Conservation and Natural Resources (ADCNR) (Wildlife and Freshwater Fisheries Division, ADCNR 2005) as a P1G1S1 species signifying its rarity in Alabama and its status as critically imperiled globally. It is also considered a species of GCN by the State (Bart 2004, p. 193). The rush darter has a High Priority Conservation Actions Needed and Key Partnership Opportunities ranking of ''CA 6,'' the highest of any fish species listed. The State Wildlife Action Plan states that the species consists of disjoint populations and information is needed to determine genetic structuring within the populations (Wildlife and Freshwater Fisheries Division, ADCNR 2005). Conservation Actions for the species may require population augmentation or reintroduction of the

species to suitable habitats to maintain viability.

Yellowcheek Darter

The yellowcheek darter (*Etheostoma moorei*) is a small and laterally-compressed fish that attains a maximum SL of about 6.4 cm (2.5 in), and has a moderately sharp snout, deep body, and deep caudal peduncle (Raney and Suttkus 1964, p. 130). The back and sides are grayish brown, often with darker brown saddles and lateral bars. Breeding males are brightly colored with a bright blue or brilliant turquoise throat and breast and a light-green belly, while breeding females possess orange and red-orange spots but are not brightly colored (Robison and Buchanan 1988, pp. 427–429).

First collected in 1959 from the Devils Fork Little Red River, Cleburne County, Arkansas, this species was eventually described by Raney and Suttkus in 1964, using 228 specimens from the Middle, South, and Devils Forks of the Little Red River (Devils Fork, Turkey Fork, and Beech Fork represent one stream with three different names and are subsequently referred to in this rule as ''Devils Fork''). Wood (1996, p. 305) verified the taxonomic status of the yellowcheek darter within the subgenus *Nothonotus.* Complete taxonomy for the species is family Percidae, subfamily Percinae, tribe *Etheostomatini,* genus *Etheostoma,* subgenus *Nothonotus* and *E. tippecanoe* species group (Wood 1996, p. 307). The yellowcheek darter is one of only two members of the subgenus *Nothonotus* known to occur west of the Mississippi River.

The yellowcheek darter inhabits high-gradient headwater tributaries with clear water; permanent flow; moderate to strong riffles; and gravel, rubble, and boulder substrates (Robison and Buchanan 1988, p. 429). Yellowcheek darter prey items include aquatic fly larvae, stonefly larvae, mayfly nymphs, and caddisfly larvae (McDaniel 1984, p. 56).

Male and female yellowcheek darters reach sexual maturity at 1 year of age, and maximum lifespan is around 5 years (McDaniel 1984, pp. 25, 76). Spawning occurs from late May through June in the swift to moderately swift portions of riffles, often around or under the largest substrate particles (McDaniel 1984, p. 82), although brooding females have been found at the head of riffles in smaller gravel substrate (Wine *et al.* 2000, p. 3). During nonspawning months, there is a general movement to portions of the riffle with smaller substrate, such as gravel or cobble, and less turbulence (Robison and Harp 1981, p. 3). Weston and Johnson (2005, p. 24) observed that the yellowcheek darter moved very little during a 1-year migration study. It was noted that the yellowcheek darter appears to be a relatively nonmobile species, with 19 of 22 recaptured darters found within 9 m (29.5 ft) of their original capture position after periods of several months. A number of life-history characteristics including courtship patterns, specific spawning behaviors, egg deposition sites, number of eggs per nest, degree of nest protection by males, and degree of territoriality are unknown at this time; however, researchers have suggested that the yellowcheek darter deposits eggs on the undersides of large rubble in swift water (McDaniel 1984, p. 82). Wine and Blumenshine (2002, p. 10) noted that, during laboratory spawning, female yellowcheek darters bury themselves in fine gravel or sand substrates (often behind large cobble or boulders) with only their heads and caudal fin exposed. A male yellowcheek darter will then position upstream of the buried female and fertilize her eggs as she releases them in a vibrating motion. Clutch size and nest defense behavior were not observed.

The yellowcheek darter is endemic to the Devils, Middle, South, and Archey Forks of the Little Red River and mainstem Little Red River in Cleburne, Searcy, Stone, and Van Buren Counties, Arkansas (Robison and Buchanan 1988, p. 429). In 1962, the construction of a dam on the Little Red River to create Greers Ferry Reservoir impounded much of the range of this species, including the lower reaches of Devils Fork, Middle Fork, South Fork, and portions of the mainstem Little Red River, thus extirpating the species from these reaches. Yellowcheek darter was also extirpated from the Little Red River downstream of Greers Ferry Reservoir due to cold tailwater releases. The lake flooded optimal habitat for the species, and caused the genetic isolation of populations (McDaniel 1984, p. 1). The yellowcheek darter was known to historically occur in portions of these streams that maintained permanent year-round flows.

In the 1978–1981 study by Robison and Harp (1981, pp. 15–16), yellowcheek darter occurred in greatest numbers in the Middle and South Forks of the Little Red River, with populations estimated at 36,000 and 13,500 individuals, respectively, while populations in both Devils Fork and Archey Fork were estimated at approximately 10,000 individuals (Robison and Harp 1981, pp. 5–11). During this study, the four forks of the Little Red River supported an estimated yellowcheek darter population of 60,000 individuals, and the species was considered the most abundant riffle fish present (Robison and Harp 1981, p. 14). Extensive sampling of the first two tributaries of the Little Red River below Greers Ferry Dam (both named Big Creek) failed to find any yellowcheek darters, and no darters were found in immediately adjacent watersheds (Robison and Harp 1981, p. 5).

Two subsequent studies have failed to observe yellowcheek darters in the Turkey Fork reach of the Devils Fork Little Red River (Wine *et al.* 2000, p. 9; Wine and Blumenshine 2002, p. 11), since four individuals were last collected by Arkansas State University (ASU) researchers in 1999 (Mitchell *et al.* 2002, p. 129). They have been observed downstream within that system in the Beech Fork reach, where flows are more permanent. The reach downstream of Raccoon Creek is influenced by inundation from Greers Ferry Reservoir and no longer supports yellowcheek darter. The U.S. Army Corps of Engineers channelized approximately 5.6 km (3.5 mi) of the lower Archey and South Forks Little Red River within the city limits of Clinton, Arkansas, in 1985 for flood control purposes. Yellowcheek darter has not been collected within this reach since channelization. The yellowcheek darter inhabits most of its historical range not currently affected by Greers Ferry Lake, although in greatly reduced numbers in the Middle, South, Archey, and Devils Forks of the Little Red River.

While collecting specimens for the 1999 genetic study, ASU researchers discovered that the yellowcheek darter was no longer the most abundant riffle fish and was more difficult to find throughout its historical range (Wine *et al.* 2000, p. 2). Because optimal habitat had been destroyed by the creation of Greers Ferry Lake, yellowcheek darters were confined to upper stream reaches with lower summer flow, smaller substrate particle size, and reduced gradient. A thorough status survey conducted in 2000 found the yellowcheek darter in three of four historically occupied forks in greatly reduced numbers (Wine *et al.* 2000, p. 9). Populations in the Middle Fork were estimated at approximately 6,000 individuals, the South Fork at 2,300, and the Archey Fork at 2,000. Yellowcheek darter was not collected from the Devils Fork. Fish community composition was similar from 1978–1981 and 2000 studies, but the proportion of yellowcheek darter declined from approximately 28 percent to 6 percent of the overall composition. Fish known to coexist with yellowcheek darter include the rainbow darter (*E.*

caeruleum) and greenside darter (*E. blennioides*), which can use pool habitats during periods of low flow, as evidenced by the collection of these two species from pools during electroshocking activities. Electroshocking has not revealed yellowcheek darter in pools, suggesting perhaps that they are unable to tolerate pool conditions (deep, slow-moving water usually devoid of cobble substrate). An inability to use pools during low flows would make them much more vulnerable to seasonal fluctuations in flows that reduce riffle habitat. As a result, researchers have suggested that yellowcheek darter declines are more likely a species rather than community phenomenon (Wine *et al.* 2000, p. 11).

Weston and Johnson (2005, p. 22) estimated yellowcheek darter populations within the Middle Fork to be between 15,000 and 40,000 individuals, and between 13,000 and 17,000 individuals in the South Fork. Such increases since the 2000 status survey would indicate remarkable adaptability to changing environmental conditions. However, it should be noted that estimates were based upon mark/recapture estimates using the Jolly-Seber method, which requires high numbers of recaptured specimens for accurate estimations. Recaptures were extremely low during that study; therefore, population estimates were highly variable and confidence in the resulting estimates is low.

The yellowcheek darter is ranked by the Arkansas Natural Heritage Commission (ANHC) (2007, pp. 2–118) as an S1G1 species: extremely rare in Arkansas, and critically imperiled globally. The Arkansas Game and Fish Commission's (AGFC) Wildlife Action Plan describes the yellowcheek darter as a critically imperiled species with declining populations (AGFC 2005, pp. 452–454).

Chucky Madtom

The chucky madtom (*Noturus crypticus*) is a small catfish (family Ictaluridae), with the largest specimen measuring 6.5 cm (2.6 in) SL (Burr *et al.* 2005, p. 795). Burr *et al.* (2005) described the chucky madtom, confirming previous analyses (Burr and Eisenhour 1994), which indicated that the chucky madtom is a unique species, a member of the *Rabida* subgenus (i.e., the ''mottled'' or ''saddled'' madtoms), and a member of the *Noturus elegans* species complex (i.e., *N. elegans, N. albater, N. fasciatus,* and *N. trautmani*) outlined by Taylor (1969 in Grady and LeGrande 1992). A robust madtom, the chucky madtom body is wide at the pectoral fin origins, greater than 23 percent of the SL. The back contains three dark, nearly black blotches ending abruptly above the lateral midline of the body, with a moderately contrasting, oval, pale saddle in front of each blotch (Burr *et al.* 2005, p. 795).

The chucky madtom is a rare catfish known from only 15 specimens collected from two Tennessee streams. A lone individual was collected in 1940 from Dunn Creek (a Little Pigeon River tributary) in Sevier County, and 14 specimens have been encountered since 1991 in Little Chucky Creek (a Nolichucky River tributary) in Greene County, Tennessee. Only 3 chucky madtom individuals have been encountered since 2000; 1 in 2000 (Lang *et al.* 2001, p. 2) and 2 in 2004 (CFI 2008, unpublished data), despite surveys that have been conducted in both historical localities at least twice a year since 2000 (Rakes and Shute 2004, pp. 2–3; Weber and Layzer 2007, p. 4; CFI 2008, unpublished data). In addition, several streams in the Nolichucky, Holston, and French Broad River watersheds of the upper Tennessee River basin, which are similar in size and character to Little Chucky Creek, have been surveyed with no success (Burr and Eisenhour 1994, pp. 1–2; Shute *et al.* 1997, p. 5; Lang *et al.* 2001, pp. 2–3; Rakes and Shute 2004, p. 1). Conservation Fisheries, Inc. did not find chucky madtoms in 2007 after attempting new sampling techniques (e.g., PVC ''jug'' traps) (CFI 2008, unpublished data).

Originally, museum specimens collected from the Roaring River in Tennessee (Cumberland River drainage) and from Piney Creek, West Fork Flint River, and the Paint Rock River system in Alabama (Tennessee River drainage) were first identified and catalogued as *Noturus elegans* species complex and thought to be chucky madtoms. The Roaring River, Piney Creek, and West Fork Flint River specimens are now considered to be a member of the *N. elegans* group, but have not been assigned to a species. While the specimens from the Paint Rock River system share typical anal ray counts with the chucky madtom, they lack the distinctive cheek characteristics, differ in pelvic ray counts, and are intermediately shaped between the chucky and saddled madtoms (*N. fasciatus*) with respect to body width as a proportion of SL (Burr *et al.* 2005, p. 796). Thus, the Little Chucky and Dunn Creek forms are the only forms that are recognized as chucky madtoms.

All of the specimens collected in Little Chucky Creek have been found in stream runs with slow to moderate current over pea gravel, cobble, or slab-rock substrates (Burr and Eisenhour 1994, p. 2). Habitat of these types is sparse in Little Chucky Creek, and the stream affords little loose, rocky cover suitable for madtoms (Shute *et al.* 1997, p. 8). It is notable that intact riparian buffers are present in the locations where chucky madtoms have been found (Shute *et al.* 1997, p. 9).

No studies to determine the life history and behavior of this species have been conducted. While nothing is known specifically about chucky madtom reproductive biology, recruitment, growth and longevity, food habits, or mobility, this information is available for other similar members of the *Noturus* group. The least madtom (*N. hildebrandi*) may reach sexual maturity at 1 or more years of age (*i.e.,* during their second summer) (Mayden and Walsh 1984, p. 351). Only the largest females of Ozark madtom (*N. albater*) were found to be sexually mature, and males were found to be sexually mature primarily within the second age class (Mayden *et al.* 1980, p. 339), though, a single large male of the first age class showed evidence of sexual maturity (Mayden *et al.* 1980, p. 339). The breeding season of the least and smoky madtoms (*N. baileyi*) is primarily during June through July, though development of breeding condition is initiated as early as April in least madtom and May in smoky madtom (Mayden and Walsh 1984, p. 353; Dinkins and Shute 1996, p. 56). Fecundity varied among the species for which data were available; however, it should be noted that fecundity in madtoms is generally lower in comparison to other North American freshwater fishes (Breder and Rosen 1966 *in* Dinkins and Shute 1996, p. 58). Dinkins and Shute (1996, p. 58) commented that for smoky madtom the combination of relatively large egg size and high level of parental care given to the fertilized eggs and larvae reduce early mortality and, therefore, the need to produce a large number of young.

Both smoky and elegant madtoms (*N. elegans*) were found to nest under flat rocks at or near the head of riffles (Dinkins and Shute 1996, p. 56; Burr and Dimmick 1981, p. 116). Shallow pools were also used by the smoky madtom, which was observed to select rocks of larger dimension for nesting than were used for shelter during other times of year (Dinkins and Shute 1996, p. 56). Single madtoms were found to guard nests in smoky and elegant madtoms, a behavior also exhibited by Ozark and least madtoms (Dinkins and Shute 1996, p. 56; Burr and Dimmick 1981, p. 116; Mayden *et al.* 1980, p. 337;

Mayden and Walsh 1984, p. 357). Males of these species were the nest guardians and many were found to have empty stomachs suggesting that they do not feed during nest guarding, which can last as long as 3 weeks.

Conservation Fisheries, Inc. had one male chucky madtom in captivity from 2004 through 2008. However, based on information from other members of this genus for which longevity data are available, least and smoky madtoms, it is unlikely that chucky madtoms can survive this long in the wild. The shorter lived of these, least madtom, reached a maximum age of 18 months, though most individuals lived little more than 12 months, dying soon after reproducing (Mayden and Walsh 1984, p. 351). Based on length-frequency distributions, smoky madtoms exhibited a lifespan of 2 years, with two cohorts present in a given year (Dinkins and Shute 1996, p. 53). Collection of two age classes together provided evidence that life expectancy exceeds 1 year in the pygmy madtom (*N. stanauli*) (Etnier and Jenkins 1980, p. 20). The Ozark madtom lives as long as 3 years (Mayden *et al.* 1980, p. 337).

Chucky madtom prey items are unknown; however, least madtom prey items include midge larvae, caddisfly larvae, stonefly larvae, and mayfly nymphs (Mayden and Walsh 1984, p. 339). In smoky madtoms, mayfly nymphs comprised 70.7 percent of stomach contents analyzed; fly, mosquitoe, midge, and gnat larvae 2.4 percent; caddisfly larvae 4.4 percent; and stonefly larvae 1.0 percent (Dinkins and Shute 1996, p. 61). Significant daytime feeding was observed in smoky madtoms.

Dinkins and Shute (1996, p. 50) found smoky madtoms underneath slabrocks in swift to moderate current during May to early November. Habitat use shifted to shallow pools over the course of a 1-week period, coinciding with a drop in water temperature to 7 or 8 °C (45 to 46 °F), and persisted from early November to May. Eisenhour *et al.* (1996, p. 43) collected saddled madtoms in gravel, cobble, and slab-rock substrates in riffle habitats with depths ranging from 0.1 to 0.3 m (0.3 to 1.0 ft). Based on their limited number of observations, Eisenhour et al. (1996, p. 43) hypothesized that saddled madtoms occupy riffles and runs in the daylight hours and then move to pools at night and during crepuscular hours (dawn and dusk) to feed.

The current range of the chucky madtom is believed to be restricted to an approximately 3-km (1.8-mi) reach of Little Chucky Creek in Greene County, Tennessee. Because this species was also collected from Dunn Creek, a stream that is in a different watershed and physiographic province than Little Chucky Creek, it is likely that the historic range of the chucky madtom encompassed a wider area in the Ridge and Valley and the Blue Ridge physiographic provinces in Tennessee than is demonstrated by its current distribution. A survey for the chucky madtom in Dunn Creek in 1996 was not successful at locating the species (Shute *et al.* 1997, p. 8). The Dunn Creek population may be extirpated (Shute *et al.* 1997, p. 6; Burr *et al.* 2005, p. 797), because adequate habitat and a diverse fish community were present at the time of the surveys, but no chucky madtoms were found. There are no population size estimates or status trends for the chucky madtom due to low numbers and only sporadic collections of specimens.

The chucky madtom is ranked by the TDEC (2009, p. 58) as an S1G1 species: extremely rare in Tennessee, and critically imperiled globally. The chucky madtom is designated as a Tier 1 GCN species in the Tennessee CWCS (TWRA 2005, pp. 44, 49).

Laurel Dace

The laurel dace (*Chrosomus saylori*), family Cyprinidae and subfamily Leuciscinae, has two continuous black lateral stripes and black pigment covering the breast and underside of the head of nuptial (breeding) males (Skelton 2001, p. 120). The maximum SL observed is 5.1 cm (2 in) (Skelton 2001, p. 124). While the belly, breast, and lower half of the head are typically a whitish-silvery color, at any time of the year laurel dace may develop red coloration below the lateral stripe that extends from the base of the pectoral fins to the base of the caudal fin (Skelton 2001, p. 121).

Nuptial males often acquire brilliant coloration during the breeding season, as the two lateral stripes, breast, and underside of head turn intensely black and the entire ventral (lower/abdominal) portion of the body, contiguous with the lower black stripe and black breast, becomes an intense scarlet color. All of the fins acquire a yellow color, which is most intense in the paired fins and less intense in the dorsal, anal, and caudal fins. Females also develop most of these colors, though of lesser intensity (Skelton 2001, p. 121). Broadly rounded pectoral fins of males are easily discerned from the broadly pointed fins of females at any time during the year.

Laurel dace have been most often collected from pools or slow runs from undercut banks or beneath slab boulders, typically in first or second order, clear, cool (maximum temperature 26 °C or 78.8 °F) streams. Substrates in streams where laurel dace are found typically consist of a mixture of cobble, rubble, and boulders, and the streams tend to have a dense riparian zone consisting largely of mountain laurel (Skelton 2001, pp. 125–126).

Skelton (2001, p. 126) reported having collected nuptial individuals from late March until mid-June, though Call (pers. obs. 2004) observed males in waning nuptial color during surveys on July 22, 2004. Laurel dace may be a spawning nest associate where syntopic (sharing the same habitat) with nest-building minnow species, as has been documented in blackside dace (Starnes and Starnes 1981, p. 366). Soddy Creek is the only location in which Skelton (2001, p. 126) has collected a nest-building minnow with laurel dace. Skelton (2001, p. 126) reports finding as many as three year classes in some collections of laurel dace, though young-of-year fish are uncommon in collections. Observations of three year classes indicate that laurel dace live as long as 3 years.

Laurel dace preferred prey items include fly larvae, stonefly larvae, and caddisfly larvae (Skelton 2001, p. 126). Skelton observed that the morphological feeding traits of laurel dace, including large mouth, short digestive tract, reduced number of pharyngeal (located within the throat) teeth, and primitively shaped basioccipital bone (bone that articulates the vertebra), all of which are consistent with a diet consisting largely of animal material.

Laurel dace are known historically from seven streams on the Walden Ridge portion of the Cumberland Plateau, where drainages generally meander eastward before dropping abruptly down the plateau escarpment and draining into the Tennessee River. Specifically, these seven streams occur in three independent systems: Soddy Creek; three streams that are part of the Sale Creek system (the Horn and Laurel branch tributaries to Rock Creek, and the Cupp Creek tributary to Roaring Creek); and three streams that are part of the Piney River system (Young's, Moccasin, and Bumbee creeks). Strange and Skelton (2005, p. 8) assessed the genetic structure within populations of laurel dace and, based on distribution of genetic diversity among populations, they recognized two genetically distinct management units; (1) The southern populations in Sale and Soddy Creeks, and (2) the northern population in the Piney River system.

Skelton (2001, p. 126) considered collections by the Tennessee Valley

Authority (TVA) during a rotenone survey of Laurel Branch in 1976 to represent laurel dace that were misidentified as southern redbelly dace (*Chrosomus erythrogaster*), as was found to be true for specimens collected by TVA from Horn Branch in 1976, but no specimens are available for confirmation. In 1991, and in four other surveys (two in 1995, one in 1996, and one in 2004), laurel dace were not collected in Laurel Branch, leading Skelton to the conclusion that laurel dace have been extirpated from this stream (Skelton 1997, p. 13; Skelton 2001, p. 126; Skelton pers. comm. 2009). Skelton (pers. comm. 2009) also noted that the site was impacted by silt.

The current distribution of laurel dace comprises six of the seven streams that were historically occupied; the species is considered extirpated from Laurel Branch (see above). In these six streams, they are known to occupy reaches of approximately 0.3 to 8 km (0.2 to 5 mi) in length. The laurel dace is known from a single reach in Soddy Creek, and surveys in 2004 produced only a single, juvenile laurel dace (Strange and Skelton 2005, pp. 5–6 and Appendices 1 and 2). In Horn Branch, laurel dace are known from approximately 900 m (2,953 ft), but have become increasingly difficult to collect (Skelton 1997, pp. 13–14). Skelton (1997, p. 14) reports that minnow traps have been the most successful method for collecting live laurel dace from Horn Branch, as it is difficult to electroshock the fish due to in-stream rock formations and fallen trees. Only a single juvenile was caught in 2004 (Strange and Skelton 2005, p. 6). A total of 19 laurel dace were collected from Cupp Creek during 1995 and 1996 using an electroshocker (Skelton 1996, p. 14). However, Skelton found no laurel dace in this stream in 2004, despite attempts to collect throughout an approximately 700-m (2,297-ft) reach (Strange and Skelton 2005, p. 6).

Laurel dace were initially found in Young's, Moccasin, and Bumbee creeks in the Piney River system in 1996 (Skelton 1997, pp. 14–15). Sampling in 2004 led to the discovery of additional laurel dace localities in Young's and Moccasin creeks, but the locality where laurel dace were found in Young's Creek in 1996 was inaccessible due to the presence of a locked gate (Strange and Skelton 2005, p. 6–7). The new localities were in the headwaters of these two streams. Persistence of laurel dace at the Bumbee Creek locality was confirmed in 2004 by surveying from a nearby road using binoculars. Direct surveys were not possible because the land had been leased to a hunt club for which contact information was not available, and, therefore, survey permission could not be obtained (Strange and Skelton 2005, p. 7). Nuptial males are easily identified from other species present in Bumbee Creek due to their brilliant coloration during the breeding season, as the two lateral stripes, breast, and underside of head turn intensely black and the entire ventral (lower/abdominal) portion of the body, contiguous with the lower black stripe and black breast, becomes an intense scarlet color. This brilliant coloration is easily seen through binoculars at short distances by trained individuals.

No population estimates are available for laurel dace. However, based on trends observed in surveys and collections since 1991, Strange and Skelton (2005, p. 8) concluded that this species is persisting in Young's, Moccasin, and Bumbee creeks in the Piney River watershed, but is at risk of extirpation from the southern part of Walden Ridge in Soddy Creek, and in the Horn Branch and Cupp Creek areas that are tributaries to Sale Creek. As noted above, the species is considered to be extirpated from Laurel Branch, which is part of the Sale Creek system.

The laurel dace is ranked by the TDEC (2009, p. 60) as an S1G1 species: extremely rare in Tennessee, and critically imperiled globally. The laurel dace is designated as a Tier 1 GCN species in the Tennessee CWCS (TWRA 2005, pp. 44, 49).

Summary of Comments and Recommendations

In the proposed rule published on June 24, 2010, we requested that all interested parties submit written comments on the proposed rule to list the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace by August 23, 2010. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in newspapers covering all affected counties in Kentucky, Tennessee, Alabama, and Arkansas. We did not receive any requests for a public hearing.

During the comment period for the proposed rule, we received ten comment letters in response to the proposed rule: four from peer reviewers, one from a State agency, and five from organizations or individuals. All of the ten commenters supported the proposed rule to list these five fishes as endangered. All substantive information provided during the comment period has either been incorporated directly into this final determination or is addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from 12 knowledgeable individuals with scientific expertise that included familiarity with the 5 species and their habitats, biological needs, and threats. We received responses from four of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the listing of the five fishes. The peer reviewers generally concurred with our conclusions and provided additional information on taxonomic classification, life-history, and distribution; technical clarifications; and suggestions to improve the final rule. Peer reviewer comments are addressed in the ''Summary of Changes from Proposed Rule'' and incorporated into the final rule as appropriate.

Public Comments

(1) *Comment:* Two commenters stated that the laurel dace is threatened, particularly in Horn Branch, a tributary to the Rock Creek watershed, by timber harvest, rock harvest (collection of surface fieldstones), and coal mining of the Sewanee Coal Seam in Bledsoe and Rhea counties, Tennessee. These commenters recommended critical habitat designation in the Upper Rock Creek watershed of Bledsoe County, Tennessee, due to the threats that are imminent and of high magnitude in Horn Branch. The commenters are particularly concerned that mining of the Sewanee Coal Seem would result in acid mine drainage.

Our Response: We concur with these commenters that the laurel dace in Rock Creek watershed is threatened by timber harvest, rock harvest, and coal mining. We have incorporated further analyses regarding the threats of rock harvest and coal mining under ''Summary of Factors Affecting the Species'' for laurel dace. Further analysis with regard to critical habitat designation will be addressed in the upcoming critical habitat rule.

(2) *Comment:* One commenter stated that the Cumberland darter is threatened, particularly in Dan Branch, a tributary to the Lick Fork watershed, by degradation of water quality from mountaintop mining projects in Campbell and Claiborne counties, Tennessee. In addition to this general concern, the commenter was aware of selenium contamination within these same watersheds and feared that the

issuance of new permits would cause further degradation to fish and wildlife habitats in Campbell County.

Our Response: We concur with the commenter that mountaintop mining, and specifically selenium contamination, has the potential to degrade the water quality of Cumberland darter streams in Campbell and Claiborne counties, Tennessee. Streams associated with mountaintop mining and valley fills are characterized by increased conductivity, total dissolved solids, and concentrations of sulfate, bicarbonate ions, and metals such as manganese, iron, aluminum, and selenium. Increased levels of selenium have been shown to bioaccumulate in organisms, leading to deformities in larval fish and potentially harming birds that prey on fishes. The proposed rule provided a more detailed analysis of these and other water quality threats to the Cumberland darter under ''Summary of Factors Affecting the Species.''

Summary of Changes From Proposed Rule

As a result of the comments received during the public comment period (see above) we made the following changes to the final listing rule:

(1) We added taxonomic classification information to the species' background sections.

(2) We added life-history information to the Cumberland darter and chucky madtom background sections.

(3) We updated the distributional information for the rush darter in Alabama.

(4) We changed the genus of laurel dace from *Phoxinus* to *Chrosomus* to reflect recent taxonomic changes (Strange and Mayden 2009).

(5) We updated population estimate and threats *information for the* yellowcheek darter in Arkansas.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The primary threat to the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace is physical habitat destruction or modification resulting from a variety of human-induced impacts such as siltation, disturbance of riparian corridors, and changes in channel morphology (Waters 1995, pp. 2–3; Skelton 1997, pp. 17, 19; Thomas 2007, p. 5). The most significant of these impacts is siltation (excess sediments suspended or deposited in a stream) caused by excessive releases of sediment from activities such as resource extraction (*e.g.,* coal mining, silviculture, natural gas development), agriculture, road construction, and urban development (Waters 1995, pp. 2–3; Kentucky Division of Water (KDOW) 2006, pp. 178–185; Skelton 1997, pp. 17, 19; Thomas 2007, p. 5).

Land use practices that affect sediment and water discharges into a stream can also increase the erosion or sedimentation pattern of the stream, which can lead to the destruction or modification of in-stream habitat and riparian vegetation, stream bank collapse, and increased water turbidity and temperature. Sediment has been shown to abrade and suffocate bottom-dwelling fish and other organisms by clogging gills; reduce aquatic insect diversity and abundance; impair fish feeding behavior by altering prey base and reducing visibility of prey; impair reproduction due to burial of nests; and, ultimately, negatively impact fish growth, survival, and reproduction (Waters 1995, pp. 5–7, 55–62; Knight and Welch 2001, pp. 134–136). Wood and Armitage (1997, pp. 211–212) identified at least five impacts of sedimentation on fish, including (1) reduction of growth rate, disease tolerance, and gill function; (2) reduction of spawning habitat and egg, larvae, and juvenile development; (3) modification of migration patterns; (4) reduction of food availability through the blockage of primary production; and (5) reduction of foraging efficiency. The effects of these types of threats will likely increase as development increases in these watersheds.

Non-point source pollution from land surface runoff can originate from virtually any land use activity and may be correlated with impervious surfaces and storm water runoff. Pollutants may include sediments, fertilizers, herbicides, pesticides, animal wastes, septic tank and gray water leakage, pharmaceuticals, and petroleum products. These pollutants tend to increase concentrations of nutrients and toxins in the water and alter the chemistry of affected streams such that the habitat and food sources for species like the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace are negatively impacted. Construction and road maintenance activities associated with urban development typically involve earth-moving activities that increase sediment loads into nearby streams. Other siltation sources, including timber harvesting, natural gas development activities, clearing of riparian vegetation, mining, and agricultural practices, allow exposed earth to enter streams during or after precipitation events. These activities result in canopy removal, elevated stream temperatures, and increased siltation, thereby degrading habitats used by fishes for both feeding and reproduction (Mattingly *et al.* 2005, p. 5). Undisturbed riparian corridors are important because they prevent elevated stream temperatures due to solar heating, serve as buffers against non-point source pollutants, provide submerged root materials for cover and feeding, and help to stabilize stream banks (Mattingly *et al.* 2005, p. 5).

Cumberland Darter

The Cumberland darter's preferred habitat characteristics (*i.e.,* low- to moderate-gradient, low current velocity, backwater nature) make it extremely susceptible to the effects of siltation (O'Bara 1991, p. 11). Sediment (siltation) has been listed repeatedly by KDOW as the most common stressor of aquatic communities in the upper Cumberland River basin (KDOW 1996, pp. 50–53, 71–75; KDOW 2002, pp. 39–40; KDOW 2006, pp. 178–185). The primary source of sediment was identified as resource extraction (*e.g.,* coal mining, logging). The streams within the Cumberland darter's current range that are identified as impaired (due to siltation from mining, logging, and agricultural activities) and have been included on Kentucky's 303(d) list of impaired waters (KDOW 2007, pp. 155–166) include Jenneys Branch (Indian Creek basin), an unnamed tributary of Jenneys Branch (Indian Creek basin), Ryans Creek (Jellico Creek basin), Marsh Creek, and Wolf Creek (Clear Fork basin).

Siltation can also occur in the Cumberland darter's known habitat as a

result of construction activities for human development. For example, during the fall of 2007, an 8.4-km (5.2-mi) reach of Barren Fork in McCreary County, Kentucky, was subjected to a severe sedimentation event (Floyd pers. obs. 2008). This event occurred despite the fact that approximately 95 percent of the Barren Fork watershed is under Federal ownership within the Daniel Boone National Forest (DBNF). Construction activities associated with the development of a 40.5-hectare (100-acre) park site caused excessive sedimentation of two unnamed headwater tributaries of Barren Fork. Successive, large rainfall events in September and October carried sediment offsite and impacted downstream areas of Barren Fork known to support Cumberland darters and the Federally threatened blackside dace. Our initial site visit on September 7, 2007, confirmed that sediment had been carried offsite, resulting in significant habitat degradation in the Barren Fork mainstem and ''adverse effects'' on the blackside dace. Several smaller sediment events have occurred despite Federal and State attempts to resolve the issue, and on July 31, 2008, another large rainfall event resulted in excessive sedimentation in two Barren Fork watershed streams.

Another significant threat to the Cumberland darter is water quality degradation caused by a variety of non-point source pollutants. Coal mining represents a major source of these pollutants (O'Bara 1991, p. 11; Thomas 2007, p. 5), because it has the potential to contribute high concentrations of dissolved metals and other solids that lower stream pH or lead to elevated levels of stream conductivity (Pond 2004, pp. 6–7, 38–41; Mattingly et al. 2005, p. 59). These impacts have been shown to negatively affect fish species, including listed species, in the Clear Fork system of the Cumberland basin (Weaver 1997, pp. 29; Hartowicz pers. comm. 2008). The direct effect of elevated stream conductivity on fishes, including the Cumberland darter, is poorly understood, but some species, such as blackside dace, have shown declines in abundance over time as conductivity increased in streams affected by mining (Hartowicz pers. comm. 2008). Studies indicate that blackside dace are generally absent when conductivity values exceed 240 microSiemens (µS) (Mattingly *et al.* 2005, p. 59; Black and Mattingly 2007, p. 12).

Other non-point source pollutants that affect the Cumberland darter include domestic sewage (through septic tank leakage or straight pipe discharges); agricultural pollutants such as fertilizers, pesticides, herbicides, and animal waste; and other chemicals associated with oil and gas development. Non-point source pollutants can cause excess nutrification (increased levels of nitrogen and phosphorus), excessive algal growth, instream oxygen deficiencies, increased acidity and conductivity, and other changes in water chemistry that can seriously impact aquatic species (KDOW 1996, pp. 48–50; KDOW 2006, pp. 70–73).

In summary, habitat loss and modification represent significant threats to the Cumberland darter. Severe degradation from sedimentation, physical habitat disturbance, and contaminants threatens the habitat and water quality on which the Cumberland darter depends. Sedimentation from coal mining, logging, agriculture, and development sites within the upper Cumberland basin negatively affect the Cumberland darter by reducing growth rates, disease tolerance, and gill function; reducing spawning habitat, reproductive success, and egg, larvae, and juvenile development; modifying migration patterns; reducing food availability through reductions in prey; and reducing foraging efficiency. Contaminants associated with coal mining (metals, other dissolved solids), domestic sewage (bacteria, nutrients), and agriculture (fertilizers, pesticides, herbicides, and animal waste) cause degradation of water quality and habitats through increased acidity and conductivity, instream oxygen deficiencies, excess nutrification, and excessive algal growths. Furthermore, these threats faced by the Cumberland darter from sources of sedimentation and contaminants are imminent, the result of ongoing projects that are expected to continue indefinitely. As a result of the imminence of these threats combined with the vulnerability of the remaining small populations to extirpation from natural and manmade threats, we have determined that the present or threatened destruction, modification, or curtailment of the Cumberland darter habitat and range represents a significant threat of high magnitude. We have no information indicating that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

Rush Darter

Sediment is the most abundant pollutant in the Mobile River Basin (Alabama Department of Environmental Management 1996, pp. 14–15) and a major threat to the rush darter. Within the Clear Creek drainage, Johnston and Kleiner (2001, p. 4) reported that, during August 2001, the dominant land use adjacent to Doe Branch and Mill Creek appeared to be forests, and that there were no obvious threats to water quality. However, Johnston and Kleiner (2001, p. 4) reported that clearcutting in the Wildcat Branch watershed may have increased sedimentation into the stream. Approximately 84 percent (i.e., 5 km or 3 mi) of Wildcat Branch is privately owned, and recent land exchanges within the Bankhead National Forest have taken about 0.9 km (0.6 mi) of stream west of Clear Creek out of U.S. Forest Service (USFS) management and protection. In 2001, Service and USFS personnel noted heavy siltation at the County Road 329 Bridge over Doe Branch and at several other road crossings in other tributary streams in the immediate area during a modest spring rain event. Sediment in area streams is also the result of increased erosion from the scouring of roadside ditches, and erosion of the gravel County Road 329 itself adjacent to Doe and Wildcat branches (Drennen pers. obs. 2005).

Blanco (2001, p. 68) identified siltation from development projects as the greatest threat to the fauna of Turkey Creek. New subdivisions have been developed throughout the watershed, increasing the amount of impervious surfaces in the recharge areas of springs. The increase in impervious surfaces is leading to increased stormwater runoff and is reducing the amount of recharge (water storage) available to the aquifers that feed springs in the watershed. These flow alterations reduce the amount and complexity of rush darter habitat by eroding stream banks, destabilizing substrates and aquatic vegetation, and decreasing overall water quality.

There are four major soil types that occur within the Turkey Creek watershed, and all are considered highly erodible due to the steep topography (Spivey 1982, pp. 5, 7, 8, 14). Therefore, any activity that removes native vegetation on these soils can be expected to lead to increased sediment loads in Turkey Creek watershed (USFWS 2001, p. 59370), including the areas near Penny and Tapawingo Springs. Industrialization is extensive and expanding throughout the watershed, particularly near the type locality for the rush darter (Bart and Taylor 1999, p. 33; Drennen pers. obs. 2007–2010).

Point source siltation has impacted the Turkey Creek watershed, including an abundance of sites affecting Beaver Creek, a major tributary to Turkey

Creek. These sites are impaired by bridge, road, and sewer line construction; industrialized areas; road maintenance; and storm water mismanagement (Drennen pers. obs. 1999, 2004–2010). Rapid urbanization in this area renders this population extremely vulnerable during the breeding season when rush darters concentrate in wetland pools and shallow pools with aquatic vegetation in headwater streams (Stiles and Mills 2008, p. 5; Fluker *et al.* 2007, p. 10).

Springs throughout the rush darter's range, especially in Pinson Valley, flush and dilute sediments and excessive nutrients from streams by providing a constant flow of cool, clean water. However, the ongoing destruction of spring heads and wetlands throughout the species' range has significantly reduced the species' movement and colonization. Little Cove Creek and Bristow Creek spring heads have been channelized, and the head of Cove Spring has a pumping facility built on it (Fluker *et al.* 2007, p. 1). Channelization and groundwater withdrawals from spring heads might do more to impact water quality in these systems than overall spring drainage disturbances such as beaver dam construction, and road maintenance (Drennen per. obs. 2005). Alteration of spring head habitats has reduced water quality and increased sediment loads into spring-fed tributary streams throughout the range of the rush darter.

In summary, threats to rush darter include stormwater runoff and siltation, caused by an increase in urbanization and impervious surfaces in the watershed. Other threats include spring head alteration, roadside maintenance, and logging. These threats are ongoing and thus considered imminent. The magnitude of the threats is high due to the small population sizes and high levels of alterations and destruction of the springs and streams. We have no information indicating that the magnitude or imminence of these threats is likely to be appreciably reduced in the foreseeable future.

Yellowcheek Darter

Robison and Harp (1981, p. 17), McDaniel (1984, p. 92), and Robison and Buchanan (1988, p. 429) have attributed the decline in populations of yellowcheek darters in the four forks of the Little Red River and the mainstem Little Red River to habitat alteration and degradation. The suspected primary cause of the species' decline is the impoundment of the Little Red River and lower reaches of the Devils, Middle, and South Forks, areas that in the past provided optimal habitat for this species. The creation of Greers Ferry Lake, in 1962, converted optimal yellowcheek darter habitat (clear, cool, perennial flow with large substrate particle size (Robison and Buchanan 1988, p. 429)), to a deep, standing water environment. This dramatic change in habitat flooded spawning sites and changed chemical and physical characteristics in the streams that provide habitat for the species. Impoundments profoundly alter channel characteristics, habitat availability, and flow regime with serious consequences for biota (Allan and Flecker 1993, p. 36, Ward and Stanford 1995, pp. 105–119). Some of these include converting flowing to still waters, increasing depths and sedimentation, decreasing dissolved oxygen, drastically altering resident fish populations (Neves *et al.* 1997, p. 63), disrupting fish migration, and destroying spawning habitat (Ligon *et al.* 1995, pp. 185–86). Channelization of the lower 5.6 km (3.5 miles) of Archey and South Forks in 1985 and subsequent, and ongoing, channel maintenance by the U.S. Army Corps of Engineers (USACE) and City of Clinton, Arkansas, degraded habitat in this reach as well as segments upstream of the project area. Based upon current knowledge and a 2004–2005 threats assessment (Davidson and Wine 2004, pp. 6–13; Davidson 2005, pp. 1–4), gravel mining, unrestricted cattle access into streams, water withdrawal for agricultural and recreational purposes (i.e., golf courses), lack of adequate riparian buffers, construction and maintenance of county roads, and non-point source pollution arising from a broad array of activities also appear to be degrading suitable habitat for the species. The threats assessment documented occurrences of the aforementioned activities and found 52 sites on the Middle Fork, 28 sites on the South Fork, 8 sites on Archey Fork (Davidson 2005, pp. 1–4), and 1 site in the Turkey/Beech/Devils Fork system that are adversely affected by these activities and are likely contributors to the decline of the species.

Ozark headwater streams typically exhibit seasonal fluctuations in flows, with flow rates highest in spring and lowest in late summer and fall. The upper reaches of these small streams are most affected by seasonally fluctuating water levels (Robison and Harp 1981, p. 17). As a result, they often lack consistent and adequate flows, and by late summer or fall are reduced to a series of isolated pools (Wine pers. comm. 2008). Expanding natural gas development activities that began in the upper Little Red River watershed in 2006 require large quantities of water (both surface water and groundwater) and pose an imminent threat to the continued existence of yellowcheek darter as these activities rapidly expand and increase in the watersheds of all four forks (Davidson pers. comm. 2008). Because the yellowcheek darter requires permanent flows with moderate to strong current (Robison and Buchanan 1988, p. 429), and because downstream refugia have been lost to impoundments and channelization, water withdraws that exacerbate seasonal stream reductions and reduce moving water (lotic) habitat are a serious threat.

Additional threats to the yellowcheek darter include habitat degradation from land use activities in the watershed, including agriculture and forestry. Traditional farming practices, feedlot operations, and associated poor land use practices contribute many pollutants to rivers. Neves *et al.* (1997, p. 65) suggest that agriculture affects 72 percent of impaired river reaches in the United States. Nutrients, bacteria, pesticides, and other organic compounds generally are found in higher concentrations in agricultural areas than forested areas. Nutrient concentrations in streams may result in increased algal growth in streams, and a related alteration in fish community composition (Petersen *et al.* 1999, p. 16). Major agricultural activities within the Little Red River watershed include poultry, dairy, swine, and beef cattle operations.

The Arkansas Natural Resources Conservation Service (NRCS) has identified animal wastes, nutrients, excessive erosion, loss of plant diversity, and loss of species as water quality concerns associated with agricultural land use activities in the upper Little Red River watershed (NRCS 1999). Large poultry and dairy operations increase nutrient inputs to streams when producers apply animal waste to pastures to stimulate vegetation growth for grazing and hay production. Continuous grazing methods in the watershed allow unrestricted animal access to grazing areas, and on steeper slopes this results in increased runoff and erosion (NRCS 1999). Since pastures often extend directly to the edge of the stream, and lack a riparian zone with native vegetation, runoff from pastures carries pollutants directly into streams. Eroding stream banks also result in alterations to stream hydrology and geomorphology, degrading habitat. Livestock spend a disproportionate amount of time in riparian areas during hot summer months. Trampling and grazing can change and reduce vegetation and eliminate riparian areas

by channel widening, channel aggradation, or lowering of the water table (Armour *et al.* 1991, pp. 7–11).

Additionally, earthen dams were constructed across a riffle in the lower South Fork to create a pool for annual chuckwagon races for many years leading up to 2003. The Service and U.S. Army Corps of Engineers met with the responsible landowner in 2004 and suggested an alternative to dam construction that would minimize impacts to the yellowcheek darter. These recommendations were followed for several years; however, another earthen dam was constructed in 2008 using material from the South Fork to facilitate events associated with the annual chuckwagon races. This dam, like its predecessors, was unpermitted and resulted in habitat degradation and alteration for several miles upstream and downstream of the site.

The chuckwagon race event draws approximately 20,000 to 30,000 people per year to the South Fork Little Red River for a 1-week period around Labor Day. Horses and wagons traverse the river and its tributaries for miles leading to increased habitat disturbance, sedimentation, and trampling. The chuckwagon races continue to grow annually and pose a threat to the continued existence of yellowcheek darters in the South Fork Little Red River.

Timber harvesting activities involving clear-cutting entire steep hillsides were observed during 1999–2000 in the Devils Fork watershed (Wine pers. comm. 2008). The failure to implement voluntary State best management practices (BMPs) for intermittent and perennial streams during timber harvests has resulted in water quality degradation and habitat alteration in stream reaches adjacent to harvesting operations. When timber harvests involve clear cutting to the water's edge, without leaving a riparian buffer, silt and sediment enter streams lying at the bottom of steep slopes. The lack of streamside vegetation also promotes bank erosion that alters stream courses and introduces large quantities of sediment into the channel (Allan 1995, p. 321). Timber harvest operations that use roads on steep slopes to transport timber can carry silt and sediment from the road into the stream at the bottom of the slope. Logging impacts on sediment production are considerable, but often erosion of access and haul roads produces more sediment than the land harvested for timber (Brim Box and Mossa 1999, p. 102). These activities have occurred historically and continue to occur in the upper Little Red River watershed.

Natural gas exploration and development is a newly emerging threat to yellowcheek darter populations. Erosion and sedimentation issues associated with natural gas development activities, particularly pipelines (herein defined as all flow lines, gathering lines, and non-interstate pipelines), were first documented by Service biologists during 2007 in the South Fork Little Red River watershed. In June 2008, the Service began documenting significant erosion and sedimentation issues associated with natural gas pipeline construction and maintenance as natural gas development activities expanded into the watershed. Service biologists documented erosion and sedimentation at almost every new pipeline stream crossing in the South Fork and Middle Fork Little Red River watersheds, regardless of the diameter of the pipe. Channel incision was documented at numerous stream crossings that are tributaries to the South Fork Little Red River. The incision increased erosion and sedimentation, as well as altering the hydrology and geomorphology characteristics of the streams. Pipeline rights-of-way were found to have one of the following conditions: (1) No BMPs (*i.e.,* silt fences, grade breaks, non-erodible stream crossing materials) installed to prevent erosion and sedimentation; (2) ineffective erosion minimization practices in place; (3) effective erosion minimization practices that had not been maintained and, thus, had become ineffective; or (4) final reclamation of the pipeline right-of-way had not occurred for months and in some cases greater than a year after construction activities ceased, leading to prolonged periods of erosion and sedimentation. The magnitude of the impacts to the South Fork and Middle Fork Little Red River from 2007–2008 also was exacerbated due to above-average rainfall, which led to more frequent and larger pipeline erosion events.

In summary, threats to the yellowcheek darter from the present destruction, modification, or curtailment of its habitat or range negatively impact the species. Threats include such activities as impoundment, sedimentation, poor livestock grazing practices, improper timber harvest practices, nutrient enrichment, gravel mining, channelization/channel instability, and natural gas development. These threats are considered imminent and of high magnitude throughout the species' entire range. We have no information indicating that the magnitude or imminence of these threats is likely to be appreciably reduced in the foreseeable future, and in the case of pipeline disturbance, we expect this threat to become more problematic over the next several years as natural gas development continues to intensify.

Chucky Madtom

The current range of the chucky madtom is believed to be restricted to an approximately 1.8-mi (3-km) reach of Little Chucky Creek in Greene County, Tennessee. Land use data from the Southeast GAP Analysis Program (SE–GAP) show that land use within the Little Chucky Creek watershed is predominantly agricultural, with the vast majority of agricultural land being devoted to production of livestock and their forage base (Jones *et al.* 2000).

Traditional farming practices, feedlot operations, and associated land use practices contribute many pollutants to rivers. Neves *et al.* (1997, p. 65) suggest that agriculture affects 72 percent of impaired river reaches in the United States. These practices erode stream banks and result in alterations to stream hydrology and geomorphology, degrading habitat. Nutrients, bacteria, pesticides, and other organic compounds generally are found in higher concentrations in agricultural areas than forested areas. Nutrient concentrations in streams may result in increased algal growth in streams, and a related alteration in fish community composition (Petersen *et al.* 1999, p. 16).

The TVA Index of Biological Integrity results indicate that Little Chucky Creek is biologically impaired (Middle Nolichucky Watershed Alliance 2006, p. 13). Given the predominantly agricultural land use within the Little Chucky Creek watershed, non-point source sediment and agrochemical discharges may pose a threat to the chucky madtom by altering the physical characteristics of its habitat, thus potentially impeding its ability to feed, seek shelter from predators, and successfully reproduce. The Little Chucky Creek watershed also contains a portion of the City of Greeneville, providing an additional source for input of sediments and contaminants into the creek and threatening the chucky madtom. Wood and Armitage (1997, pp. 211–212) identify at least five impacts of sedimentation on fish, including (1) reduction of growth rate, disease tolerance, and gill function; (2) reduction of spawning habitat and egg, larvae, and juvenile development; (3) modification of migration patterns; (4) reduction of food availability through

the blockage of primary production; and (5) reduction of foraging efficiency.

The chucky madtom is a bottom-dwelling species. Bottom-dwelling fish species are especially susceptible to sedimentation and other pollutants that degrade or eliminate habitat and food sources (Berkman and Rabeni 1987, pp. 290–292; Richter *et al.* 1997, p. 1091; Waters 1995, p. 72). Etnier and Jenkins (1980, p. 20) suggested that madtoms, which are heavily dependent on chemoreception (detection of chemicals) for survival, are susceptible to human-induced disturbances, such as chemical and sediment inputs, because the olfactory (sense of smell) ''noise'' they produce could interfere with a madtom's ability to obtain food and otherwise monitor its environment.

In summary, threats to the chucky madtom from the present destruction, modification, or curtailment of its habitat or range negatively impact the species. Degradation from sedimentation, physical habitat disturbance, and contaminants threaten the habitat and water quality on which the chucky madtom depends. Sedimentation from agricultural lands could negatively affect the chucky madtom by reducing growth rates, disease tolerance, and gill function; reducing spawning habitat, reproductive success, and egg, larvae, and juvenile development; reducing food availability through reductions in prey; and reducing foraging efficiency. Contaminants associated with agriculture (e.g., fertilizers, pesticides, herbicides, and animal waste) can cause degradation of water quality and habitats through instream oxygen deficiencies, excess nutrification, and excessive algal growths. Furthermore, these threats faced by the chucky madtom from sources of sedimentation and contaminants are imminent; the result of ongoing agricultural practices that are expected to continue indefinitely. As a result of the imminence of these threats combined with the vulnerability of the remaining small population to extirpation from natural and manmade threats, we have determined that the present or threatened destruction, modification, or curtailment of the chucky madtom habitat and range represents a significant threat of high magnitude. We have no information indicating that the magnitude or imminence of these threats is likely to be appreciably reduced in the foreseeable future.

Laurel Dace

Skelton (2001, p. 127) concluded that the laurel dace is ''presumably tolerant of some siltation.'' However, Strange and Skelton (2005, p. 7 and Appendix 2) observed levels of siltation they considered problematic during later surveys for the laurel dace and concluded this posed a threat in several localities throughout the range of the species. Sediment has been shown to abrade and or suffocate bottom-dwelling fish and other organisms by clogging gills; reducing aquatic insect diversity and abundance; impairing fish feeding behavior by altering prey base and reducing visibility of prey; impairing reproduction due to burial of nests; and, ultimately, negatively impacting fish growth, survival, and reproduction (Waters 1995, pp. 5–7, 55–62; Knight and Welch 2001, pp. 134–136). However, we do not currently know what levels of siltation laurel dace are able to withstand before populations begin to decline due to these siltation-related stressors. The apparent stability of the northern population of laurel dace in the Piney River system suggests that this species is at least moderately tolerant of siltation-related stressors. We do not know the extent to which other factors might have driven the decline of the southern populations in Sale and Soddy Creeks.

Of the streams inhabited by the southern populations recognized by Strange and Skelton (2005, p. Appendix 2), the reaches from which laurel dace have been collected in Soddy Creek and Horn Branch approach 1 km (0.6 mi) in length. In Cupp Creek, collections of this species are restricted to less than 300 m (984 ft) of stream, in spite of surveys well beyond the reach known to be inhabited. In each of the streams occupied by the southern populations, Strange and Skelton (2005, Appendix 2) identified siltation as a factor that could alter the habitat and render it unsuitable for laurel dace. The restricted distribution of laurel dace in streams inhabited by the southern populations leaves them highly vulnerable to potential deleterious effects of excessive siltation or other localized disturbances.

A newly emerging threat to laurel dace in Soddy Creek is the conversion of silvicultural lands to row crop agriculture. Two large pine plantations within the Soddy Creek Watershed were harvested and then converted to tomato farms. An irrigation impoundment was built on one Soddy Creek tributary and another is under construction. As a result of these activities, a large silt source was introduced into the Soddy Creek headwaters. In addition to contributing sediment, crop fields often allow runoff from irrigation water to flow directly into the creek. This water contains fungicides, herbicides, and fertilizers (Thurman pers. comm. 2010).

Strange and Skelton (2005, p. 7 and Appendix 2) identified siltation as a threat in all of the occupied Piney River tributaries (Young's, Moccasin, and Bumbee Creeks). The Bumbee Creek type locality for the laurel dace is located within industrial forest that has been subjected to extensive clear-cutting and road construction in close proximity to the stream. Strange and Skelton (2005, p. 7) noted a heavy sediment load at this locality and commented that conditions in Bumbee Creek in 2005 had deteriorated since the site was visited by Skelton in 2002. Strange and Skelton (2005, pp. 7 and 8 and Appendix 2) also commented on excessive siltation in localities they sampled on Young's and Moccasin Creeks, and observed localized removal of riparian vegetation around residences in the headwaters of each of these streams. They considered the removal of riparian vegetation problematic not only for the potential for increased siltation, but also for the potential thermal alteration of these small headwater streams. Skelton (2001, p. 125) reported that laurel dace occupy cool streams with a maximum recorded temperature of 26 °C (78.8 °F). The removal of riparian vegetation could potentially increase temperatures above the laurel dace's maximum tolerable limit.

Water temperature may be a limiting factor in the distribution of this species (Skelton 1997, pp. 17, 19). Canopy cover of laurel dace streams often consists of eastern hemlock (Tsuga canadensis), mixed hardwoods, pines (*Pinus* spp.), and mountain laurel (Kalmia latifolia). The hemlock woolly adelgid (*Adelges tsugae*) is a nonnative insect that infests hemlocks, causing damage or death to trees. The woolly adelgid was recently found in Hamilton County, Tennessee, and could impact eastern hemlock in floodplains and riparian buffers along laurel dace streams in the future (Simmons pers. comm. 2008). Riparian buffers filter sediment and nutrients from overland runoff, allow water to soak into the ground, protect stream banks, and provide shade for streams (Waters 1995, p. 149–152). Because eastern hemlock is primarily found in riparian areas, the loss of this species adjacent to laurel dace streams would be detrimental to fish habitat.

Habitat destruction and modification also stem from existing or proposed infrastructure development in association with silvicultural activities. The presence of culverts at one or more road crossings in most of the streams inhabited by laurel dace may disrupt upstream dispersal within those systems (Chance pers. obs. 2008). Such dispersal barriers could prevent re-establishment

of laurel dace populations in reaches where they suffer localized extinctions due to natural or human-caused events.

In summary, the primary threat to laurel dace throughout its range is excessive siltation resulting from agriculture and extensive silviculture involving both inadequate riparian buffers in harvest areas and the failure to use BMPs during road construction. Severe degradation from sedimentation, physical habitat disturbance, and contaminants threatens the habitat and water quality on which the laurel dace depends. Sedimentation negatively affects species (such as the laurel dace) by reducing growth rates, disease tolerance, and gill function; reducing spawning habitat, reproductive success, and egg, larvae, and juvenile development; reducing food availability through reductions in prey; and reducing foraging efficiency (Waters 1995, pp. 5–7; 55–62; Wood and Armitage 1997, pp. 211–212; Knight and Welch 2001, pp. 134–136). These threats faced by the laurel dace from sources of sedimentation and contaminants are imminent, the result of ongoing agricultural and silvicultural practices that are expected to continue. Since the identified threats substantially affect survival, growth, reproduction, and feeding, we have determined that the present or threatened destruction, modification, or curtailment of the laurel dace habitat and range represents a significant threat of high magnitude. We have no information indicating that the magnitude or imminence of these threats is likely to be appreciably reduced in the foreseeable future.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace are not commercially utilized. Individuals have been taken for scientific and private collections in the past, but collecting is not considered a factor in the decline of these species and is not expected to be so in the future. The available information does not indicate that overutilization is likely to become a threat to any of these five fishes in the foreseeable future.

C. Disease or Predation

Disease is not considered to be a factor in the decline of the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, or laurel dace. Although the Cumberland darter, rush darter, yellowcheek darter, and laurel dace are undoubtedly consumed by predators, the available information suggests that this predation is naturally occurring, or a normal aspect of the population dynamics. As a result, we do not believe that predation is considered to currently pose a threat to these species. Furthermore, the information we do have does not indicate that disease or predation is likely to become a threat to any of these five fishes in the foreseeable future.

D. The Inadequacy of Existing Regulatory Mechanisms

Cumberland Darter

The Cumberland darter and its habitats are afforded some protection from water quality and habitat degradation under the Clean Water Act of 1977 (33 U.S.C. 1251 *et seq.*), Kentucky's Forest Conservation Act of 1998 (KRS 149.330–355), Kentucky's Agriculture Water Quality Act of 1994 (KRS 224.71–140), additional Kentucky laws and regulations regarding natural resources and environmental protection (KRS 146.200–360; KRS 224; 401 KAR 5:026, 5:031), and Tennessee's Water Quality Control Act of 1977 (TWQCA; T.C.A. 69–3–101). However, as demonstrated under Factor A, population declines and degradation of habitat for this species are ongoing despite the protection afforded by these laws and corresponding regulations. While these laws have resulted in some improvements in water quality and stream habitat for aquatic life, including the Cumberland darter, they alone have not been adequate to fully protect this species; sedimentation and non-point source pollutants continue to be a significant problem.

States maintain water-use classifications through issuance of National Pollutant Discharge Elimination System (NPDES) permits to industries, municipalities, and others. NPDES permits set maximum limits on certain pollutants or pollutant parameters. For water bodies on the 303(d) list, States are required under the Clean Water Act to establish a total maximum daily load (TMDL) for the pollutants of concern that will bring water quality into the applicable standard. Three Cumberland darter streams, Jenneys Branch, Marsh Creek, and Wolf Creek, have been identified as impaired by the KDOW and placed on the State's 303(d) list (KDOW 2008). Causes of impairment were listed as siltation/sedimentation from agriculture, coal mining, land development, and silviculture and organic enrichment/eutrophication from residential areas. TMDLs have not yet been developed for these pollutants.

The Cumberland darter has been designated as an endangered species by Tennessee (TWRA 2005, p. 240) and Kentucky (KSNPC 2005, p. 11), but the designation in Kentucky conveys no legal protection. Under the Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974 (Tennessee Code Annotated §§ 70–8–101–112), ''[I]t is unlawful for any person to take, attempt to take, possess, transport, export, process, sell or offer for sale or ship nongame wildlife, or for any common or contract carrier knowingly to transport or receive for shipment nongame wildlife.'' Further, regulations included in the Tennessee Wildlife Resources Commission Proclamation 00–15 Endangered Or Threatened Species state the following: ''Except as provided for in Tennessee Code Annotated, Section 70–8–106 (d) and (e), it shall be unlawful for any person to take, harass, or destroy wildlife listed as threatened or endangered or otherwise to violate terms of Section 70–8–105 (c) or to destroy knowingly the habitat of such species without due consideration of alternatives for the welfare of the species listed in (1) of this proclamation, or (2) the United States list of Endangered fauna.'' Under these regulations, potential collectors of this species are required to have a State collection permit, therefore protecting against potential threats under Factor B. However, in terms of project management, and potential habitat disturbance, this regulation only provides for the consideration of alternatives, and does not require the level of project review afforded by the Act.

In 7 of 12 streams where the Cumberland darter still occurs, the species receives incidental protection under the Act due to the coexistence of the Federally threatened blackside dace. These streams are in watersheds that are at least partially owned by the Federal Government (*i.e.,* DBNF). The five remaining streams supporting populations of the Cumberland darter are not afforded this protection.

In summary, population declines and degradation of habitat for the Cumberland darter are ongoing despite the protection afforded by State and Federal laws and corresponding regulations. Because of the vulnerability of the small remaining populations of the Cumberland darter and the imminence of these threats, we find the inadequacy of existing regulatory mechanisms to be a significant threat of high magnitude. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be

appreciably reduced in the foreseeable future.

Rush Darter

The rush darter and its habitats are afforded some protection from water quality and habitat degradation under the Clean Water Act and the Alabama Water Pollution Control Act, as amended, 1975 (Code of Alabama, §§ 22–22–1 to 22–22–14). However, as demonstrated under Factor A, population declines and degradation of habitat for this species are ongoing despite the protection afforded by these laws. While these laws have resulted in some improvement in water quality and stream habitat for aquatic life, including the rush darter, they alone have not been adequate to fully protect this species; stormwater mismanagement, sedimentation, and non-point source pollutants continue to be a significant problem. In addition, these laws have not adequately addressed water quantity issues that are a problem throughout the range of the species. Sediment is the most abundant pollutant in the Mobile River Basin and is among the greatest threats to the rush darter.

The State of Alabama maintains water-use classifications through issuance of NPDES permits to industries, municipalities, and others that set maximum limits on certain pollutants or pollutant parameters. For water bodies on the 303(d) list, States are required under the Clean Water Act to establish a TMDL for the pollutants of concern that will bring water quality into the applicable standard. The State of Alabama has not identified any impaired water bodies in Jefferson, Winston, and Etowah counties in the immediate or upstream portion of the rush darter range or in any watersheds in Winston or Etowah counties. However, sedimentation events are usually related to stormwater runoff episodes, and are usually not captured by routine water quality sampling.

Although stormwater events are temporary in nature, they are still harmful to aquatic species. The size and frequency of floods and stormwater events increases with urbanization (Konrad 2003, pp. 1–4). Stormwater events in urban areas decrease the storage capacity for water in urban basins compared to rural basins; and urbanization promotes more rapid runoff, higher peak discharge rates, and total volume of water (Konrad 2003, pp. 1–4). Not only does urbanization and associated runoff change the physical aspects of water resources, but also the chemical and biological conditions of waterways (AMEC Earth and Environmental 2001, p. 1). Jefferson County, Alabama (2005, pp. 2, 39) has noted that the expansion of impervious surfaces in the Turkey Creek Drainage Basin caused an increase in flood heights and water velocity during stormwater events. Due to these observations, the Storm Water Management Authority and Jefferson County Department of Health (2010, pp. 4–9) are tracking and monitoring construction and maintenance sites that impact stormwater management within the Turkey Creek and City of Pinson area. As demonstrated under Factor A, flow alterations associated with stormwater runoff reduce the amount and complexity of rush darter habitat by eroding stream banks, destabilizing substrates and aquatic vegetation, and decreasing overall water quality.

In summary, population declines and degradation of habitat for the rush darter are ongoing despite the protection afforded by State and Federal laws and corresponding regulations. Despite these laws, sedimentation, flow alterations, and non-point source pollution continue to adversely affect the species. Because of the vulnerability of the small remaining populations of the rush darter and the imminence of these threats, we find the inadequacy of existing regulatory mechanisms to be a significant threat of high magnitude. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

Yellowcheek Darter

The Arkansas Department of Environmental Quality (ADEQ) has established water quality standards for surface waters in Arkansas, including specific standards for those streams designated as ''extraordinary resource waters'' (ERW) based on ''a combination of the chemical, physical, and biological characteristics of a waterbody and its watershed, which is characterized by scenic beauty, aesthetics, scientific values, broad scope recreation potential, and intangible social values'' (ADEQ Regulation 2, November 25, 2007). As described in ADEQ's Regulation 2, Section 2.203, ERW ''shall be protected by (1) water quality controls, (2) maintenance of natural flow regime, (3) protection of in stream habitat, and (4) pursuit of land management protective of the watershed.'' This regulatory mechanism has precluded most large-scale commercial gravel mining in the Little Red River watershed; however, illegal gravel mining is still considered a cause of habitat degradation and a threat in this watershed. The Middle, Archey, and Devils (and its major tributaries) forks are designated as ERW. The South Fork has not been designated as an ERW. The applicable water quality standards have not protected yellowcheek darter habitat from alterations and water quality degradation from traditional land use and expanding natural gas development activities.

The Arkansas Forestry Commission is the State agency responsible for establishing BMPs for timber harvests in Arkansas. BMPs for timber harvests in Arkansas are only recommendations; there is no requirement that timber harvesters include BMPs in timber operations. The BMPs are currently under revision, but the Service does not know what effect these revisions will have on aquatic habitats within the range of the species.

Natural gas production in the upper Little Red River watershed presents a unique problem for yellowcheek darter conservation. In Arkansas, mineral rights for properties supersede the surface rights. Even where private landowners agree to implement certain BMPs or conservation measures on their lands for yellowcheek darter conservation, there is no guarantee that these BMPs or conservation measures will be implemented by natural gas companies, their subsidiaries, or contractors that lease and develop the mineral rights for landowners. For this reason, the intended benefits of conservation measures agreed to by landowners in agreements such as Candidate Conservation Agreements with Assurances may never be realized. Additionally, natural gas projects often do not contain a Federal nexus that would allow the Service to comment on proposed or ongoing projects.

The Arkansas Natural Resources Commission regulates water withdrawal in Arkansas streams. To date, they have not precluded water withdrawal for natural gas development activities in the upper Little Red River watershed. The USACE regulates instream activities under the Clean Water Act. Their policy to date has been to issue permits for instream activities associated with pipeline construction and maintenance under Nationwide Permits rather than Individual Permits that require more public involvement. The ADEQ lacks the resources necessary to enforce existing regulations under the Clean Water Act and the Arkansas Water and Air Pollution Act for activities associated with natural gas development.

The yellowcheek darter receives incidental protection under the Act due to the coexistence of the Federally endangered speckled pocketbook

mussel (*Lampsilis streckeri*), which occurs throughout the upper Little Red River drainage. However, this protection has been insufficient to mitigate the threats to either species.

In summary, the threats of inadequacy of existing regulatory mechanisms are imminent and considered high in magnitude. This is of particular concern in regard to the vulnerability of the species to threats from natural gas development, which is already impacting populations in the South and Middle forks of the Little Red River and is expected to intensify in the next several years throughout the range of the species. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

Chucky Madtom

The chucky madtom and its habitats are afforded some protection from water quality and habitat degradation under the Clean Water Act and TDEC's Division of Water Pollution Control under the TWQCA. However, as demonstrated under Factor A, population declines and degradation of habitat for this species are ongoing despite the protection afforded by these laws. While these laws have resulted in improved water quality and stream habitat for aquatic life, including the chucky madtom, they alone have not been adequate to fully protect this species; sedimentation and non-point source pollutants continue to be a significant problem. Sediment is the most abundant pollutant in the Little Chucky Creek watershed and is the greatest threat to the chucky madtom.

Portions of the Nolichucky River and its tributaries in Greene County, Tennessee, are listed as impaired (303d) by the State of Tennessee due to pasture grazing, irrigated crop production, unrestricted cattle access, land development, municipal point source discharges, septic tank failures, gravel mining, agriculture, and channelization (TDEC 2010, pp. 64–73). However, Little Chucky Creek is not listed as ''an impaired water'' by the State of Tennessee (TDEC 2010, pp. 64–73). For water bodies on the 303(d) (impaired) list, States are required under the Clean Water Act to establish a TMDL for the pollutants of concern that will bring water quality into the applicable standard. The TDEC has developed TMDLs for the Nolichucky River watershed to address the problems of fecal coliform loads, siltation, and habitat alteration by agriculture.

The chucky madtom receives incidental protection under the Act due to the coexistence of the Federally endangered Cumberland bean (*Villosa trabalis*), which is still thought to occur in Little Chucky Creek, Greene County, Tennessee (Ahlstedt pers. comm. 2008). However, this protection has been insufficient to mitigate the threats to either species.

The chucky madtom was listed as Endangered by the State of Tennessee in September of 2000. Under the Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974 (Tennessee Code Annotated §§ 70–8–101–112), ''[I]t is unlawful for any person to take, attempt to take, possess, transport, export, process, sell or offer for sale or ship nongame wildlife, or for any common or contract carrier knowingly to transport or receive for shipment nongame wildlife.'' Further, regulations included in the Tennessee Wildlife Resources Commission Proclamation 00–15 Endangered Or Threatened Species state the following: ''Except as provided for in Tennessee Code Annotated, Section 70–8–106 (d) and (e), it shall be unlawful for any person to take, harass, or destroy wildlife listed as threatened or endangered or otherwise to violate terms of Section 70–8–105 (c) or to destroy knowingly the habitat of such species without due consideration of alternatives for the welfare of the species listed in (1) of this proclamation, or (2) the United States list of Endangered fauna.'' Under these regulations, potential collectors of this species are required to have a State collection permit. However, in terms of project management, this regulation only provides for the consideration of alternatives, and does not require the level of project review afforded by the Act.

In summary, population declines and degradation of habitat for the chucky madtom are ongoing despite the protection afforded by State and Federal laws and corresponding regulations. Despite these laws, sedimentation and non-point source pollution continue to adversely affect the species. Because of the vulnerability of the small remaining populations of the chucky madtom and the imminence of these threats, we find the inadequacy of existing regulatory mechanisms to be a significant threat of high magnitude. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

Laurel Dace

The laurel dace and its habitats are afforded some protection from water quality and habitat degradation under the Clean Water Act and by TDEC's Division of Water Pollution Control under the TWQCA. However, as demonstrated under Factor A, population declines and degradation of habitat for this species are ongoing despite the protection afforded by these laws. While these laws have resulted in improved water quality and stream habitat for aquatic life, including the laurel dace, they alone have not been adequate to fully protect this species; sedimentation and non-point source pollutants continue to be a significant problem. Sediment is the most abundant pollutant in the watershed and one of the greatest threats to the laurel dace.

The State of Tennessee maintains water-use classifications through issuance of NPDES permits to industries, municipalities, and others that set maximum limits on certain pollutants or pollutant parameters. For water bodies on the 303(d) list, States are required under the Clean Water Act to establish a TMDL for the pollutants of concern that will bring water quality into the applicable standard. The TDEC has not identified any impaired water bodies in the Soddy Creek, the Sale Creek system, or the Piney River system (TDEC 2008).

The TWRA lists the laurel dace as endangered. Under the Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974 (Tennessee Code Annotated §§ 70–8–101–112), ''[I]t is unlawful for any person to take, attempt to take, possess, transport, export, process, sell or offer for sale or ship nongame wildlife, or for any common or contract carrier knowingly to transport or receive for shipment nongame wildlife.'' Further, regulations included in the Tennessee Wildlife Resources Commission Proclamation 00–15 Endangered Or Threatened Species state the following: ''Except as provided for in Tennessee Code Annotated, Section 70–8–106 (d) and (e), it shall be unlawful for any person to take, harass, or destroy wildlife listed as threatened or endangered or otherwise to violate terms of Section 70–8–105 (c) or to destroy knowingly the habitat of such species without due consideration of alternatives for the welfare of the species listed in (1) of this proclamation, or (2) the United States list of Endangered fauna.'' Under these regulations, potential collectors of this species are required to have a State collection permit. However, in terms of

project management, this regulation only provides for the consideration of alternatives, and does not require the level of project review afforded by the Act.

In summary, population declines and degradation of habitat for the laurel dace are ongoing despite the protection afforded by State and Federal water quality laws. While these laws have resulted in improved water quality and stream habitat for aquatic life, including the laurel dace, they alone have not been adequate to fully protect this species; sedimentation and non-point source pollutants continue to be a significant problem. Non-point source pollution is not regulated by the Clean Water Act. Due to the vulnerability of the laurel dace to water quality and habitat degradation, we find the inadequacy of regulatory mechanisms that address water quality to be an imminent threat of high magnitude. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Restricted Range and Population Size

The Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace have limited geographic ranges and small population sizes. Their existing populations are extremely localized, and geographically isolated from one another, leaving them vulnerable to localized extinctions from intentional or accidental toxic chemical spills, habitat modification, progressive degradation from runoff (non-point source pollutants), natural catastrophic changes to their habitat (e.g., flood scour, drought), other stochastic disturbances, and to decreased fitness from reduced genetic diversity. Potential sources of unintentional spills include accidents involving vehicles transporting chemicals over road crossings of streams inhabited by one of these five fish, or the accidental or intentional release of chemicals used in agricultural or residential applications into streams.

Species that are restricted in range and population size are more likely to suffer loss of genetic diversity due to genetic drift, potentially increasing their susceptibility to inbreeding depression, decreasing their ability to adapt to environmental changes, and reducing the fitness of individuals (Soule 1980, pp. 157–158; Hunter 2002, pp. 97–101; Allendorf and Luikart 2007, pp. 117–146). It is likely that some of the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace populations are below the effective population size required to maintain long-term genetic and population viability (Soule 1980, pp. 162–164; Hunter 2002, pp. 105–107). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). These separate populations are essential for the species to recover and adapt to environmental change (Noss and Cooperrider 1994, pp. 264–297; Harris 1984, pp. 93–104). The level of isolation seen in these five species makes natural repopulation following localized extirpations virtually impossible without human intervention.

Climate Change

Climate change has the potential to increase the vulnerability of the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace to random catastrophic events (*e.g.,* McLaughlin *et al.* 2002; Thomas *et al.* 2004). Climate change is expected to result in increased frequency and duration of droughts and the strength of storms (*e.g.,* Cook *et al.* 2004). During 2007, a severe drought affected the upper Cumberland River basin in Kentucky and Tennessee. Streamflow values for the Cumberland River at Williamsburg, Kentucky (USGS Station Number 03404000), in September and October of 2007 were among the lowest recorded monthly values (99th percentile for low-flow periods) during the last 67 years (Cinotto pers. comm. 2008). Climate change could intensify or increase the frequency of drought events, such as the one that occurred in 2007. Thomas *et al.* (2004, p. 112) report that the frequency, duration, and intensity of droughts are likely to increase in the Southeast as a result of global climate change.

Fluker *et al.* (2007, p. 10) reported that drought conditions, coupled with rapid urbanization in watersheds that contain rush darters, render the populations vulnerable, especially during the breeding season when they concentrate in wetland pools and shallow pools of headwater streams. Drought conditions from 2006 to 2007 greatly reduced spawning habitat for rush darter in Jefferson County (Drennen pers. obs. 2007). Survey numbers for the rush darter within the spring-fed headwaters for the unnamed tributary to Turkey Creek during 2007 were reduced due to a lack of water (Kuhajda pers. comm. 2008). In Winston County, Stiles and Mills (2008, pp. 5–6) noted that Doe Branch almost completely dried up during the summer of 2007 (Stiles pers. comm. 2008).

The Little Red River watershed in Arkansas experienced moderate drought conditions during 1997–2000 (Southern Regional Climate Center 2000), which reduced flows in its tributaries and affected yellowcheek darter populations. During a status survey for the species conducted in 2000, the stage height of the Little Red River was 0.3 m (1 ft) lower than what was reported during a 1979–1980 status survey of the darter (Wine *et al.* 2000, p. 7). Stream flow is strongly correlated with important physical and chemical parameters that limit the distribution and abundance of riverine species (Power *et al.* 1995, p. 159; Resh *et al.* 1988, p. 437) and it regulates the ecological integrity of flowing water systems (Poff *et al.* 1997, p. 769). During the 2000 status survey, the yellowcheek darter was not found in the upper reaches of any study streams or in the Turkey/Beech Fork reach of Devils Fork, a likely result of drought conditions. This indicates a contraction of yellowcheek darter range to stream reaches lower in the watershed where flows are maintained for a greater portion of the year (Wine *et al.* 2000, p. 11). It is possible that the perceived contraction in range occurs only during low precipitation years in north-central Arkansas. The threat of drought is imminent and moderate to high, respectively, in all four watersheds for the yellowcheek darter. Exacerbation of natural drought cycles as a result of global climate change could have detrimental effects on the species, which could continue for the foreseeable future.

Competition From Introduced Species

The Federally endangered watercress darter (*Etheostoma nuchale*) was translocated outside of its native range by the Service into Tapawingo Springs in 1988 in order to assist in the species' recovery by expanding its range (Moss 1995, p. 5). The watercress darter is now reproducing and is competing with the rush darter in Tapawingo Springs (USFWS 1993, p. 1; Drennen pers. obs. 2004; George *et al.* 2009, p. 532). In 2001, a population of watercress darters was found in the Penny Springs site (Stiles and Blanchard 2001, p. 3). The introduced watercress darter appears to be out-competing the rush darter at this site (Fluker *et al.* 2008, p. 1; George *et al.* 2009, p. 532), even though the rush darter has always been considered rare in the Tapawingo Spring area (Stiles pers. comm. 2008). Further investigation may be required to determine whether interspecific competition is occurring

between the watercress darter and the rush darter at this site (Stiles pers. comm. 2008). However, Fluker *et al.* (2008, p. 1) and George *et al.* (2009, p. 532) consider the rush darter to be extirpated after completing 2 years of surveys (2008–2009) in Tapawingo Spring.

Reduced Fecundity

The low fecundity rates exhibited by many madtom catfishes (Breder and Rosen 1966 *in* Dinkins and Shute 1996, p. 58) could limit the potential for populations to rebound from disturbance events. The short lifespan exhibited by members of the *N. hildebrandi* clade (a taxonomic group of organisms classified together on the basis of homologous features traced to a common ancestor) of madtoms, if also true of chucky madtoms, would further limit the species' viability by rendering it vulnerable to severe demographic shifts from disturbances that prevent reproduction in even a single year, and could be devastating to the population if the disturbance persists for successive years.

Summary

Because the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace all have limited geographic ranges and small population sizes, they are subject to several ongoing natural and manmade threats. Since these threats are ongoing, they are considered to be imminent. The magnitude of these threats is high for each of these species because they result in a reduced ability to adapt to environmental change. Further, the information available to us at this time does not indicate that the magnitude or imminence of this threat is likely to be appreciably reduced in the foreseeable future.

Exacerbation of natural drought cycles as a result of global climate change could have detrimental effects on these five species, which are expected to continue or increase in the future. The specific threat of global climate change is considered to be nonimminent. The Federally endangered watercress darter (*Etheostoma nuchale*) introduced into the range of the rush darter is now potentially competing with the rush darter. The low fecundity rates exhibited by many madtom catfishes could specifically affect the chucky madtom and exacerbate the problem of its recovering from disturbance events. These threats are considered moderate/low in magnitude because of the uncertainty of their effects, but are considered imminent as they are ongoing.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace. Section 3(6) of the Act defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' We find that each of these five species is presently in danger of extinction throughout its entire range, based on the immediacy and magnitude of the threats described above. Based on our analysis, we have no reason to believe that the negative population trends for any of the five species addressed in this final rule will improve, nor will the effects of current threats acting on the species be ameliorated in the foreseeable future. Therefore, on the basis of the best available scientific and commercial information, we are listing the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace as endangered under the Act.

Without the protection of the Act, these five species are in danger of extinction throughout all of their highly localized ranges. Extinction could occur within a few years, given the reduction of habitats and ranges, small population sizes, current habitat threats, and natural or human-induced catastrophic events. Furthermore, because of the immediate and ongoing significant threats to each species throughout their entire respective ranges, as described above in the five-factor analysis, we find that it is unnecessary to analyze whether there are any significant portions of ranges for each species that may warrant a different determination of status.

Critical Habitat

In the June 24, 2010 proposed listing rule (75 FR 36035) we determined that designation of critical habitat was prudent for all five species. However, we found that critical habitat was not determinable at the time, and set forth the steps we would undertake to obtain the information necessary to develop a proposed designation of critical habitat. We have completed these steps and intend to publish a proposed designation in the next few months for all five species. We were unable to include the critical habitat with the final listing rule due to an internal publishing issue requiring separate publication of proposed and final rules in the **Federal Register**.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation actions by Federal, State, and private organizations; and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection measures required of Federal agencies and the prohibitions against certain activities are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include, but are not limited to, the carrying out or the issuance of permits for reservoir construction, stream alterations, discharges, wastewater facility development, water withdrawal projects, pesticide registration, mining, and road and bridge construction.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these), import or export, ship in interstate

commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Required Determinations

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (NEPA)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* or upon request from the Field Supervisor, Tennessee Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Tennessee Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding entries for ''Dace, laurel,'' ''Darter, Cumberland,'' ''Darter, rush,'' ''Darter, yellowcheek,'' and ''Madtom, chucky'' to the List of Endangered and Threatened Wildlife, in alphabetical order, under FISHES, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Dace, laurel	*Chrosomus saylori*	U.S.A (TN)	Entire	E	791	NA	NA
*	*	*	*	*	*		*
Darter, Cumberland	*Etheostoma susanae.*	U.S.A. (KY, TN)	Entire	E	791	NA	NA
*	*	*	*	*	*		*
Darter, rush	*Etheostoma phytophilum.*	U.S.A. (AL)	Entire	E	791	NA	NA
*	*	*	*	*	*		*
Darter, yellowcheek	*Etheostoma moorei*	U.S.A. (AR)	Entire	E	791	NA	NA
*	*	*	*	*	*		*
Madtom, chucky	*Noturus crypticus*	U.S.A. (TN)	Entire	E	791	NA	NA
*	*	*	*	*	*		*

* * * * *

Dated: July 27, 2011.

James J. Slack,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–20018] Filed 8–8–11; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 76, No. 153
Tuesday, August 9, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AMS–FV–11–0041; FV11–920–1 PR]

Kiwifruit Grown in California; Change in Reporting Requirements and New Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed Rule.

SUMMARY: This rule invites comments on proposed changes to the reporting requirements currently prescribed under the marketing order that regulates the handling of kiwifruit grown in California. The order is administered locally by the Kiwifruit Administrative Committee (Committee). This rule would require handlers to file two end-of-season reports with the Committee. One report would contain price and handler shipment information and the other report would contain grower shipment information. The Committee would use this information to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and the annual marketing policy, as required under the order. This proposal also announces the Agricultural Marketing Service's (AMS) intention to request approval from Office of Management and Budget (OMB) of a new information collection.

DATES: Comments on the proposed rulemaking must be received by October 11, 2011. Pursuant to the Paperwork Reduction Act (44 U.S.C. chapter 35), comments on the information collection burden that would result from this proposal must be received by October 11, 2011.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent 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 docket number and the date and page number of this issue of the **Federal Register** 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.* All comments submitted in response to this rule will be included in the record and will be made available to the public. 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.

FOR FURTHER INFORMATION CONTACT: Kathie M. Notoro, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (559) 487–5901, *Fax:* (559) 487–5906, or *e-mail: Kathie.Notoro@ams.usda.gov* or *Kurt.Kimmel@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 Order No. 920 as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California, 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 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.

This proposal invites comments on changes to the reporting requirements authorized under the order. This rule would add two new reporting requirements and two new forms to those currently specified in the order's administrative rules and regulations. These changes would allow the Committee to collect annual, end-of-season price, shipment, and grower information (grower entity/farm name, mailing address, location of farm by county, shipments by pack style, and acreage) from all kiwifruit handlers. Under this proposed regulation, both reports would be due from each handler within 30 days after such handler has completed current season shipments. The Committee would use this information to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and the annual marketing policy, as required under the order. This proposal was unanimously recommended by the Committee at a meeting on March 17, 2011.

Section 920.12 of the order defines the Districts within the production area, and Section 920.20 provides, in part, that ''* * * district representation on the committee shall be based upon the previous five-year average production in the district and shall be established so as to provide an equitable relationship between membership and districts.''

Section 920.22 of the order defines the nomination procedures, allowing for nominations to be conducted via mail, and provides that growers are eligible to

participate in nominations in the district they produce kiwifruit.

Section 920.34 of the order requires that the Committee prepare an annual report for presentation to the Secretary and the industry.'' The annual report provides a cumulative review of industry statistics as well as information about program activities and expenditures.

Section 920.41 of the order provides authority to assess each person who first handles kiwifruit a pro rata share of the expenses which are reasonable and likely to be incurred by the Committee during a fiscal period.

Section 920.50 of the order requires the Committee to prepare an annual marketing policy for submission to the Secretary. The marketing policy describes expected kiwifruit production, quality, and marketing conditions. Along with other pertinent information, the marketing policy provides the basis for the recommendation of appropriate kiwifruit handling regulations for the upcoming season.

Section 920.60 of the order authorizes the Committee to require handlers to file reports and provide other information as may be necessary for the Committee to perform these duties.

Section 920.61 (Compliance) of the order provides that all handlers must conform to the provisions and regulations set forth in the order, and the Committee is to verify handler compliance with order provisions.

The Committee's current reporting requirements are specified in § 920.160 of the order's administrative rules and regulations. This section currently requires that handlers submit: (1) A report of shipment and inventory data which provides monthly data regarding the reporting period, name and identification of the shipper, and the number of containers by type and weight by shipment destination category of all kiwifruit; (2) a Kiwifruit Inventory Shipping System (KISS) form, which consists of three sections: KISS/Add Inventory, KISS/Deduct Inventory, and KISS/Shipment and which provides beginning inventory by size and container type, quantity of the fruit lost in repack or repacked into other container types, total domestic and export shipments by size and container type; and any other adjustments which increase or decrease handler inventory; (3) a Return Receipt of Kiwifruit to Grower Form which reports fruit returned by a handler to a grower(s); and (4) a KISS Price/Shipment report which contains handler information, reporting period, total fresh market shipments, and gross f.o.b. sales of non-organic kiwifruit by pack style and size.

Since 1984, the California Kiwifruit Commission (Commission) has collected end-of-season price, shipment, and grower information (grower entity/farm name, mailing address, location of farm by county, shipments by pack style, and acreage), on organic and non-organic kiwifruit via two Commission forms. The Commission has, through an agreement, shared this information with the Committee. The Committee previously used the majority of this information to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and the annual marketing policy under the order.

The Commission will cease to exist as of September 30, 2011. Thus, the Committee would no longer have access to this previously shared information. As the current reporting requirements, under the order, make no provisions for collecting end-of-season information previously provided by the Commission, and as the Committee would need this information from all handlers, to include organic handlers, the Committee unanimously recommended adding these new reporting requirements and two new forms, the End-of-Season F.O.B. Sales Report and the Final Packout Report, to § 920.160 of the order's administrative rules and regulations.

Under the proposed change, § 920.160 would be revised by adding two new reporting requirements and two new forms, due by each handler (organic and non-organic) within 30 days after such handler has completed current season shipments. Kiwifruit shipments generally begin in September and continue through July. The information collected on the End-of-Season F.O.B. Sales Report would include data on gross f.o.b. sales value and number of containers for fresh market shipments by fruit size and pack style for the season. The information collected on the Final Packout Report would include containers shipped by pack style for fresh market shipments, for each grower entity during the season. The report would also include the grower entity and farm name, mailing address, the county where the farm is located, and total acreage. Both reports would also show the company name, contact person, and phone number of the handler. The information obtained from both of the two new reports would provide data to determine appropriate representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and annual marketing policy.

Section 8e of the Act provides that when certain domestically produced commodities, including kiwifruit, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. This rule would only change the reporting requirements under the domestic handling regulations. No changes to the import regulations would be made.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA), 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.

Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

Based on Committee data, there are approximately 27 handlers of kiwifruit subject to regulation under the marketing order and approximately 176 kiwifruit growers in the production area.

The California Agricultural Statistical Service (CASS) reported total California kiwifruit production for the 2009–10 season at 26,000 tons with an average price of $1,470 per ton. Based on the average price, shipment, and grower information provided by the CASS and the Committee, it could be concluded that the majority of kiwifruit handlers would be considered small businesses under the SBA definition. In addition, based on kiwifruit production and price information, as well as the total number of California kiwifruit growers, the average annual grower revenue is less than $750,000. Thus, the majority of California kiwifruit producers may also be classified as small entities.

This proposed rule would revise § 920.160 by adding two new reporting requirements and two new forms, due

by handlers within 30 days after such handler has completed current season shipments. The information collected on the End-of-Season F.O.B. Sales Report would include data on gross f.o.b. sales value and number of containers for fresh market shipments by fruit size and pack style for the season. The information collected on the Final Packout Report would include containers shipped by pack style for fresh market shipments, for each grower entity during the season. The report would also include the grower entity and farm name, mailing address, the county where the farm is located, and total acreage. Both reports would also show the company name, contact person, and phone number of the handler. The information obtained from both of the two new reports would provide data to determine appropriate grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare the annual report and annual marketing policy. This rule would revise § 920.160, which specifies the reporting requirements.

Requiring the price, shipment, and grower information at the end of the season would impose a minor increase in the reporting burden on all kiwifruit handlers. As this data was previously provided to the Commission and shared with the Committee, these two annual end-of-season reports would not significantly increase the handlers' record keeping burden because the primary source of data is already being recorded and maintained by handlers as a routine part of their daily business. The majority of handlers use computers to record their data, and this information can readily be accessed and summarized for these reports. Consequently, any additional costs associated with these changes are expected to be minimal. Also, the benefits of having consolidated end-of-season price, shipping, and grower data are expected to outweigh any costs associated with the increase in reporting burden. Further, the benefits of this rule are expected to be equally available to all industry members, regardless of their size. It is anticipated that the transmission of these reports from handlers to the Committee would be done by either e-mail or facsimile (Fax) machines.

The Committee discussed alternatives to this action, including making no changes to the reporting requirements, but determined that in order to carry out the objectives of the marketing order, the information collected contained within these two new reports would be necessary. Therefore, this alternative was rejected.

This proposal would establish two new reporting requirements and would also require two new Committee forms: the End-of-Season F.O.B. Sales Report and the Final Packout Report. Therefore, this proposed rule would impose a minor increase in the reporting burden equally on all handlers, which is discussed in the Paperwork Reduction Act section of this document.

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. 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.

Further, the Committee's meetings were widely publicized throughout the kiwifruit industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the March 17, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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 Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided for interested persons to comment on this proposal. All written comments timely received will be considered before a final determination is made on this matter.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this notice announces that AMS is requesting approval from the Office of Management and Budget (OMB) for a new information collection request, under OMB No. 0581–NEW. Upon approval of this new collection by OMB, it will be merged with the forms currently approved for use under OMB No. 0581–0189, Generic OMB Fruit Crops.

Title: Kiwifruit Grown in California; Marketing Order No. 920.

OMB Number: 0581–New.

Type of Request: New collection.

Abstract: The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the California kiwifruit marketing order program, which has been operating since 1984.

On March 17, 2011, the Committee unanimously recommended an End-of-Season F.O.B. Sales Report and a Final Packout Report for all handlers to report end-of-season prices, shipment, and grower information. Information for these reports was previously collected by the Commission. This action concerns these reports, which would require the reports to be submitted to the Committee by handlers. Pursuant to § 920.60(c), handlers would maintain records for at least two succeeding fiscal years to verify the data reported to the Committee on these reports.

These forms would facilitate the collection of price, shipment, and grower information from all kiwifruit handlers and are titled End-of-Season F.O.B. Sales Report and Final Packout Report. The forms covered under this collection require the minimum information necessary to carry out the requirements of the order. The information collected would only be used by authorized representatives of the USDA, including AMS, Fruit and Vegetable Programs regional and headquarters staff, and authorized employees of the Committee. Authorized Committee employees would be the primary users of the information, and AMS would be the secondary user. The Committee's staff would compile the information collected from handlers and use it to determine grower representation on the Committee, to conduct grower nominations, to verify shipments for assessment collections, and to prepare its annual report and annual marketing policy, as required under the order. All proprietary handler information would be kept confidential in accordance with the Act and order.

The proposed request for a new information collection under the order is as follows:

End-of-Season F.O.B. Sales Report

Estimate of Burden: Public reporting burden for this collection of information is estimated to be no more than an average of 0.75 hours per response.

Respondents: Persons who handle California kiwifruit.

Estimated Number of Respondents: 27.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 20.25 hours.

Final Packout Report

Estimate of Burden: Public reporting burden for this collection of information is estimated to be an average of 0.75 hours per response.

Respondents: Persons who handle California kiwifruit.

Estimated Number of Respondents: 27.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 20.25 hours.

Comments: Comments are invited on: (1) 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) 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.

Comments should reference OMB No. 0581–New and the Marketing Order for Kiwifruit Grown in California, and should be sent to the USDA in care of the Docket Clerk at the previously-mentioned address or at *http://www.regulations.gov.*

All responses to this notice will be summarized and included in the request for OMB approval. All comments received will become a matter of public record and will be available for public inspection during regular business hours at the address of the Docket Clerk or at *http://www.regulations.gov.*

Upon publication of the final rule, this collection will be merged with the forms currently approved for use under OMB No. 0581–0189 ''Generic OMB Fruit Crops.''

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 920 is proposed to be amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

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

Authority: 7 U.S.C. 601–674.

§ 920.160 [Amended]

2. § 920.160 is amended by adding paragraphs (f) and (g) to read as follows:

§ 920.160 Reports.

* * * * *

(f) Each handler shall file annually with the Committee an End-of-Season F.O.B. Sales Report, due within 30 days after such handler has completed current season shipments, reporting gross f.o.b. sales value and number of containers by pack style and size for fresh market shipments for the season. The report shall also show the company name, contact person, and phone number of the handler.

(g) Each handler shall file annually with the Committee a Final Packout Report, due within 30 days after such handler has completed current season shipments, reporting total containers shipped, by pack style for fresh market shipments, for each grower entity during the season. The report shall also include the grower entity and farm name, mailing address, the county in which the farm is located, and total acreage for each reported grower entity. Also, the report shall show the company name, contact person, and phone number of the handler.

Dated: August 3, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–20116 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[Docket No. EERE–2011–BT–CE–0050]

RIN 1904–AC58

Energy Conservation Program: Compliance Date Regarding the Test Procedures for Walk-In Coolers and Freezers and the Certification for Metal Halide Lamp Ballasts and Fixtures

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

ACTION: Notice of Proposed Rulemaking (NOPR).

SUMMARY: This document clarifies the compliance date by which manufacturers must begin to use portions of a recently promulgated test procedure (i.e., the April 15, 2011 final rule) when certifying walk-in coolers and walk-in freezers. This document also proposes regulatory text changes to reflect U.S. Department of Energy's (DOE) intent that only manufacturers of components of walk-in coolers and walk-in freezers are required to submit certification reports. Additionally, the NOPR proposes clarifications as to the types of test data needed to support the certification of compliance per DOE's existing test procedures for walk-in coolers and walk-in freezers and the recently promulgated test procedure for this equipment. Finally, this document proposes to extend the compliance date for certification of metal halide lamp ballasts and fixtures.

DATES: DOE will accept comments, data, and information regarding the notice of proposed rulemaking (NOPR) postmarked no later than August 30, 2011. See section III, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the NOPR for walk-in coolers and walk-in freezers and metal halide lamp ballasts and fixtures by providing the docket number EERE–2011–BT–CE–0050 and/or RIN number 1904–AC58. Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: WICF-MHL-2011-CE-0050@ee.doe.gov.* Include docket number EERE–2011–BT–CE–0050 and/or RIN 1904–AC58 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024. Please submit one signed original paper copy.

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., 6th Floor, 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. Please note: DOE's Freedom of Information Reading Room (Room 1E–190 at the Forrestal Building) no longer houses rulemaking materials.

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, 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. *E-mail: Ashley.Armstrong@ee.doe.gov.*

In the Office of the General Counsel, contact Ms. Laura Barhydt, U.S. Department of Energy, Office of the General Counsel, GC–32, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 287–5772. *E-mail: Laura.Barhydt@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Policy and Conservation Act (EPCA), as amended by section 312(c) of the Energy Independence and Security Act (EISA 2007), requires the DOE to prescribe a test procedure to measure the energy use of walk-in coolers and freezers (collectively, walk-ins). See 42 U.S.C. 6314(a). DOE recently satisfied this requirement by issuing a final rule establishing a test procedure for manufacturers to use when measuring the energy use or energy efficiency of certain walk-in components: panels, non-display doors, display doors, and refrigeration systems. See 76 FR 21580 (April 15, 2011) (final rule prescribing walk-in test procedures) and 76 FR 33631 (June 9, 2011) (notice containing corrected formulas).

Since the publication of that rulemaking, DOE recognized a need to clarify the date by which manufacturers must begin using the test procedure. The **SUMMARY** and **DATES** sections of the preamble text to the final rule stated that the test procedures will be mandatory for making representations of energy usage or energy efficiency starting October 12, 2011; that is, 180 days after publication of the test procedure final rule. In this notice, DOE proposes to add regulatory text to clarify that the compliance date for using the test procedure for certifications of compliance is the same as the date for compliance with the energy conservation standards currently under development. DOE plans to issue the final rule by 2012 and manufacturers must comply with these standards within three years of publication of the final rule. DOE may also provide for a delayed effective date if the Secretary determines this three-year period is inadequate. (42 U.S.C. 6313(f)(4)(B)) DOE is also proposing to add regulatory text to clarify that only component manufacturers are required to submit certifications of compliance with the current standards.

II. Need for Clarification

DOE is publishing this notice to address questions from walk-in manufacturers regarding how to comply with their certification requirements under 10 CFR part 429, subpart B and Appendix A, which collectively prescribe the process for manufacturers to follow when certifying their commercial equipment as compliant under the relevant energy conservation standards. DOE recently indicated that walk-in manufacturers must comply with these requirements starting on October 1, 2011. 76 FR 38287, 38292 (June 30, 2011). EPCA, through amendments established by the Energy Independence and Security Act of 2007, Pub. L. 140–110 (Dec. 19, 2007) (EISA 2007), specified a test procedure that must be followed when determining the insulation value of the insulating foam used in walk-in applications, and manufacturers have raised questions as to whether they should continue using these procedures when certifying their equipment or use the new procedures that DOE promulgated in April 2011.

EISA 2007 prescribed several design requirements for walk-ins and specified that the R value (a representation of the thermal insulating characteristics of insulating foam) shall be the 1/K factor multiplied by the thickness of the panel, and the K factor shall be based on ASTM test procedure C518–2004. EPCA also prescribed certain temperature conditions for calculating the R value. (42 U.S.C. 6314(a)(9)(A)) Since 2009, these design requirements and test procedure provisions currently apply to all newly manufactured walk-ins. See 42 U.S.C. 6314(a)(9). See also 10 CFR Part 431.306(a)–(b) and 10 CFR 304(b)(1)–(4).

In addition to the above provisions, EPCA requires that DOE issue a test procedure for walk-ins. See 42 U.S.C. 6314(a)(9)(b). As noted above, DOE complied with that requirement by publishing a final rule prescribing a test procedure that covers the various key components comprising a walk-in. See 76 FR 21580 and 76 FR 33631.

Although the April 2011 test procedure continues to remain effective under today's proposal, the procedure prescribed by the EISA 2007 amendments must continue to be used by manufacturers for certification purposes. At this time, the statutorily-prescribed procedure for determining an R value must also continue to be used when making representations regarding the energy-related performance of the relevant walk-in components. To the extent that a manufacturer chooses to make representations regarding the energy-related performance of the relevant walk-in components beyond the R-value of the foam used in panels, the April 2011 test procedure must be used for those representations. Once energy conservation standards that are performance based are established in 2012 for walk-in equipment, manufacturers must exclusively use the April 2011 test procedure when certifying their components as well as when making representations regarding that equipment's energy-related performance.

To clarify walk-in manufacturer responsibilities, DOE is proposing to add regulatory text to specify when the current and new test procedures must be used. DOE is also proposing additional language to clarify when tests must be performed on walk-in panels and when tests may be performed on insulation foam used in the construction of panels, but that has not yet been incorporated into a walk-in panel. DOE invites comment on its proposed resolution to this issue. Finally, DOE is also clarifying that manufacturers are not and will not be required to test non-foam members and/or edge regions using the ASTM C518 test procedure prescribed in EPCA. Non-foam members and edge regions are only considered in the U-factor testing using ASTM C1363, which is part of the new DOE test procedures.

In addition, DOE's recent certification, compliance and enforcement rulemaking indicated that only manufacturers of walk-in cooler and freezer components are required to submit certification reports. 76 FR 38287, 38292 (June 30, 2011). As such, DOE is proposing to add regulatory text to clarify that the WICF component manufacturers are the entities responsible for certifying compliance to the Department.

Finally, DOE's recent certification, compliance and enforcement rulemaking extended the compliance dates for certification of several types of commercial equipment. 76 FR 38287, 38292. Specifically, DOE extended the certification compliance date for manufacturers of metal halide lamp fixtures to October 1, 2011. Since the issuance of the final rule, additional information has come to the attention of the DOE regarding a lack of sufficient

test data to support certification on the full sample required by DOE's regulations. To provide parity with similarly situated manufacturers of other types of commercial equipment, DOE is proposing to extend the certification compliance date further for manufacturers of metal halide lamp fixtures, requiring submittal of a certification report no later than 1 year following publication of a final rule.

III. Public Participation

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting Comments via www.regulations.gov

The regulations.gov web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting Comments via E-mail, Hand Delivery/Courier, or Mail

Comments and documents submitted via email, hand delivery, or mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign Form Letters

Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This proposed rule has been determined not to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19,

2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov*.

DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule would merely extend the compliance date of a rulemaking already promulgated. To the extent such action has any economic impact it would be positive in that it would allow regulated parties additional time to come into compliance. DOE did undertake a full regulatory flexibility analysis of the original test procedures rulemaking. That analysis considered the impacts of that rulemaking on small entities. As a result, DOE certifies that, if adopted, this proposed rule, which would clarify the application of the test procedures, would not have a significant economic impact on a substantial number of small entities.

C. Review Under the National Environmental Policy Act

DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without changing its environmental effect and, therefore, is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A5. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's NOPR.

List of Subjects

10 CFR Part 429

Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC on August 2, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend parts 429 and 431 of chapter II of title 10 of the Code of Federal Regulations to read as follows:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for Part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

2. Revise § 429.12(i)(6) to read as follows:

§ 429.12 General requirements applicable to certification reports.

* * * * *

(i) * * *

(6) Metal halide lamp ballasts and fixtures, [insert date 1 year after date of publication of the final rule in the **Federal Register**].

3. Revise § 429.53(b) to read as follows:

§ 429.53 Walk-in coolers and walk-in freezers.

* * * * *

(b) *Certification reports.* (1) The requirements of § 429.12 are applicable to manufacturers of components of walk-in coolers and freezers (WICFs), except that paragraph § 429.12(b)(6) applies to the certified component; and

(2) Pursuant to § 429.12(b)(13), a certification report shall include the following public product-specific information:

(i) For WICF doors: The door type, R-value of the door insulation, and a declaration that the manufacturer has incorporated the applicable design requirements. In addition, for those WICFs with transparent reach-in doors and windows: The glass type of the doors and windows (e.g., double-pane with heat reflective treatment, triple-pane glass with gas fill), and the power draw of the antisweat heater in watts.

(ii) For WICF panels: The R-value of the insulation (except for glazed portions of the doors or structural members).

(iii) For WICF fan motors: The motor purpose (i.e., evaporator fan motor or condenser fan motor), the horsepower, and a declaration that the manufacturer has incorporated the applicable design requirements.

(iv) For WICF lighting: The efficacy of the lighting including ballast losses, and a declaration that the manufacturer has incorporated the applicable design requirements.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

4. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

5. Section 431.304 is amended by:

a. Redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b); and

b. Adding in newly redesignated paragraph (c), new introductory text prior to paragraph (c)(1); and adding a new sentence at the end of paragraph (c)(5). The additions read as follows:

§ 431.304 Uniform test method for the measurement of energy consumption of walk-in coolers and walk-in freezers.

* * * * *

(b) *Testing and Calculations for Panels.* Manufacturers shall use this paragraph (b) for the purposes of certifying compliance with the applicable energy conservation standards and making representations of the R-value of panels until January 1, 2015.

(1) The R value shall be the 1/K factor multiplied by the thickness of the panel.

(2) The K factor shall be based on ASTM C518 (incorporated by reference; see § 431.303).

(3) For calculating the R value for freezers, the K factor of the foam at 20 degrees Fahrenheit (average foam temperature) shall be used.

(4) For calculating the R value for coolers, the K factor of the foam at 55 degrees Fahrenheit (average foam temperature) shall be used.

(5) Foam shall be tested after it is produced in its final chemical form. Foam produced inside of a panel (''foam-in-place'') must be tested in its final foamed state and must not include any structural members or non-foam materials other than the panel's protective skins or facers. A test sample less than or equal to 4 inches thick must be taken from the center of the foam-in-place panels. Foam produced as board stock may be tested prior to its incorporation into a final panel.

(6) Manufacturers are not required to consider non-foam member and/or edge regions in ASTM C518 testing.

(c) *Testing and Calculations.* Manufacturers shall use this paragraph (c) for any representations of energy efficiency/energy use (other than the R-

value of a panel) starting on October 12, 2011. Manufacturers shall use this paragraph (c) for the purposes of certifying compliance with the applicable energy conservation standards and for all representations of energy efficiency/energy use starting on January 1, 2015.

* * * * *

(5) * * * Testing must be performed on a completed panel; foam may not be used for the test sample.

* * * * *

[FR Doc. 2011–20114 Filed 8–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0789; Directorate Identifier 2011–NE–04–AD]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. TPE331–10 and TPE331–11 Series Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD would require inspecting certain serial number (S/N) first stage turbine disks, part number (P/N) 3101520–1 and P/N 3107079–1. This proposed AD was prompted by a report of an uncontained failure of a first stage turbine disk that had a metallurgical defect. We are proposing this AD to prevent uncontained failure of the first stage turbine disk and damage to the airplane.

DATES: We must receive comments on this proposed AD by September 23, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; *Web site: http://portal.honeywell.com;* or call Honeywell toll free at (800) 601–3099 (U.S./Canada) or (602) 365–3099 (International Direct). You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Joseph Costa, Aerospace Engineer, Los Angles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; *phone:* (562) 627–5246; *fax:* (562) 627–5210; *e-mail: joseph.costa@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–0789; Directorate Identifier 2011–NE–04–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

In May 2008, we received a report of an uncontained separation of a first stage turbine disk, P/N 3107079–1. The disk was installed in a TPE331–11U turboprop engine. That disk, which has a 20,000-cycle life, failed after accumulating 8,314 cycles-in-service. The fracture revealed a large melt-related oxide cluster inclusion in the web area of the disk, which occurred during the forging alloy melting process. The disk was produced from Waspaloy material, from Heat Lot 9–7121, which was melted by Special Metals in 1980. We have determined that approximately 360 turbine disks were produced from the same heat lot as the failed forged turbine disk and therefore may have similar inclusions. This condition, if not corrected, could result in uncontained failure of the first stage turbine disks made from these billets and damage to the airplane.

Relevant Service Information

We reviewed Honeywell International Inc. Alert Service Bulletin (ASB) TPE331–72–A2156, dated December 2, 2008. The Honeywell ASB TPE331–72–A2156, dated December 2, 2008, provides S/Ns of the affected turbine disks and describes procedures for initial and repetitive fluorescent penetrant inspection (FPI) and eddy current inspection (ECI) of the first stage turbine disk.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require:

- For turbine disks that have an S/N listed in Table 1 of this proposed AD with 4,100 or fewer cycles-since-new (CSN) on the effective date of this proposed AD, performing an initial FPI and ECI within 4,500 CSN or at the next access, whichever occurs first.
- For turbine disks that have an S/N listed in Table 1 of this proposed AD with more than 4,100 CSN on the effective date of this proposed AD, performing an initial FPI and ECI within 400 cycles-in-service after the effective date of this proposed AD or at the next access, whichever occurs first.
- Thereafter, for turbine disks that have an S/N listed in Table 1 of this proposed AD, perform a repetitive FPI and ECI at each scheduled hot section inspection, but not to exceed 3,600 hours-since-last inspection.

The proposed AD would require that you do these actions using the service information described previously.

Costs of Compliance

We estimate that this proposed AD would affect 90 engines installed on airplanes of U.S. registry. We also estimate that it would take about 20 work-hours per engine to perform the proposed actions, and that the average labor rate is $85 per work-hour. Required parts would cost about $19,000 per engine. We estimate that one disk would fail the initial inspection and that repetitive inspections would be performed on 89 engines. We estimate that one engine would fail the repetitive inspections and that further repetitive inspections would be performed on 88 engines. We estimate that an additional one disk would fail those repetitive inspections before retirement. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $511,155.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Honeywell International Inc. (Formerly AlliedSignal Inc., Garrett Engine Division; Garrett Turbine Engine Company; and AiResearch Manufacturing Company of Arizona): Docket No. FAA–2011–0789; Directorate Identifier 2011–NE–04–AD.

Comments Due Date

(a) We must receive comments by September 23, 2011.

Affected ADs

(b) None.

Applicability

(c) Honeywell International Inc. TPE331–10, –10AV, –10GP, –10GT, –10N, –10P, –10R, –10T, –10U, –10UA, –10UF, –10UG, –10UGR, –10UR, and TPE331–11U model turboprop engines with a first stage turbine disk, part number (P/N) 3101520–1 or 3107079–1, with a serial number (S/N) listed in Table 2 of Honeywell International Inc. Alert Service Bulletin (ASB) TPE331–72–A2156, dated December 2, 2008, installed.

Unsafe Condition

(d) This AD was prompted by a report of an uncontained failure of a first stage turbine disk that had a metallurgical defect. We are issuing this AD to prevent uncontained failure of the first stage turbine disk and damage to the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Initial Inspection

(f) For first stage turbine disks, P/N 3101520–1 or 3107079–1, that have an S/N listed in Table 2 of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, inspect the disks as follows:

(1) For turbine disks with 4,100 or fewer cycles-since-new (CSN) on the effective date of this proposed AD, perform an initial fluorescent penetrant inspection (FPI) by using paragraph 3.B.(2) through 3.B.(5) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, within 4,500 CSN or at the next access, whichever occurs first.

(2) For turbine disks with more than 4,100 CSN on the effective date of this proposed AD, perform an initial FPI by using paragraph 3.B.(2) through 3.B.(5) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, within 400 cycles-in-service (CIS) after the effective date of this proposed AD or at the next access, whichever occurs first.

(3) If the disk passes the FPI inspection, perform a special eddy current inspection (ECI) by using paragraph 3.B.(6) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, before returning the disk to service.

(g) If you find a crack in the disk, remove the disk from service.

Repetitive Inspection

(h) Thereafter, for first stage turbine disks, P/N 3101520–1 or 3107079–1, that have an S/N listed in Table 2 of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, inspect the disks as follows:

(1) Perform a repetitive inspection at each scheduled hot section inspection, but not to exceed 3,600 hours-since-last inspection. Use paragraph 3.B.(2) through 3.B.(5) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008.

(2) If the disk passes the FPI inspection, perform a special ECI by using paragraph 3.B.(6) of Honeywell International Inc. ASB TPE331–72–A2156, dated December 2, 2008, before returning the disk to service.

(i) If you find a crack in the disk, remove the disk from service.

Definition

(j) For the purpose of this AD, ''next access to the first stage turbine disk'' is defined as the removal of the second stage turbine nozzle from the turbine stator housing.

Alternative Methods of Compliance (AMOCs)

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

Related Information

(l) For more information about this AD, contact Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; *phone:* (562) 627–5246; *fax:* (562) 627–5210; *e-mail: joseph.costa@faa.gov.*

(m) For service information identified in this AD, contact Honeywell International Inc., 111 S. 34th Street, Phoenix, AZ 85034–2802; *Web site: http://portal.honeywell.com;* or call Honeywell toll free at (800) 601–3099

(U.S./Canada) or (602) 365–3099 (International Direct). You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7125.

Issued in Burlington, Massachusetts, on August 1, 2011.

Peter A. White,

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

[FR Doc. 2011–20170 Filed 8–8–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2011–F–0549]

Lanxess Corp.; Filing of Food Additive Petition (Animal Use); Calcium Formate

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of petition.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Lanxess Corp. has filed a petition proposing that the food additive regulations be amended to provide for the safe use of calcium formate in poultry and swine feed as a nutrient and digestive aid.

DATES: Submit either electronic or written comments on the petitioner's environmental assessment by September 8, 2011.

ADDRESSES: Submit electronic comments to: *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Isabel W. Pocurull, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6853, e-mail: *isabel.pocurull@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5)), notice is given that a food additive petition (FAP 2261) has been filed by Lanxess Corp. (Lanxess), 111 RIDC Park West Dr., Pittsburgh, PA 15275–1112. The petition proposes to amend the food additive regulations in part 573 *Food Additives Permitted in Feed and Drinking Water of Animals* (21 CFR part 573) to provide for the safe use of calcium formate in poultry and swine feed as a nutrient and digestive aid.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations issued under the National Environmental Policy Act (40 CFR 1501.4(b)), the Agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Division of Dockets Management (see **DATES** and **ADDRESSES**) for public review and comment.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register**. If, based on its review, the Agency finds that an environmental impact statement is not required, and this petition results in a regulation, the notice of availability of the Agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.51(b).

Dated: August 3, 2011.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2011–20126 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0489]

RIN 1625–AA87

Security Zones; Captain of the Port Lake Michigan Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: Based on a review of safety and security zones around critical infrastructure in the Chicago area, the Captain of the Port Sector Lake Michigan has determined that to better protect such infrastructure, while also mitigating burdens on waterway users, it is necessary to amend these security zones in our regulations. Specifically, the Coast Guard proposes to reduce the size of an existing security zone, disestablish another security zone, and create three new security zones.

DATES: Comments and related materials must reach the Coast Guard on or before September 8, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2011–0489 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov.*

(2) *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.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call MST1 Brenden Otjen Coast Guard Marine Safety Unit, Willowbrook, IL at (630) 986–2155. 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. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0489), indicate the specific section of this document to which each comment

applies, and give the reason for each comment. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments and material by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

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* at any time. Enter the docket number for this rulemaking (USCG–2011–0489) in the ''Keyword'' box, and click ''Search. '' You may also visit either the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, D.C. 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or the U.S. Coast Guard Marine Safety Unit Chicago, 555A Plainfield Rd., Willowbrook, IL 60527, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review 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 to the Docket Management Facility at the address under **ADDRESSES** explaining why one 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**.

Background and Purpose

The Coast Guard recently worked with local governmental agencies to review the safety and security zones around critical infrastructure in the Chicago area. Based on this review, the Captain of the Port Sector Lake Michigan had determined that to better protect critical infrastructure while also mitigating burdens on waterway users it is necessary to reduce the size of an existing security zone, disestablish an existing security zone, and establish three new security zones.

Discussion of Proposed Rule

For the reasons discussed in the preceding paragraph, the Captain of the Port Sector Lake Michigan proposes to amend 33 CFR 165.904 and 910. Specifically, this proposed rule would reduce the size of the safety and security zone entitled Lake Michigan at Chicago Harbor & Burnham Park Harbor-Safety and Security Zone, which is located at 33 CFR 165.904. The revised zone will be significantly reduced in size due to the disestablishment of Meigs Airfield and the need to secure only Burnham Park harbor during high profile visits that require security zone enforcement. This proposed reduction of the Chicago Harbor & Burnham Park Harbor-Safety and Security Zone would result in the zone encompassing all U.S. navigable waters of Lake Michigan within Burnham Park Harbor shoreward of a line across the entrance of the harbor connecting coordinates 41°51′09″ N, 87°36′36″ W and 41°51′11″ N, 87°36′22″ W.

In addition to reducing the size of the security zone described in § 165.904(a), this proposed rule would also disestablish a security zone. Specifically, this proposed rule would disestablish the security zone in 33 CFR 165.910(a)(1) entitled Security Zones; Captain of the Port Lake Michigan; Navy Pier Northside.

Finally, this proposed rule would establish three new security zones in 33 CFR 165.910. The first new security zone would be located in the vicinity of the Jardine Water Treatment Plant, Chicago, Illinois. The Jardine Water Filtration Plant security zone would encompass all U.S. navigable waters of Lake Michigan within an arc of a 100-yard radius with its center located on the approximate position 41°53′46″ N, 87°36′23″ W.

The second new security zone would be located in the vicinity of the Wilson Avenue Crib, Chicago, Illinois. It would encompass all U.S. navigable waters of Lake Michigan within the arc of a circle with a 100-yard radius with its center in approximate position 41°58′00″ N, 87°35′30″ W.

The third new security zone would be located in the vicinity of the new Four Mile Intake Crib in Chicago, Illinois. It would encompass all U.S. navigable waters of Lake Michigan within the arc of a circle with a 100-yard radius with its center in approximate position 41°52′40″ N, 87°32′45″ W.

In accordance with 33 CFR 165.33, no person or vessel would be able to enter or remain in one of the security zones discussed in this proposed rule without permission of the Captain of the Port Sector Lake Michigan. The Captain of the Port Sector Lake Michigan, at his or her discretion, may permit persons and vessels to enter the security zones addressed in this proposed rule. For instance, the Captain of the Port Sector Lake Michigan may permit those U.S. Coast Guard certificated passenger vessels that normally load and unload passengers at the north side of Navy Pier to operate in the Jardine Water Filtration Plant security zone.

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.

Regulatory Planning and Review

This proposed 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. We conclude that this proposed rule is not a significant regulatory action because we anticipate that it would have minimal impact on the economy, would not interfere with other agencies, would not adversely alter the budget of any grant or loan recipients, and would not raise any novel legal or policy issues. The security zones amended and established by this proposed rule would be relatively small and enforced for relatively short time. Also, each security zone is designed to minimize its impact on navigable waters. Furthermore, each security zone has been designed to allow vessels to transit unrestricted to portions of the waterways not affected by the security zones. Thus, restrictions on vessel movements within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through each security zone when permitted by the Captain of the Port,

Sector Lake Michigan. On the whole, the Coast Guard expects insignificant adverse impact to mariners from the activation of these security zones.

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 proposed rule would affect the following entities, some of which might be small entities: the owners and operators of vessels intending to transit or anchor in the security zones addressed in this proposed rule. These security zones would not have a significant economic impact on a substantial number of small entities for the following reasons: the security zones in this proposed rule would be in small areas surrounding the intake cribs or areas near shore to Chicago's water filtration plants; the security zones have been designed to allow traffic to pass safely around these zones whenever possible.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed 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 this proposed 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 Department, Coast Guard Marine Safety Unit Chicago, Willowbrook, IL at (630) 986–2155. The Coast Guard will not retaliate against small entities that question or object to this rule or any policy or action of the Coast Guard.

Collection of Information

This proposed 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 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 proposed rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect the 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 proposed rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This proposed 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 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 Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, 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 not likely to have a significant effect on the human environment. This proposed rule involves the establishing, disestablishing, and changing of security zones and therefore, is categorically excluded under paragraph 34(g) of the Instruction. A preliminary environmental analysis check list supporting this preliminary

determination is available in the docket where indicated under **ADDRESSES**. 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 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 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:

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; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Amend § 165.904 by revising paragraph (a) to read as follows:

§ 165.904 Lake Michigan at Chicago Harbor & Burnham Park Harbor—Safety and Security Zone.

(a) *Location.* All waters of Lake Michigan within Burnham Park Harbor shoreward of a line across the entrance of the harbor connecting coordinates 41°51′09″ N, 87°36′36″ W and 41°51′11″ N, 87°36′22″ W.

* * * * *

3. In § 165.910, revise paragraph (a)(1),(a)(1)(i) and add paragraphs (a)(10) and (a)(11) to read as follows:

§ 165.910 Security Zones; Captain of the Port Lake Michigan.

(a) * * *

(1) *Jardine Water Filtration Plant.*

(i) Location. All waters of Lake Michigan within the arc of a 100-yard radius with its center located on the north wall of Jardine Water Filtration Plant, approximate position 41°53′46″ N, 87°36′23″ W; (NAD 83)

* * * * *

(10) Wilson Avenue Intake Crib. All waters of Lake Michigan within the arc of a circle with a 100-yard radius of the Wilson Avenue Crib with its center in approximate position 41°58′00″ N, 87°35′30″ W. (NAD 83)

(11) Four Mile Intake Crib. All waters of Lake Michigan within the arc of a circle with a 100-yard radius of the Four Mile Crib with its center in approximate position 41°52′40″ N, 87°32′45″ W. (NAD 83)

* * * * *

Dated: July 21 2011.

M.W. Sibley,

Captain, U.S. Coast Guard, Captain of the Port, Sector Lake Michigan.

[FR Doc. 2011–20091 Filed 8–8–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0032; FRL–9449–9]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Reasonably Available Control Technology, Oxides of Nitrogen, Cleveland Ozone Non-Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve, under the Clean Air Act (CAA), revisions to the Ohio State Implementation Plan (SIP) submitted on January 3, 2008 and June 1, 2011. These revisions incorporate provisions related to the implementation of nitrogen oxides (NO_X) Reasonably Available Control Technology (RACT) for major sources in the former Cleveland-Akron-Lorain moderate ozone nonattainment area. These rules are not required because, as established in section 182(f) of the CAA, NO_X emission control requirements do not apply if the resulting emission reductions are not needed to demonstrate attainment of the 8-hour ozone standard, which is the case for the former Cleveland-Akron-Lorain moderate ozone nonattainment area. However, these rules are being submitted and approved for their SIP strengthening effect as the control requirements in the submitted rules result in a RACT level of control.

DATES: Comments must be received on or before September 8, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0032, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 692–2511.
- *Mail:* John Mooney, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* John Mooney, Chief, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2008–0032. 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 instructions on submitting comments, go to section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, 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 Environmental Protection Agency, Region 5, Air and Radiation

Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal, Environmental Engineer, at (312) 886–6052 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Steven Rosenthal, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052, *Rosenthal.steven@epa.gov.*

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

I. What should I consider as I prepare my comments for EPA?
II. What action is EPA taking today and what is the purpose of this action?
III. What is EPA's analysis of Ohio's NO_X RACT rule?
IV. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What action is EPA taking today and what is the purpose of this action?

EPA is proposing to approve Ohio's new rule for the control of NO_X into the Ohio SIP. This rule, Ohio Administrative Code (OAC) 3745–110 ''Nitrogen Oxides—Reasonably Available Control Technology,'' was submitted to EPA on January 3, 2008, and June 1, 2011. This rule consists of the following sections: OAC 3745–110–01 ''Definitions,'' OAC 3745–110–02 ''Applicability,'' OAC 3745–21–110 ''RACT requirements and/or limitations for emissions of NO_X from stationary sources,'' OAC 3745–11–04 ''Compliance deadlines,'' and OAC 3745–110–05 ''Compliance methods.''

The CAA amendments of 1990 introduced the requirement for existing major (100 tons per year in moderate nonattainment areas) stationary sources of NO_X in nonattainment areas to install and operate NO_X RACT. Specifically, section 182(f) establishes NO_X emission control requirements for ozone nonattainment areas. It provides that these emission control requirements, however, do not apply to an area if the Administrator determines that NO_X emission reductions would not contribute to attainment of the ozone standard. EPA's January 2005 document, ''Guidance on Limiting Nitrogen Oxides Requirements Related to 8-Hour Ozone Implementation,'' provides guidance for demonstrating that further NO_X reduction in an ozone nonattainment area will not contribute to ozone attainment. The guidance provides that three consecutive years of monitoring data showing attainment of the standard without implementation of section 182(f) NO_X provisions is adequate to demonstrate that ''additional reductions of oxides of nitrogen would not contribute to attainment * * *.'' CAA section 182(f)(1)(A). As described in the guidance document, approval of this type of NO_X exemption is contingent on continued monitored attainment of the standard.

On March 17, 2009, Ohio submitted a request for a waiver from the section 182(f) NO_X requirements for the Cleveland-Akron-Lorain area based on monitoring data for the years 2006–2008 showing attainment of the 8-hour ozone standard in the area. Based on these data, EPA approved Ohio's request for an exemption from the section 182(f) NO_X requirements in the Cleveland-Akron-Lorain area on September 15, 2009. Because of this NO_X waiver the Ohio EPA is not required to adopt and implement NO_X emission control regulations pursuant to section 182(f) for the Cleveland-Akron-Lorain area to qualify for redesignation. The waiver request notwithstanding, Ohio EPA submitted NO_X RACT rules to EPA on January 3, 2008, and June 1, 2011, and has included NO_X RACT in the list of contingency measures in the maintenance plan for the area.

III. What is EPA's analysis of Ohio's NO_X RACT rule?

These NO_X RACT rules are approvable because they are enforceable and, for the sources covered, meet all of EPA's requirements except for the compliance dates. As discussed above, these rules are not required because of the NO_X waiver for the Cleveland-Akron-Loraine (former nonattainment) area. A discussion of these rules follows.

3745–110–01—Definitions

This section contains definitions that are necessary and appropriate for the remainder of Ohio's NO_X RACT rule.

3745–110–02—Applicability

This rule identifies the categories of NO_X sources subject to the control requirements in rule 3745–110–03. It applies to existing very large boilers (greater than 250 mmBtu/hr), large boilers (100 mmBtu/hr to 250 mmBTU/hr), mid-size boilers (50 mmBtu/hr to 100 mmBtu/hr), small boilers (20 to 50 mmBtu/hr), stationary combustion turbines and stationary internal combustion engines or to any stationary source of NO_X that is located at a facility that emits or has the potential to emit over 100 tons per year of NO_X emissions from all sources at the facility and the source is located in Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, or Summit County. The control requirements in rule 3745–110–03 also apply to new (after 1974) or modified very large boilers, large boilers, mid-size boilers, small boilers, stationary combustion turbines, and stationary internal combustion engines.

3745–110–03—RACT Requirements for Stationary Sources

This chapter contains control requirements for industrial boilers, stationary combustion turbines, and stationary internal combustion engines. The emission limits contained in this chapter for industrial boilers (provided below), stationary combustion turbines, and stationary internal combustion engines are consistent with EPA guidance (generally requiring combustion controls) and other state RACT evaluations.

(A) Small boilers.

The owner or operator of a small boiler must annually perform a tune-up and maintain, in a permanently bound log book, or other format approved in writing by the Director of Ohio EPA, the following information:

a) The date of the last tune-up;

b) The name, title and affiliation of the person who performed the tune-up and made any adjustments; and

c) Any other information which the Ohio environmental protection agency may require as a condition of approval of any permit for the boiler.

(B) Mid-size, large and very large boilers.

Except as otherwise provided in paragraphs (I) and (J) of this rule, on and after the compliance deadline specified by rule 3745–110–04 of the Administrative Code, no owner or operator of a mid-size, large, or very large boiler shall allow or permit the discharge into the ambient air of any NO_X emissions in excess of the following:

EMISSIONS LIMITATIONS

[Pounds of NO_X Emissions per mmBtu]

Fuel type	Tangential-fired	Wall-fired	Cyclone-fired	Spreader stoker-fired	Overfeed stoker-fired
Gas Only	[1] 0.10	[1] 0.10	N/A	N/A	N/A
Distillate Oil	[1] 0.12	[1] 0.12	[1] 0.12	N/A	N/A
Residual Oil	[2] 0.23	[2] 0.23	[2] 0.23	N/A	N/A
Coal (Wet Bottom)	[2] 0.30	[2] 0.30	[2] 0.30	N/A	N/A
Coal (Dry Bottom)	[2] 0.30	[2] 0.30	[2] 0.30	[2] 0.30	[2] 0.30

The NO_X emission limitations for the boilers specified above may be achieved by employing the NO_X emission control technologies specified below.

[1] low NO_X burners (LNB)

[2] low NO_X burners (LNB) in conjunction with flue gas recirculation (FGR) or over-fired air (OFA) as applicable.

This rule does not contain control requirements for electric generating units (EGUs). EPA's Cross-State Air Pollution Rule provides statewide, not unit specific, limits for EGUs. This rulemaking does not address whether unit specific limits are needed to satisfy RACT.

Ohio's rule allows an emission averaging program in lieu of the applicable emission limits for industrial boilers, stationary combustion turbines, and stationary internal combustion engines. However, Ohio's rule states that an emission averaging program shall not be Federally enforceable until EPA approves the program as part of the Ohio SIP. Any such averaging program would therefore have to be consistent with ''Improving Air Quality with Economic Incentive Programs, EPA–452/R–01–001, January 2001.'' Ohio's submittal includes no such averaging programs. EPA will review any such programs if and when submitted by Ohio.

This chapter also requires site-specific RACT evaluations (or RACT studies) for any applicable source that is not an industrial boiler, stationary combustion turbine, or stationary internal combustion engines. Site-specific RACT evaluations are also allowed for industrial boilers, stationary combustion turbines, and stationary internal combustion engines if the owner or operator claims that the applicable limit is economically unreasonable and/or technically infeasible. These RACT studies consist of a detailed engineering study to determine the technical and economic feasibility of reducing the NO_X emissions and to define RACT for the source. Any definition of RACT and schedule of compliance shall be submitted to and approved by EPA as a revision of the Ohio SIP.

This chapter contains site-specific RACT requirements for four sources. Compliance for all of these sources is required by the effective date of the rule, which is May 12, 2011. These sources are:

(1) *The Northeast Ohio Regional Sewer District—Southerly Wastewater Treatment Center in Cuyahoga Heights*

This facility has two mid-sized natural gas fired boilers, with low NO_X burners, for which the presumptive limit is 0.10 lb of NO_X/mmBTU. The use of ultra low NO_X burners was considered but rejected because they would only provide an additional 18 percent reduction and a cost-effectiveness of over $50,000 per ton of NO_X removed. The requested limits of 0.15 lb of NO_X/mmBTU, based upon the use of low-NO_X burners, can therefore be reasonably considered to represent RACT for these boilers under these particular circumstances.

(2) *ArcelorMittal Cleveland Inc.*

ArcelorMittal has 12 emission units located at its facility which are not one of the specific source types with specified limits. A 0.35 lb/mmBTU limit for the three reheat furnaces at its Hot Strip Mill is based upon the installation of 240 low NO_X burners which has resulted in a 51 percent reduction in NO_X emission. The Continuous Galvanizing Line is equipped with a low NO_X burner providing an estimated 50 percent NO_X emission reduction resulting in an emission limit of 0.23 lb/mmBTU. The remaining emissions units burn natural gas or blast furnace gas as fuel and generate relatively low NO_X emissions and are subject to limits from 0.06–0.10 lb/mmBTU. For the reasons provided above, the above limits can reasonably be considered to represent RACT under these particular circumstances.

(3) *Republic Engineered Products*

Republic Engineered products has 2 reheat furnaces at its facility which are not one of the specific source types with specified limits. These furnaces use low NO_X burners with resulting emission limitations of 0.15 and 0.132 lb/mmBTU. These limits can reasonably be considered to represent RACT, under these particular circumstances, because the additional reductions that could be obtained with post-combustion controls are not cost-effective.

(4) *United States Steel Lorain Tubular Operations*

United States Steel Lorain Tubular Operations has several furnaces at its facility which are not one of the specific source types with specified limits. Emissions Units P003, P0037 and P040 are subject to limits of 0.068 lb/mmBTU, 0.15 lb/mmBTU and 0.15 lb/mmBTU. These limits are based upon the continued use of low NO_X burners because post combustion controls are not cost-effective. RACT limits have not yet been established for Emission Units P035 and P039.

It should be noted that there are other subject sources for which RACT limits have not yet been established.

The emission limits specified in this rule are based upon either of the following:

(1) The average of three one-hour stack test runs if stack testing is used to demonstrate compliance; or

(2) A twenty-four-hour input-weighted average if a continuous emissions monitor is used to demonstrate compliance.

Both of these are accepted methods for determining the lbs of NO_X/mmBTU.

3745–110–04 Compliance Deadlines

The effective date of this chapter is December 22, 2007. For facilities that have not conducted a RACT study, compliance is required by December 22, 2009, if combustion modifications are required to achieve compliance with the limits in 3745–21–03 or December 22, 2010, if add-on controls are required to demonstrate compliance.

For facilities conducting a RACT study, compliance is required by two years after approval by the Director of Ohio EPA if combustion modifications are required to demonstrate compliance. Compliance is required by three years after approval by the Director if add-on controls are needed to demonstrate compliance. The four facilities identified in the discussion of rule 3745–110–03, and for which RACT studies have been approved, were required to have achieved compliance by May 2, 2011.

The general emission limits for industrial boilers, stationary combustion turbines, and stationary internal combustion engines represent RACT. In addition, the limits for the four facilities resulting from RACT studies can reasonably be considered to represent RACT under the specified circumstances. It should be noted that there are other facilities for which RACT studies are being developed that are not currently complying with NO_X RACT. EPA expects that Ohio will adopt and submit limits for those sources once the studies are complete, and EPA will evaluate those limits at that time. To the extent that the facilities are subject to specific limits under rule 3745–110–03, compliance with those limits is required now, unless and until a revised limit is approved.

EPA's November 29, 2005, ''Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2'' (70 FR 71612) required that compliance be achieved by March 2009. Rule 3745–110–04 provides for compliance dates after March 2009, but the compliance date has now passed for all sources that are subject to the NO_X limits in this rule. Therefore, there is no longer any ozone air quality impact from allowing facilities to have compliance deadlines after 2009 (and there is also no way that these facilities can ever meet the March 2009 deadline). Finally, since Ohio is not currently required to adopt RACT rules, Ohio is not required to have RACT rules with a March 2009 compliance date.

3745–110–05 Compliance Methods

This rule requires that a source which is subject to the requirements of rule 3745–110–03 demonstrate compliance with the applicable emission limits by performing emission tests in accordance with EPA Method 7, 7A, 7C, 7D, or 7E, and any additional approved EPA methods as applicable.

Any continuous emissions monitoring system for NO_X shall meet the requirements of Performance Specification 2, 40 CFR Part 60, Appendix B and quality assurance procedures contained in 40 CFR Part 60, Appendix F or 40 CFR Part 75.

These are the appropriate EPA approved methods for establishing compliance.

Conclusion

These rules are not required because, as established in section 182(f) of the CAA, NO_X emission control requirements do not apply if the resulting emission reductions are not needed to demonstrate attainment of the 8-hour ozone standard, which is the case for the former Cleveland-Akron-Lorain moderate ozone nonattainment area. However, these rules are being submitted and approved for their SIP strengthening effect. In addition, EPA believes that the control requirements in the submitted rules mandate an acceptable RACT level of control.

As indicated above, these rules do not apply to EGUs. In addition, there are other otherwise applicable sources that are not subject to these rules because their RACT studies have not as yet been approved. Finally, compliance deadlines for some sources are later than the March 2009, deadline that was established in EPA's phase 2 guidance for areas required to adopt RACT rules pursuant to the 1997 8-hour ozone standard. However, EPA is satisfied that the limits for sources covered in Ohio's rule are RACT-level limits, and EPA finds the compliance dates acceptable given that the RACT requirements (and associated compliance deadline requirements) do not apply and given that in any case all sources are now required to be in compliance.

These rules are therefore being proposed for approval because they provide additional NO_X control requirements and therefore strengthen the effectiveness of the SIP.

IV. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and

recordkeeping requirements, Volatile organic compounds.

Dated: July 29, 2011.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2011–20205 Filed 8–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 85, 86, and 600

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533

[EPA–HQ–OAR–2010–0799; FRL–9448–7; NHTSA–2010–0131]

RIN 2060–AQ54; RIN 2127–AK79

2017–2025 Model Year Light-Duty Vehicle GHG Emissions and CAFE Standards: Supplemental Notice of Intent

AGENCY: National Highway Traffic Safety Administration (NHTSA), and Environmental Protection Agency (EPA).

ACTION: Supplemental Notice of Intent.

SUMMARY: President Obama issued a Presidential Memorandum on May 21, 2010, concerning the development of a new generation of clean cars and trucks through innovative technologies and manufacturing. The President requested that EPA and NHTSA, on behalf of the Department of Transportation, develop, through notice and comment rulemaking, a coordinated National Program under the Clean Air Act (CAA) and the Energy Policy and Conservation Act (EPCA), as amended by the Energy Independence and Security Act (EISA), to reduce fuel consumption by and greenhouse gas emissions of light-duty vehicles for model years 2017–2025.

This notice of intent generally describes the joint proposal that the EPA and NHTSA expect to issue to establish the National Program for model years 2017–2025. The agencies are developing the proposal based on extensive technical analyses, an examination of the factors required under the respective statutes and on discussions with individual motor vehicle manufacturers and other stakeholders. The National Program would apply to passenger cars, light-duty trucks, and medium-duty passenger vehicles (light-duty vehicles) built in those model years.

DATES: The agencies currently expect to issue a proposal for a coordinated National Program for model year 2017–2025 light-duty vehicles by September 28, 2011, and a final rule by July 31, 2012.

ADDRESSES: *See* the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: *EPA:* Christopher Lieske, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; *telephone number:* 734–214–4584; *fax number:* 734–214–4816; *e-mail address: lieske.christopher@epa.gov,* or contact the Assessment and Standards Division; *e-mail address: otaqpublicweb@epa.gov. DOT/NHTSA:* Rebecca Yoon, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* (202) 366–2992.

SUPPLEMENTARY INFORMATION:

How can I get copies of this document and other related information?

NHTSA and EPA have established dockets for the already issued notices and upcoming rulemaking under Docket ID numbers NHTSA–2010–0131 and EPA–HQ–OAR–2010–0799, respectively. You may read the materials placed in the dockets (*e.g.,* the TAR and the comments submitted in response to the first NOI [1] by other interested persons) at any time by going to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

You may also read the materials at the EPA Docket Center or NHTSA Docket Management Facility at the following locations: *EPA:* EPA Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744. *NHTSA:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

The dockets established by the agencies will remain open for the duration of the rulemaking.

[1] 75 FR 62739 (Oct. 13, 2010).

I. Background and Introduction

Following the successful adoption of a National Program for greenhouse gas emissions (GHG) and fuel economy standards for model years (MY) 2012–2016 vehicles, the President issued a Memorandum on May 21, 2010 requesting that the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA), on behalf of the Department of Transportation, work together to develop a national program for model years 2017–2025. Specifically, he requested that the agencies develop *'' * * * a coordinated national program under the CAA [Clean Air Act] and the EISA [Energy Independence and Security Act of 2007] to improve fuel efficiency and to reduce greenhouse gas emissions of passenger cars and light-duty trucks of model years 2017–2025.''* [2] The President recognized our country could take a leadership role in addressing the global challenges of improving energy security and reducing greenhouse gas pollution, stating that *''America has the opportunity to lead the world in the development of a new generation of clean cars and trucks through innovative technologies and manufacturing that will spur economic growth and create high-quality domestic jobs, enhance our energy security, and improve our environment.''*

Since that time, the agencies have worked with the state of California, as requested by the President, to address all elements requested in the May 21, 2010 memorandum. We completed an initial assessment of the technologies, strategies and underlying analyses that would be considered in setting standards for MYs 2017–2025 in consultation with a wide range of stakeholders.[3] The Interim Technical Assessment Report (TAR) and a Notice of Intent (NOI) to conduct a joint rulemaking were concluded on September 30, 2010.[4] Following the opportunity for public comment on the interim TAR and NOI, the agencies developed and published a Supplemental NOI (SNOI) [5] in December 2010 highlighting many of the key comments received in response to the September NOI, and to the TAR. The Supplemental NOI also discussed the agencies' plans for many of the key technical analyses that have been and

[2] The Presidential Memorandum is found at: *http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards.*

[3] In addition, NHTSA will consider analyses it is required to conduct under the National Environmental Policy Act.

[4] 75 FR 62739, October 13, 2010.

[5] 75 FR 76337, December 8, 2010.

will be undertaken in developing the upcoming proposed rulemaking.

Since the publication of the SNOI in December 2010, the agencies, working with California, have been engaged in discussions with individual auto manufacturers, automotive suppliers, states, environmental groups, and the United Auto Workers, who all have expressed support for a continuation of the National Program. The agencies have focused their discussions and efforts on developing information that will support the underlying technical assessments that will inform the proposed standards.

This joint Notice of Intent announces plans by NHTSA and EPA to propose strong and coordinated Federal greenhouse gas and fuel economy standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles (hereafter light-duty vehicles), referred to as the National Program.[6] Both agencies seek to propose a coordinated program that can achieve important reductions of greenhouse gas (GHG) emissions from and fuel consumption by the light-duty vehicle part of the transportation sector, based on technologies that will be commercially available and that can be incorporated at a reasonable cost.

Under the joint rulemaking, EPA will propose GHG emissions standards under the Clean Air Act (CAA), and NHTSA will propose Corporate Average Fuel Economy (CAFE) standards under EPCA, as amended by the Energy Independence and Security Act of 2007 (EISA). It is intended that this joint rulemaking proposal will reflect a carefully coordinated and harmonized approach to implementing these two statutes and will be in accordance with all substantive and procedural requirements imposed by law.[7]

The program the agencies intend to propose holds out the promise of development of a new generation of clean cars and trucks through innovative technologies and manufacturing that will spur economic growth and create high-quality domestic jobs, enhance our energy security, and improve our environment. Consistent with Executive Order 13563, it is the result of early consultation with all stakeholders, employs flexible regulatory approaches to reduce burdens, maintains freedom of choice for the public, and harmonizes federal and state regulations.

The National Program would apply to passenger cars, light-duty trucks, and medium-duty passenger vehicles (light-duty vehicles) built in those model years. Together, these vehicle categories, which include passenger cars, sport utility vehicles, minivans, and pickup trucks, are responsible for approximately 60 percent of all U.S. transportation-related greenhouse gas emissions and fuel consumption. If ultimately adopted, these standards would represent a harmonized and consistent National Program pursuant to the separate statutory frameworks under which NHTSA and EPA operate. The approach addressed in this Notice of Intent, if ultimately adopted, is intended to allow manufacturers to build a single light-duty national fleet that would satisfy all requirements under both programs and would provide significant reductions in both greenhouse gas emissions and oil consumption.

EPA and NHTSA's current estimate is that the standards discussed in this Notice of Intent would reduce greenhouse gases by approximately 2 billion metric tons and would save approximately 4 billion barrels of oil, over the lifetime of the model year 2017–2025 vehicles.

Key elements of a harmonized and coordinated National Program that the agencies intend to propose are the level and form of the standard, the available flexibilities and compliance mechanisms, and general implementation elements. These elements are outlined in the following sections. The agencies will continue to analyze all of the issues relevant to the proposal, and will provide their analyses for review and public comment with the upcoming proposal. This will include analyses on a variety of relevant issues, such as the costs and benefits of the proposal, as well as the effects that the proposal would have on the economy, manufacturers, and consumers. The proposal that the agencies intend to issue will discuss both the analyses that will be completed for the proposal as well as any plans for conducting additional analyses.

II. Broad Program Overview

A. Level of the Standards

Consistent with the Presidential Memorandum of May 21, 2010, EPA and NHTSA intend to propose two separate sets of standards for model years 2017 through 2025, each under their respective statutory authorities. Both the proposed CO_2 and CAFE standards would be footprint-based, similar to the standards currently in effect through model year 2016, and would become more stringent each model year from 2017 through 2025.

EPA currently intends to propose standards that would be projected to achieve, on an average industry fleet wide basis, 163 grams/mile of CO_2 in model year 2025 (this would be equivalent, on a mpg-equivalent basis, to 54.5 mpg if all of the CO_2 emissions reductions were achieved with fuel economy technology).[8] For passenger cars, the CO_2 compliance values associated with the footprint curves would be reduced on average by 5 percent per year from the CO_2-footprint curves for the model year 2016 passenger car standard through model year 2025. In recognition that full-size pick-up trucks have unique challenges compared to other light-duty trucks and passenger cars, EPA intends to propose a lower annual rate of improvement for light-duty trucks in the early years of the program. For light-duty trucks, the proposed average annual rate of CO_2 emissions reduction in model years 2017 through 2021 would be 3.5 percent per year. EPA intends to change the slopes of the CO_2-footprint curves for light-duty trucks from those in the 2012–2016 rule, in a manner that effectively means that the annual rate of improvement for smaller light-duty trucks in model years 2017 through 2021 would be higher than 3.5 percent, and the annual rate of improvement for larger light-duty trucks over the same time period would be lower than 3.5 percent. For model years 2022 through 2025, EPA expects to propose an average annual rate of CO_2 emissions reduction for light-duty trucks of 5 percent per year.

NHTSA currently intends to propose standards that would be projected to require, on an average industry fleet wide basis, 40.9 mpg in model year 2021, and 49.6 mpg in model year 2025. For passenger cars, the annual increase in stringency between model years 2017 to 2021 is expected to average 4.1 percent, and to average 4.3 percent between model years 2017 and 2025. Like EPA, in recognition of the utility requirements of full-size pick-up trucks and the unique challenges to improving fuel economy compared to other light-duty trucks and passenger cars, NHTSA intends to propose a lower annual rate of improvement for light-duty trucks in the early years of the program. For light-duty trucks, the proposed overall annual

[6] NHTSA is delegated responsibility for implementing the Energy Policy and Conservation Act (EPCA) fuel economy requirements assigned to the Secretary of Transportation. 49 CFR 1.50, 501.2(a)(8).

[7] For NHTSA, this includes the requirements of the National Environmental Policy Act (NEPA).

[8] Real-world CO_2 is typically 25 percent higher and real-world fuel economy is typically 20 percent lower than the CO_2 and CAFE values discussed here.

rate of fuel economy improvement in model years 2017 through 2021 would be 2.9 percent per year. NHTSA expects to change the slopes of the fuel economy footprint curves for light-duty trucks from those in the 2012–2016 rule, which would effectively make the annual rate of improvement for smaller light-duty trucks in model years 2017 through 2021 higher than 2.9 percent, and the annual rate of improvement for larger light-duty trucks over the same time period lower than 2.9 percent. For model years 2022 through 2025, NHTSA expects to propose conditional standards with an overall annual rate of fuel economy improvement for light-duty trucks of 4.7 percent per year. For the first time, NHTSA expects to propose that manufacturers may include air conditioning system efficiency improvements as a means to comply with fuel economy standards, and NHTSA also expects to increase the stringency of standards by the amount industry is expected to improve air conditioning system efficiency. NHTSA notes that the intended proposed rates of increase in stringency for CAFE standards are lower than EPA's intended proposed rates of increase in stringency for GHG standards. As in the MY 2012–2016 rulemaking, this is for purposes of harmonization and in reflection of certain statutory constraints in EPCA/EISA. For example, NHTSA's standards do not reflect the inclusion of air conditioning system refrigerant and leakage improvements.

The coefficients and industry-wide curves that NHTSA and EPA intend to propose are included as Appendix B.

The agencies believe that the standards discussed above could be met with improvements in conventional gasoline and hybrid vehicle technologies and an increased market share of more advanced technologies including electric vehicles and plug-in hybrid electric vehicles.

B. Mid-Term Review

Given the long time frame at issue in setting standards for MY2022–2025 light-duty vehicles, and given NHTSA's obligation to conduct a separate rulemaking in order to establish final standards for vehicles for those model years, EPA and NHTSA intend to propose a comprehensive mid-term evaluation and agency decision-making as described in Appendix A to this Notice of Intent. Up to date information will be developed and compiled for the evaluation, through a collaborative, robust and transparent process, including public notice and comment. The evaluation will be based on (1) A holistic assessment of all of the factors considered by the agencies in setting standards, including those set forth in the rule and other relevant factors, and (2) the expected impact of those factors on the manufacturers' ability to comply, without placing decisive weight on any particular factor or projection. The comprehensive evaluation process will lead to final agency action by both agencies.

Consistent with the Agencies' commitment to maintaining a single national framework for regulation of vehicle emissions and fuel economy, the Agencies fully expect to conduct the mid-term evaluation in close coordination with the California Air Resources Board (CARB). Moreover, the Agencies fully expect that any adjustments to the standards will be made with the participation of CARB and in a manner that ensures continued harmonization of state and Federal vehicle standards.

C. Key Program Elements

EPA and NHTSA have more recently sought extensive input from automobile manufacturers regarding design elements for the MY 2017–2025 National Program. In achieving the level of standards described above for the 2017–2025 program, the agencies expect automakers' use of advanced technologies to be an important element of transforming the vehicle fleet. To facilitate this transformation, the agencies are considering a number of incentive programs to encourage early adoption and introduction into the marketplace of advanced technologies that represent ''game changing'' performance improvement, including electric vehicles, plug-in hybrid electric vehicles and fuel cell vehicles, and hybrid electric large pickups. In addition, the agencies recognize that, as with the MY 2012–2016 program, there are technologies with the potential to achieve real-world CO2 and fuel consumption reductions that are not captured by the standard test procedures. The agencies intend to propose a program approach to further encourage manufacturer investments in these ''off-cycle'' technologies.

1. Off-Cycle Credits

As in the MY 2012–2016 program, the objective of the off-cycle credits program is to promote the early market penetration of tailpipe CO_2/fuel consumption reducing technologies that are not appropriately accounted for in the current test procedure. Many automakers indicated that they had a strong interest in pursuing off-cycle technologies, but the process outlined in the 2012–2016 program should be refined and simplified so as to provide more certainty as to the types of technologies the agencies would consider, and so the process could be simplified. The agencies intend to propose to expand and streamline the 2012–2016 off-cycle credit provisions, including an approach by which the agencies would provide credit for a subset of beneficial off-cycle technologies to encourage early penetration of these technologies.

For the NPRM, EPA and NHTSA intend to develop a minimum credit value on a subset of technologies for which we have sufficient data. We expect this list to include at least six defined technologies, if not more.[9] The total number of technologies will be dependent on the available data. In order to make use of the pre-defined credit list of off-cycle technologies, a manufacturer must utilize the technology on a minimum percentage of the company's vehicles. EPA and NHTSA will continue to assess the appropriate level and will propose a level in the NPRM. The specific percentage values may vary by off-cycle technology, and will consider the applicability of the technology across vehicle type. Under the planned proposal, the total gram/mile credit from the predefined list for any given model year would not exceed a 10 gram/mile [10] impact on the company's combined fleet average. This limit would only apply to the total for technologies where the company chooses to use the agency provided credit values. Automakers can apply for additional credits beyond the minimum credit value of listed technologies if they have sufficient supporting data.

In addition, the agencies are planning to propose that companies could also apply for off-cycle credit for technologies that are not on the pre-defined list, based on the submission of sufficient supporting data. EPA and NHTSA intend to propose a timeline for the approval process, including a 60-day NHTSA and EPA decision process from the time a manufacturer submits a complete application. EPA and NHTSA also intend to propose a detailed, common, step-by-step process, including a specification of the data that manufacturers must submit. For off-

[9] Technologies may include active grill shutters, electric heat pumps, high efficiency alternators, high efficiency lights, start-stop, solar roof panels for battery charging on EV, PHEV or HEV with at least 100 watts, active transmission warm-up, and/or engine heat recovery using thermo-electric for 100 watts, and the credit for individual technologies could range from less than 1gm/mile to approximately 5 gm/mile.

[10] This corresponds to 0.001125 gallon/mile.

cycle technologies that are both not covered by the pre-approved off-cycle credit list and that are not quantifiable based on the 5-cycle test cycle option provided in the 2012–2016 rulemaking, EPA and NHTSA will retain the public comment process described by EPA in the MY 2012–2016 rule.

NHTSA and EPA also intend to propose that once a technology has been approved by the two agencies, either from the pre-approved list or through the approval process, that technology and its assigned credit value is available through MY 2025.

2. Incentives for Electric Vehicles, Plug-in Hybrid Electric Vehicles, and Fuel Cell Vehicles

To facilitate market penetration of the most advanced vehicle technologies as rapidly as possible, EPA intends to propose an incentive multiplier for all electric vehicles (EVs), plug-in hybrid electric vehicles (PHEVs), and fuel cell vehicles (FCVs) sold in MYs 2017 through 2021. This multiplier approach means that each EV/PHEV/FCV would count as more than one vehicle in the manufacturer's compliance calculation. EPA intends to propose that EVs and FCVs start with a multiplier value of 2.0 in MY 2017, phasing down to a value of 1.5 in MY 2021. PHEVs would start at a multiplier value of 1.6 in MY 2017 and phase down to a value of 1.3 in MY 2021.[11] These multipliers would be proposed for incorporation in EPA's GHG program.

NHTSA is precluded from offering incentives for EVs, FCVs and PHEVs, except as specified by EISA, and is not intending to propose incentive multipliers comparable to the EPA incentive multipliers described above.

As an additional incentive for EVs, PHEVs and FCVs, EPA intends to propose allowing a value of 0 g/mile for the tailpipe compliance value for EVs, PHEVs (electricity usage) and FCVs for MY 2017–2021, with no limit on the quantity of vehicles eligible for 0 g/mi tailpipe emissions accounting. For MY 2022–2025, 0 g/mi will only be allowed up to a per-company cumulative sales cap based on significant penetration of these advanced vehicles in the marketplace. EPA intends to propose an appropriate cap in the NPRM.

3. Incentives for ''Game Changing'' Technologies Performance for Full-Size Pickup Truck Including Hybridization

The agencies recognize that the standards under consideration for MY 2017–2025 will be most challenging to large trucks, including full size pickup trucks. The agencies' goal is to incentivize the penetration into the marketplace of ''game changing'' technologies for these pickups, including their hybridization. The agencies intend to solicit information on technologies that offer significant increases in fuel efficiency and reduction in greenhouse gas emissions. We intend to propose a credit for manufacturers that employ significant quantities of hybridization on full size pickup trucks, by including a per-vehicle credit available for mild and strong hybrid electric vehicles (HEVs). This provides the opportunity to begin to transform the most challenging category of vehicles in terms of the penetration of advanced technologies, allowing additional opportunities to successfully achieve the higher levels of truck stringencies in MY 2022–2025.

The agencies intend that access to this credit is conditioned on a minimum penetration of the technology in a manufacturer's full size pickup truck fleet, with defined criteria for a full size pickup truck (*e.g.,* minimum bed size and minimum towing capability). The agencies intend to propose that mild HEV pickup trucks are eligible for a 10 g/mi[12] credit during 2017–2021 if the technology is used on a minimum percentage of a company's full size pickups, beginning with at least 30% of a company's full size pickup production in 2017 and ramping up to at least 80% in 2021. Strong HEV pickup trucks would be eligible for a 20g/mi credit during 2017–2025 if the technology is used on at least 10% of the company's full size pickups. The agencies will propose specific definitions of mild and strong HEV pickup trucks, but expect to include stop/start, regenerative braking, minimum motor power, minimum battery voltage value and minimum energy storage capacity, or similar types of objective metrics. The agencies expect that a ''mild'' HEV will include moderate hybridization and not just start/stop, and that a ''strong'' HEV will include launch assist.

The agencies also intend to propose a performance based incentive credit for full size pickup trucks which achieve a significant reduction below the applicable target. This credit could also be on the order of 10–20 gm/mile vehicle. The same vehicle would not receive credit under both the HEV and the performance based approaches.

4. Air Conditioning Credits

As with the MY2012–2016 program, manufacturers will be able to earn credits for improvements in air conditioning (A/C) systems, both for efficiency improvements (reduces tailpipe CO_2 and improves fuel consumption) and for leakage or alternative, lower GWP (global warming potential) refrigerant use (reduces hydrofluorocarbon (HFC) emissions). EPA intends to propose that the maximum A/C credit available for cars is 18.8 grams/mile CO_2 and for trucks is 24.4 grams/mile CO_2. The test methods used to calculate these credits will be very similar to those of the MY2012–2016 program.

For the first time, NHTSA expects to propose that manufacturers may include air conditioning system efficiency improvements as a means to comply with fuel economy standards. NHTSA expects to not allow the use of A/C system credits that affect leakage or alternative, lower GWP refrigerant use, because those changes do not affect fuel efficiency. NHTSA also expects to increase the stringency of standards by the amount industry is expected to improve air conditioning system efficiency. NHTSA intends to propose that the maximum A/C credit available for cars is 0.000563 gallon/mile and for trucks is 0.000810 gallon/mile. The test methods used to calculate these credits will be the same as EPA's.

5. Treatment of Compressed Natural Gas (CNG), Plug-in Hybrid Electric Vehicles (PHEVs), and Flexible Fuel Vehicles (FFVs)

EPA intends that CO_2 credits for plug-in hybrid electric vehicles (PHEVs) and bi-fuel compressed natural gas (CNG) vehicles will be based on the recognition that, once a consumer has paid several thousand dollars to be able to use a fuel that is considerably cheaper than gasoline, it is very likely that the consumer will seek to use the cheaper fuel as much as possible. Accordingly, for CO_2 emissions compliance, EPA expects to use the Society of Automotive Engineers ''utility factor'' methodology (based on vehicle range on the alternative fuel and typical daily travel mileage) to determine the assumed percentage of operation on alternative fuel and percentage of operation on CNG for both PHEVs and bi-fuel CNG vehicles, along with the CO_2 emissions test values on the alternative fuel and gasoline.

EPA does not expect to extend this method to flexible fueled vehicles (FFVs) using E–85 and gasoline, since there is not a significant cost differential

[11] The multipliers for EV/FCV would be: 2017–2019—2.0, 2020—1.75, 2021—1.5; for PHEV: 2017–2019—1.6, 2020—1.45, 2021—1.3.

[12] 0.001125 gallon/mile.

between an FFV and conventional gasoline vehicle and historically consumers have only fueled these vehicles with E85 a very small percentage of the time. Therefore, treatment of E85 FFVs will continue as the MY2016 program, based on actual usage of E85 which represents a real-world reduction attributed to alternative fuels.

In the NHTSA program for MYs 2017–2019, NHTSA expects that the fuel economy of dual fuel vehicles will be determined in the same manner as specified in the MY 2012–2016 rule, and as defined by EISA. Beginning in MY 2020, EISA does not specify how to measure the fuel economy of dual fuel vehicles, and it is expected NHTSA will propose to use the EPA ''utility factor'' methodology for PHEV and CNG vehicles to determine how to proportion the fuel economy when operating on gasoline or diesel fuel and the fuel economy when operating on the alternative fuel. For FFVs, NHTSA expects to propose to use the same methodology as EPA to determine how to proportion the fuel economy, which would be based on actual usage of E85. NHTSA expects to continue to use Petroleum Equivalency Factors and the incentive multipliers that are used in the MY 2012–2016 rule, however with no cap on the amount of fuel economy increase allowed.

6. Credit Banking and Trading

The agencies will propose to continue the 5-year credit carry forward and 3-year credit carry back provisions of the MY2012–2016 program, with one key exception under the EPA program. To facilitate the transition to the increasingly more stringent standards, EPA intends to propose a one-time credit carry forward beyond 5 years, such that any credits generated from MY2010 through 2016 will be able to be used any time through MY 2021. This provision would not apply to early credits generated in MY 2009. NHTSA's program will continue the 5-year carry-forward and 3-year carry-back as required by statute.

As with the MY 2012–2016 program, EPA intends to continue to allow manufacturers to make unlimited transfers between their car and light truck fleets, and unlimited credit trading between manufacturers. NHTSA intends to continue to allow unlimited credit trading between manufacturers, and credit transferring up to the limits allowed by statute, consistent with the approach in the MY 2012–2016 program.

7. Exclusion of Emergency and Police Vehicles

Under EPCA, manufacturers are allowed to exclude emergency vehicles from their CAFE fleet and all manufacturers have historically done so. In the MY 2012–2016 program, EPA's GHG program does apply to these vehicles. However, after further consideration of this issue, EPA intends to propose that an exclusion is appropriate because of the unique features of vehicles designed specifically for law enforcement purposes, which have the effect of raising their GHG emissions.

8. Small Businesses and Small Volume Manufacturers

As EPA did for the MY 2012–2016 program, EPA intends to propose to continue to exclude small businesses from the GHG standards, for any company that meets the Small Business Administration's definition of a small business. For vehicle manufacturers, the definition of small business is any firm with less than 1,000 employees. EPA believes this exemption is appropriate since these businesses make up less than 0.1% of total U.S. vehicle sales, and there is no significant impact on emission reductions.

EPCA provides NHTSA with the authority to exempt from the generally applicable CAFE standards manufacturers that produce fewer than 10,000 passenger cars worldwide in the model year each of the two years prior to the year in which they seek an exemption.[13] If NHTSA exempts a manufacturer, it must establish an alternate standard for that manufacturer for that model year, at the level that the agency decides is maximum feasible for that manufacturer. The exemption and alternative standard apply only if the exempted manufacturer also produces fewer than 10,000 passenger cars worldwide in the year for which the exemption was granted.

For small volume manufacturers, which EPA defines as manufacturers with U.S. annual sales of less than 5,000 vehicles, EPA intends to propose to bring these manufacturers into the program for the first time, and allow them to petition for alternative standards.

D. Conclusion

This document outlines the key program elements of a National Program that EPA and NHTSA plan to propose for model year 2017–2025 light-duty vehicles. The agencies' efforts to develop this program have been fully consistent with the President's May 21, 2010 Memorandum. The agencies have coordinated extensively with California, and held extensive discussions with stakeholders to ensure our proposal is based on the most robust technical analysis possible. The agencies plan to issue a Notice of Proposed Rulemaking by the end of September 2011.

[13] 49 U.S.C. 32902(d). Implementing regulations may be found in 49 CFR part 525.

Appendix A—Mid-Term Evaluation for MY 2022–2025 LDV Rules

Given the long time frame at issue in setting standards for MY2022–2025 light-duty vehicles, and given NHTSA's obligation to conduct a separate rulemaking in order to establish final standards for vehicles for those model years, EPA and NHTSA will conduct a comprehensive mid-term evaluation and agency decision-making as described below. Up to date information will be developed and compiled for the evaluation, through a collaborative, robust and transparent process, including public notice and comment. The evaluation will be based on (1) A holistic assessment of all of the factors considered by the agencies in setting standards, including those set forth in the rule and other relevant factors, and (2) the expected impact of those factors on the manufacturers' ability to comply, without placing decisive weight on any particular factor or projection. The comprehensive evaluation process will lead to final agency action by both agencies.

Consistent with the Agencies' commitment to maintaining a single national framework for regulation of vehicle emissions and fuel economy, the Agencies fully expect to conduct the mid-term evaluation in close coordination with the California Air Resources Board (CARB). Moreover, the Agencies fully expect that any adjustments to the standards will be made with the participation of CARB and in a manner that ensures continued harmonization of state and Federal vehicle standards.

- EPA will conduct a mid-term evaluation of the later model year light-duty GHG standards (MY2022–2025). The evaluation will determine whether those standards are appropriate under section 202(a) of the Act. EPA will be legally bound to make a final decision, by April 1, 2018, on whether the MY 2022–2025 GHG standards are appropriate under section 202(a), in light of the record then before the agency. In the MY 2017–2025 rule EPA will adopt a regulation requiring EPA to make such a determination by that date.
- EPA, NHTSA and CARB will jointly prepare a draft Technical Assessment Report (TAR) to inform EPA's determination on the appropriateness of the GHG standards and to inform NHTSA's rulemaking for the CAFE standards for MYs 2022–2025. The TAR will examine the same issues and underlying analyses and projections considered in the original rulemaking, including technical and other analyses and projections relevant to each agency's authority to set standards as well as any relevant new issues that may present themselves. There will be an opportunity for public comment on the draft

TAR, and appropriate peer review will be performed of underlying analyses in the TAR. The assumptions and modeling underlying the TAR will be available to the public, to the extent consistent with law.

● EPA will also seek public comment on whether the standards are appropriate under section 202(a), *e.g.* comments to affirm or change the GHG standards (either more or less stringent). The agencies will carefully consider comments and information received and respond to comments in their respective subsequent final actions.

● EPA and NHTSA will consult and coordinate in developing EPA's determination on whether the MY 2022–2025 GHG standards are appropriate under section 202(a) and NHTSA's NPRM.

● In making that determination, EPA will evaluate and determine whether the MY2022–2025 GHG standards are appropriate under section 202(a) of the CAA based on a comprehensive, integrated assessment of all of the results of the review, as well as any public comments received during the evaluation, taken as a whole. The decision making required of the Administrator in making that determination is intended to be as robust and comprehensive as that in the original setting of the MY2017–2025 standards.

● In making this determination, EPA will consider information on a range of relevant factors, including but not limited to those listed in the draft rule and below:

1. Development of powertrain improvements to gasoline and diesel powered vehicles.
2. Impacts on employment, including the auto sector.
3. Availability and implementation of methods to reduce weight, including any impacts on safety.
4. Actual and projected availability of public and private charging infrastructure for electric vehicles, and fueling infrastructure for alternative fueled vehicles.
5. Costs, availability, and consumer acceptance of technologies to ensure compliance with the standards, such as vehicle batteries and power electronics, mass reduction, and anticipated trends in these costs.
6. Payback periods for any incremental vehicle costs associated with meeting the standards.
7. Costs for gasoline, diesel fuel, and alternative fuels.
8. Total light-duty vehicle sales and projected fleet mix.
9. Market penetration across the fleet of fuel efficient technologies.
10. Any other factors that may be deemed relevant to the review.

■ If, based on the evaluation, EPA decides that the GHG standards are appropriate under section 202(a), then EPA will announce that final decision and the basis for EPA's decision. The decision will be final agency action which also will be subject to judicial review on its merits. EPA will develop an administrative record for that review that will be no less robust than that developed for the initial determination to establish the standards. In the midterm evaluation, EPA will develop a robust record for judicial review that is the same kind of record that would be developed and before a court for judicial review of the adoption of standards.

■ Where EPA decides that the standards are not appropriate, EPA will initiate a rulemaking to adopt standards that are appropriate under section 202(a), which could result in standards that are either less or more stringent. In this rulemaking EPA will evaluate a range of alternative standards that are potentially effective and reasonably feasible, and the Administrator will propose the alternative that in her judgment is the best choice for a standard that is appropriate under section 202(a). In the 2017–2025 rulemaking EPA will formally adopt the interpretation that the provisions of section 202(b)(1)(C) are not applicable to any revisions of the greenhouse standards adopted in this later rulemaking based on the mid-term evaluation. If EPA initiates a rulemaking, it will be a joint rulemaking with NHTSA. Any final action taken by EPA at the end of that rulemaking is also judicially reviewable.

■ The MY 2022–2025 GHG standards will remain in effect unless and until EPA changes them by rulemaking.

■ NHTSA intends to issue conditional standards for MYs 2022–2025 in the LDV rulemaking being initiated this fall for MY 2017 and later model years. The CAFE standards for MYs 2022–2025 will be determined with finality in a subsequent, de novo notice and comment rulemaking conducted in full compliance with section 32902 of title 49, U.S.C. and other applicable law. Accordingly, NHTSA's development of its proposal in that later rulemaking will include the making of economic and technology analyses and estimates that are appropriate for those model years and based on then-current information.

■ Any rulemaking conducted jointly by the agencies or by NHTSA alone will be timed to provide sufficient lead time for industry to make whatever changes to their products that the rulemaking analysis deems feasible based on the new information available. At the very latest, the three agencies will complete the mid-term evaluation process and subsequent rulemaking on the standards that may occur in sufficient time to promulgate final standards for MYs 2022–2025 with at least 18 months lead time, but additional lead time may be provided.

■ EPA understands that California intends to propose a mid-term evaluation in its program that is coordinated with EPA and NHTSA and is based on a similar set of factors as outlined in this Appendix A. The rules submitted to EPA for a waiver under the CAA will include such a mid-term evaluation. EPA understands that California intends to continue promoting harmonized state and federal vehicle standards. EPA further understands that California's 2017–2025 standards to be submitted to EPA for a waiver under the Clean Air Act will deem compliance with EPA greenhouse gas emission standards, even if amended after 2012, as compliant with California's. Therefore, if EPA revises it standards in response to the mid-term review, California may need to amend one or more of its 2022–2025 MY standards and would submit such amendments to EPA with a request for a waiver, or for confirmation that said amendments fall within the scope of an existing waiver, as appropriate.

Consistent with the above, EPA intends to propose regulations that state that no later than April 1, 2018, the Administrator shall determine whether the standards for MY2022–25 are appropriate under section 202(a) of the Act, in light of the record then before the Administrator. An opportunity for public comment shall be provided before making such determination. If she determines they are not appropriate, she shall initiate a rulemaking to revise the standards, to be either more or less stringent as appropriate.

In making the determination required by the previous paragraph, the Administrator shall consider the information available on the factors relevant to setting greenhouse gas standards under section 202(a) for these model years, including but not limited to the availability and effectiveness of technology, and the appropriate lead time for introduction of technology; the cost on the producers or purchasers of new motor vehicles or new motor vehicle engines; the feasibility and practicability of the standards; the impact of the standards on reduction of emissions, oil conservation, energy security, and fuel savings by consumers; the impact of the standards on the automobile industry; the impacts of the standards on safety; the impact of the standards on the CAFE standards and a national harmonized program; and the impact of the standards on other relevant factors.

The Administrator shall make the determination required based upon a record that includes a draft Technical Assessment Report (TAR) addressing issues relevant to the standard for MY2022–25, public comment on the TAR, public comment on whether the standards for MY2022–25 are appropriate under section 202(a), and such other materials the Administrator deems appropriate.

No later than November 15, 2017, the Administrator shall issue a draft TAR addressing issues relevant to the standards for MY2022–25.

The Administrator will set forth in detail the bases for the determination required as described above, including her assessment of each of the factors listed above.

Appendix B

EPA Curve Coefficients

a = Minimum CO_2 Target [g/mile]
b = Maximum CO_2 Target [g/mile]
c = Slope [g/mile per square foot]
d = Intercept [g/mile]
e = Minimum CO_2 Target [g/mile] for CO_2 Target Ceiling Curve
f = Maximum CO_2 Target [g/mile] for CO_2 Target Ceiling Curve
g = Slope [g/mile per square foot] for CO_2 Target Ceiling Curve
h = Intercept [g/mile] for CO_2 Target Ceiling Curve

Where:

Target = min(min (b,max(a, c * footprint+d)),min(f,max(e,g*footprint+h)

CARS

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
a	206.0	194.7	184.9	175.3	166.1	157.2	150.2	143.3	136.8	130.5
b	277.0	262.7	250.1	238.0	226.2	214.9	205.5	196.5	187.8	179.5
c	4.72	4.53	4.35	4.17	4.01	3.84	3.69	3.54	3.40	3.26
d	12.70	8.92	6.54	4.20	1.89	−0.38	−1.12	−1.83	−2.52	−3.17
e	.....	203.4	201.9	200.4	198.9	197.4	197.4	197.4	197.4	197.4
f	.....	274.4	277.0	278.5	280.0	281.5	283.0	283.0	283.0	283.0
g	.....	4.72	4.72	4.72	4.72	4.72	4.72	4.72	4.72	4.72
h	.....	10.10	8.60	7.10	5.60	4.10	4.10	4.10	4.10	4.10

TRUCKS

	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
a	247.0	238.1	226.8	219.5	211.9	195.4	185.7	176.4	167.6	159.1
b	348.0	347.2	341.7	338.6	336.7	334.8	320.8	305.6	291.0	277.1
c	4.04	4.87	4.76	4.68	4.57	4.28	4.09	3.91	3.74	3.58
d	81.10	38.28	31.62	27.69	24.64	19.80	17.85	15.98	14.21	12.51
e	.....	246.4	240.9	237.8	235.9	234.0	234.0	234.0	234.0	234.0
f	.....	347.4	341.9	338.8	336.9	335.0	335.0	335.0	335.0	335.0
g	.....	4.04	4.04	4.04	4.04	4.04	4.04	4.04	4.04	4.04
h	.....	80.50	75.00	71.90	70.00	68.10	68.10	68.10	68.10	68.10

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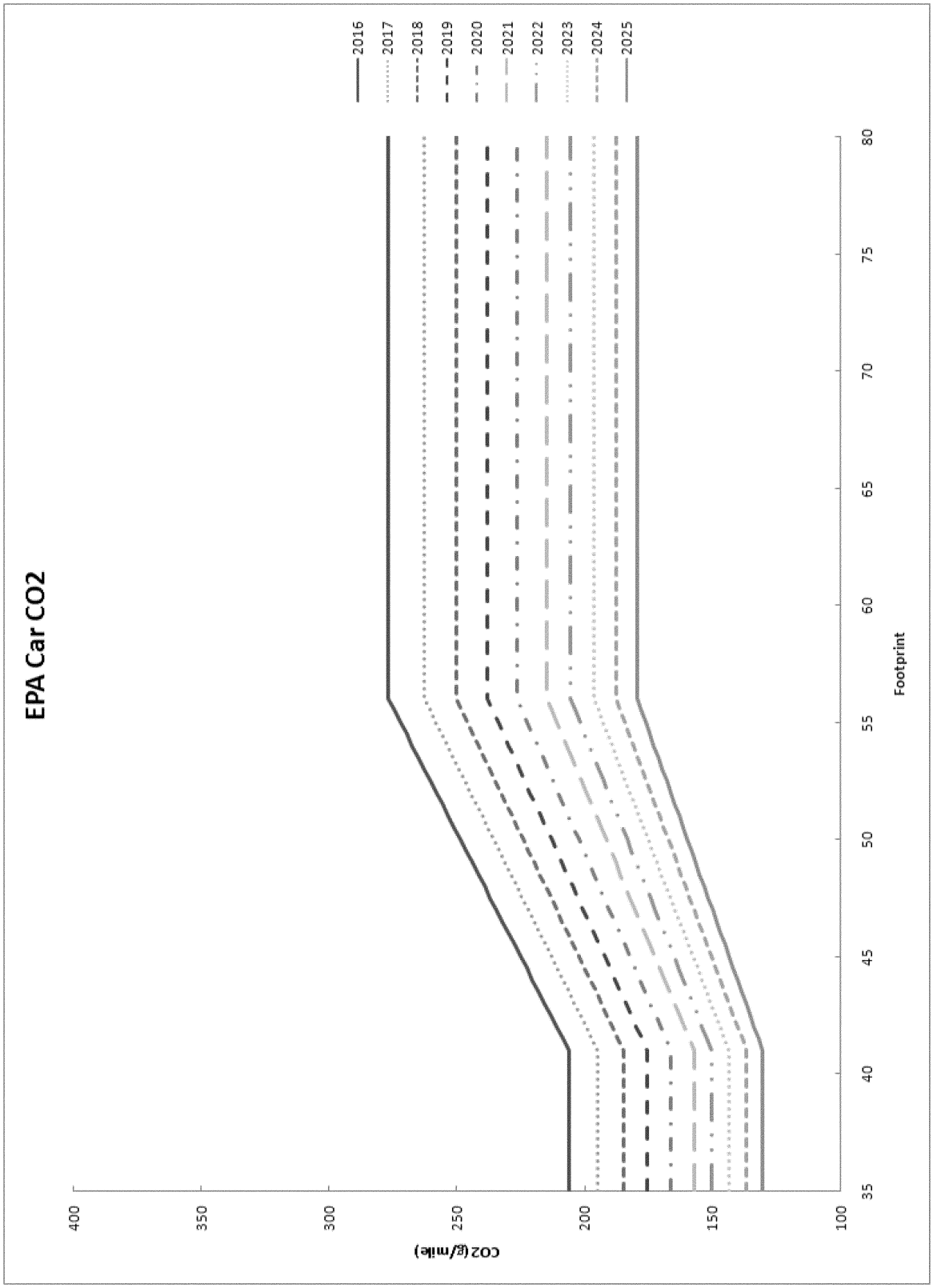
EPA Car CO2
CO2 (g/mile)
400
350
300
250
200
150
100
35
40
45
50
55
60
65
70
75
80
Footprint
2016
2017
2018
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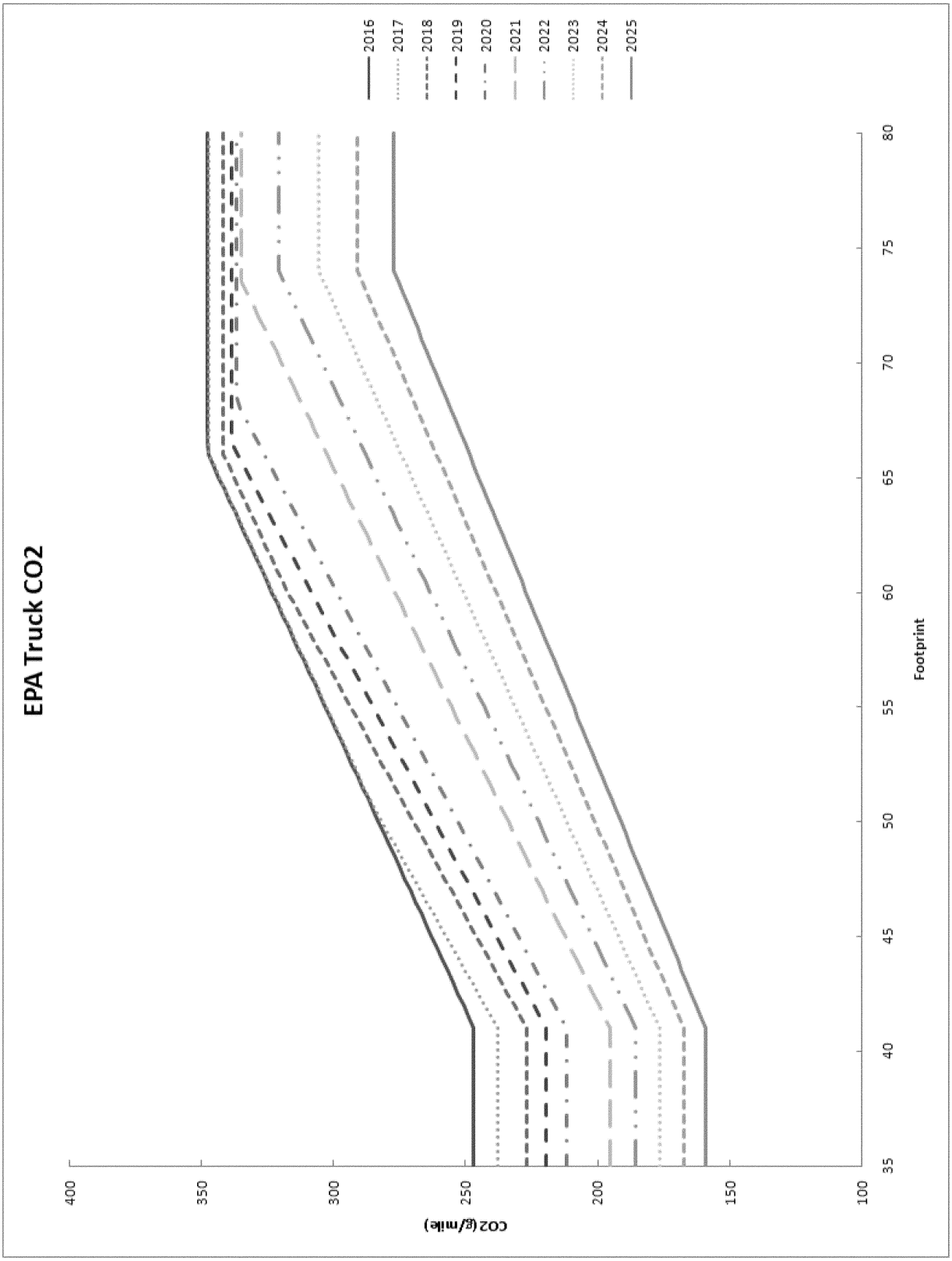
2021
2022
2023
2024
2025


EPA Truck CO2
CO2 (g/mile)
400
350
300
250
200
150
100
35
40
45
50
55
60
65
70
75
80
Footprint
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025

NHTSA CAFE Coefficients and Curves for Cars and Trucks

Instructions for Calculating NHTSA CAFE and EPA GHG Target Curves Using the Coefficients

The target curve is calculated by:

Step 1. Calculate targets using the a, b, c, and d coefficients

Step 2. Calculate targets using the e, f, g and h coefficients

Step 3. The curve is defined by the more stringent value at each footprint calculated from Step 1 and Step 2

Chart A.1: CAFE Target Curve for Passenger Cars

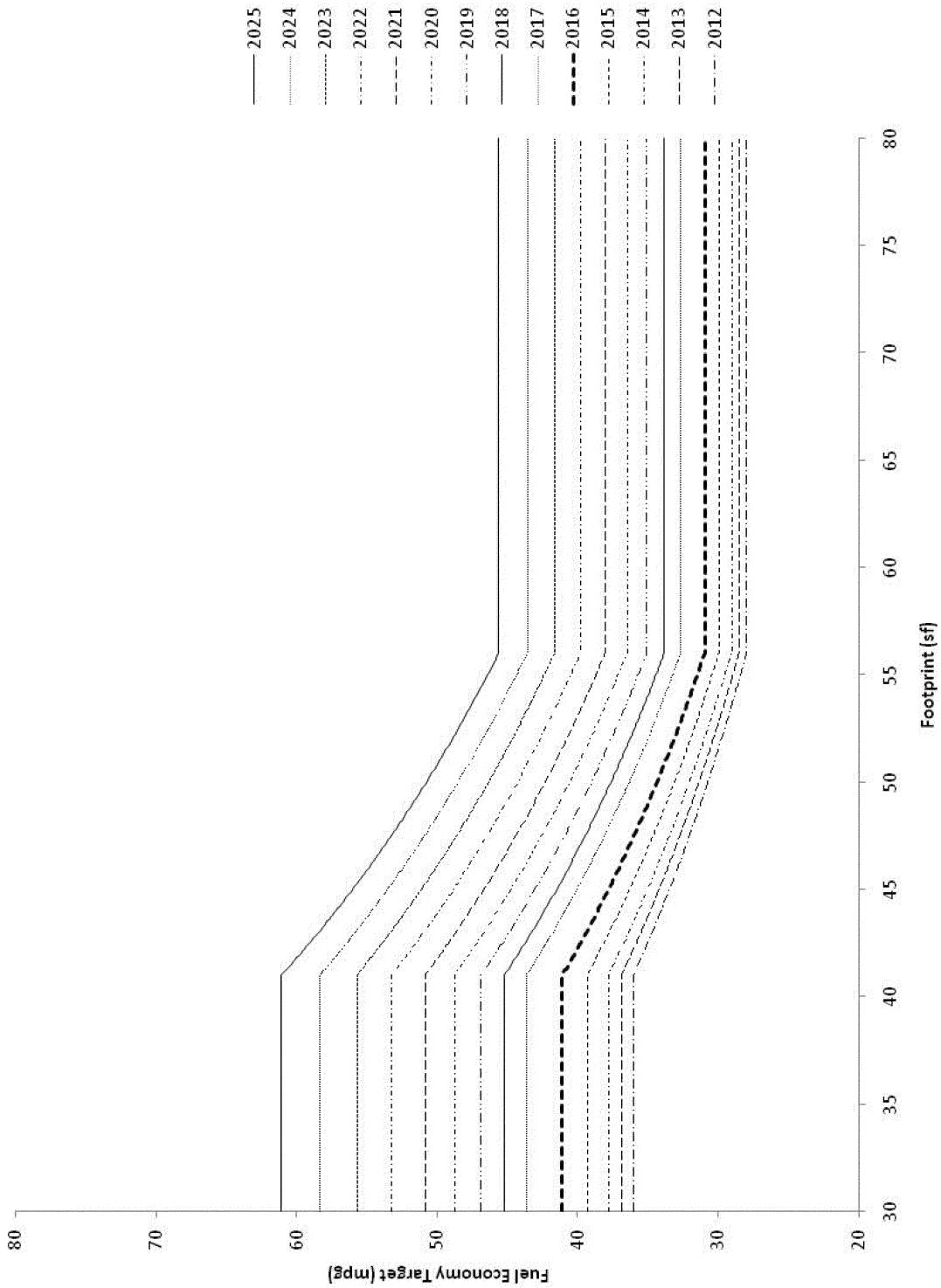


Chart A.2: CAFE Target Curve for Light Trucks

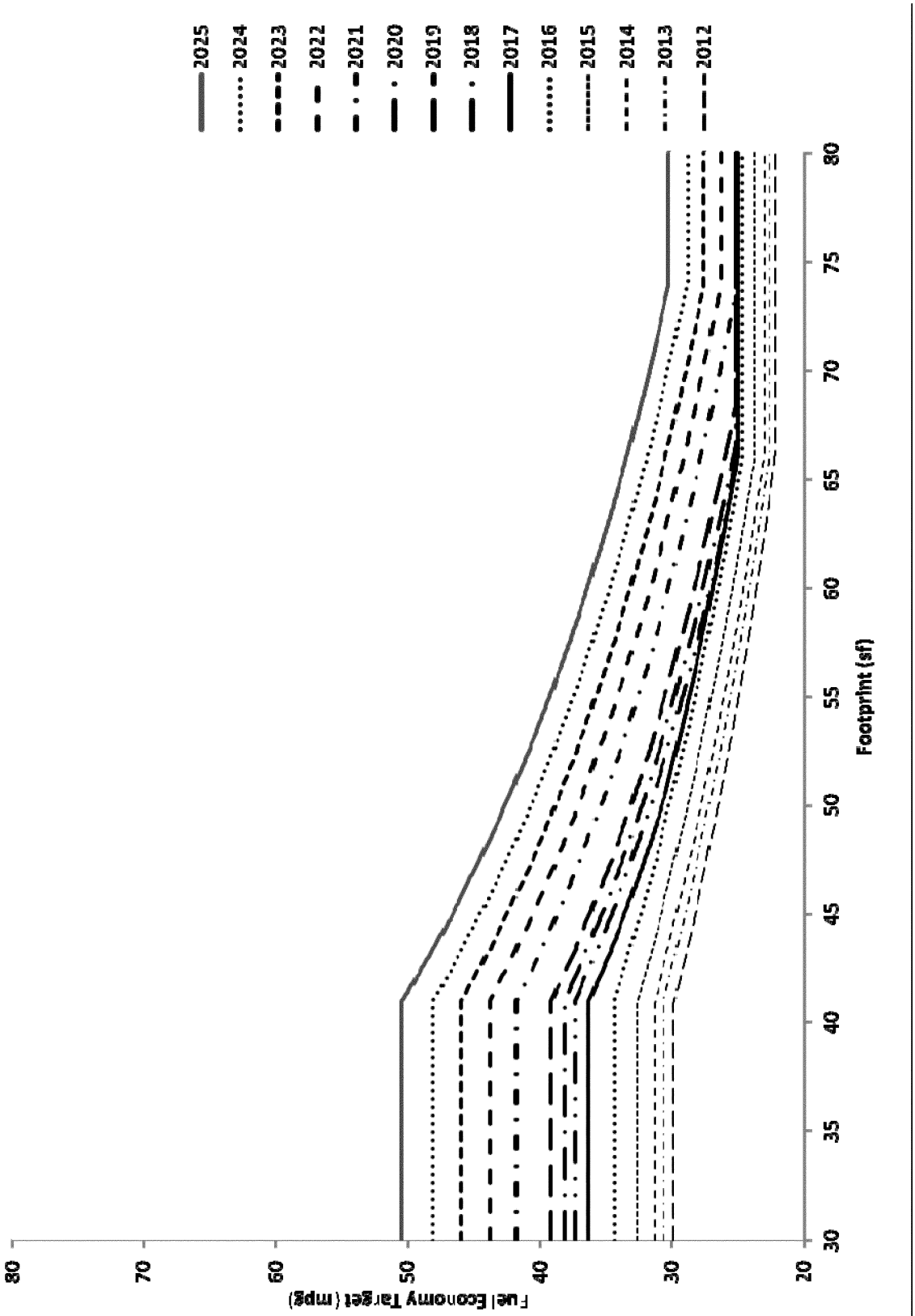


Table A.1—CAFE Target Curve Coefficients

PASSENGER CARS

Model year	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
a	30.96	32.65	33.84	35.07	36.47	38.02	39.79	41.64	43.58	45.61
b	41.09	43.61	45.21	46.87	48.74	50.83	53.21	55.71	58.32	61.07
c	0.0005308	0.0005131	0.0004954	0.0004783	0.0004603	0.0004419	0.0004227	0.0004043	0.0003867	0.0003699
d	0.002573	0.001896	0.001811	0.001729	0.001643	0.001555	0.001463	0.001375	0.001290	0.001210
e	.....	31.51	31.51	31.51	31.51	31.51	31.51	31.51	31.51	31.51
f	.....	42.06	42.06	42.06	42.06	42.06	42.06	42.06	42.06	42.06
g	.....	0.0005308	0.0005308	0.0005308	0.0005308	0.0005308	0.0005308	0.0005308	0.0005308	0.0005308
h	.....	0.002010	0.002010	0.002010	0.002010	0.002010	0.002010	0.002010	0.002010	0.002010

TRUCKS

Model year	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
a	24.74	25.09	25.20	25.25	25.25	25.25	26.29	27.53	28.83	30.19
b	34.42	36.26	37.36	38.16	39.11	41.80	43.79	45.89	48.09	50.39
c	0.0004546	0.0005484	0.0005358	0.0005265	0.0005140	0.0004820	0.0004607	0.0004404	0.0004210	0.0004025
d	0.010413	0.005097	0.004797	0.004623	0.004494	0.004164	0.003944	0.003735	0.003534	0.003343
e	.....	25.09	25.20	25.25	25.25	25.25	25.25	25.25	25.25	25.25
f	.....	35.10	35.31	35.41	35.41	35.41	35.41	35.41	35.41	35.41
g	.....	0.0004546	0.0004546	0.0004546	0.0004546	0.0004546	0.0004546	0.0004546	0.0004546	0.0004546
h	.....	0.009851	0.009682	0.009603	0.009603	0.009603	0.009603	0.009603	0.009603	0.009603

a = Fuel Economy Value for Lower Footprint Cutpoint [mpg].
b = Fuel Economy Value for Upper Footprint Cutpoint [mpg].
c = Slope [gallons per mile per square foot].
d = Intercept [gallons per mile].
e = Fuel Economy Value for Lower Footprint Cutpoint [mpg] for Floor Curve.
f = Fuel Economy Value for Upper Footprint Cutpoint [mpg] for Target Floor Curve.
g = Slope [gallons per mile per square foot] for Target Floor Curve.
h = Intercept [gallons per mile] for Target Floor Curve.

Dated: July 29, 2011

Ray LaHood,

Secretary, Department of Transportation.

Dated: July 29, 2011.

Lisa P. Jackson,

Administrator, Environmental Protection Agency.

[FR Doc. 2011–19905 Filed 8–8–11; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 170

RIN 0991–AB78

Metadata Standards To Support Nationwide Electronic Health Information Exchange

AGENCY: Office of the National Coordinator for Health Information Technology, Department of Health and Human Services.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Through this advance notice of proposed rulemaking (ANPRM), the Office of the National Coordination for Health Information Technology (ONC) is soliciting public comments on metadata standards to support nationwide electronic health information exchange. We are specifically interested in public comments on the following categories of metadata recommended by both the HIT Policy Committee and HIT Standards Committee: patient identity; provenance; and privacy. We also request public comments on any additional metadata categories, metadata elements, or metadata syntax that should be considered. The immediate scope of this ANPRM is the association of metadata with summary care records. More specifically, in the scenario where a patient obtains a summary care record from a health care provider's electronic health record technology or requests for it to be transmitted to their personal health record. Public comment, however, is also welcome on the use of metadata relative to other electronic health information contexts.

DATES: To be assured consideration, written comments must be received at one of the addresses provided below, no later than 5 p.m. on September 23, 2011. Similarly, electronic comments must be received by Midnight Eastern Time on September 23, 2011 as the Federal Docket Management System will not accept comments after this time.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments, identified by RIN 0991–AB78, by any of the following methods (please do not submit duplicate comments).

- *Federal eRulemaking Portal:* Follow the instructions for submitting comments. Attachments should be in Microsoft Word or Excel, Adobe PDF; however, we prefer Microsoft Word. *http://www.regulations.gov.*
- *Regular, Express, or Overnight Mail:* Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Attention: Steven Posnack, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201. Please submit one original and two copies.
- *Hand Delivery or Courier:* Office of the National Coordinator for Health Information Technology, Attention: Steven Posnack, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201. Please submit one original and two copies. (Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without federal government identification, commenters are encouraged to leave their comments in the mail drop slots located in the main lobby of the building.)

Inspection of Public Comments: All comments received before the close of the comment period will be available for public inspection, including any personally identifiable or confidential business information that is included in

a comment. Please do not include anything in your comment submission that you do not wish to share with the general public. Such information includes, but is not limited to: a person's social security number; date of birth; driver's license number; state identification number or foreign country equivalent; passport number; financial account number; credit or debit card number; any personal health information; or any business information that could be considered to be proprietary. We will post all comments received before the close of the comment period at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or U.S. Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201 (call ahead to the contact listed below to arrange for inspection).

FOR FURTHER INFORMATION CONTACT: Steven Posnack, Director, Federal Policy Division, Office of Policy and Planning, Office of the National Coordinator for Health Information Technology, 202–690–7151.

SUPPLEMENTARY INFORMATION:

Acronyms

ANPRM Advance Notice of Proposed Rulemaking
ASTM American Society for Testing and Materials
ARRA American Recovery and Reinvestment Act of 2009
BPPC Basic Patient Privacy Consents
CCR Continuity of Care Record
CDA R2 PCD Clinical Document Architecture Release 2: Patient Consent Directives
CDC Centers for Disease Control and Prevention
CDISC Clinical Data Interchange Standards Consortium
CFR Code of Federal Regulations
CMS Centers for Medicare & Medicaid Services
EHR Electronic Health Record
EPAL Enterprise Privacy Authorization Language
EO Executive Order
HIEs Health Information Exchanges
HHS Department of Health and Human Services
HL7 CDA R2 Health Level 7 Clinical Document Architecture Release 2
HL7 V2 Health Level 7 Version 2
HIT Health Information Technology
HITECH Act Health Information Technology for Economic and Clinical Health Act
ICD–9 International Classification of Diseases, 9th Revision
ICD–10 International Classification of Diseases, 10th Revision
IHE Integrating the Healthcare Enterprise
IHE XDS Integrating the Healthcare Enterprise Cross Enterprise Document Sharing
LOINC Logical Observation Identifiers Names and Codes
NIEM National Information Exchange Model
OID Object Identifier
OMB Office of Management and Budget
OSTP Office of Science and Technology Policy
ONC Office of the National Coordinator for Health Information Technology
P3P Platform for Privacy Preferences
PCAST President's Council of Advisors on Science and Technology
PHSA Public Health Service Act
RFI Request for Information
TDE Tagged Data Element
UEL Universal Exchange Language
URI Uniform Resource Identifier
URL Uniform Resource Locator
UUIDs Universally Unique Identifiers
XML eXtensible Markup Language

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I. Background

A. Legislative History

The Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5), was enacted on February 17, 2009. The HITECH Act amended the Public Health Service Act (PHSA) and established ''Title XXX—Health Information Technology and Quality'' to improve health care quality, safety, and efficiency through the promotion of health information technology (HIT) and the electronic exchange of health information. Section 3003(b)(1)(A) of the PHSA states that ''[t]he HIT Standards Committee shall recommend to the National Coordinator standards, implementation specifications, and certification criteria described in subsection (a) that have been developed, harmonized, or recognized by the HIT Standards Committee. * * *'' Section 3003(b)(2) of the PHSA states that ''[t]he HIT Standards Committee shall serve as a forum for the participation of a broad range of stakeholders to provide input on the development, harmonization, and recognition of standards, implementation specifications, and certification criteria necessary for the development and adoption of a nationwide health information technology infrastructure that allows for the electronic use and exchange of health information.''

Section 3001(c)(1)(A) of the PHSA, under ''Duties of the National Coordinator,'' states that the National Coordinator shall ''review and determine whether to endorse each standard, implementation specification, and certification criterion for the electronic exchange and use of health information that is recommended by the HIT Standards Committee under section 3003 for purposes of adoption [by the Secretary] under section 3004.''

Section 3004 of the PHSA identifies a process for the adoption of health IT standards, implementation specifications, and certification criteria and authorizes the Secretary of Health and Human Services (the Secretary) to adopt such standards, implementation specifications, and certification criteria. As specified in section 3004(a)(1), the Secretary is required, in consultation with representatives of other relevant Federal agencies, to jointly review standards, implementation specifications, and certification criteria endorsed by the National Coordinator for Health Information Technology (the National Coordinator) under section 3001(c) and subsequently determine whether to propose the adoption of any grouping of such standards, implementation specifications, or certification criteria. Section 3004(b)(1) of the PHSA requires the Secretary to adopt an initial set of standards, implementation specifications, and certification criteria for the areas required for consideration under section 3002(b)(2)(B) by December 31, 2009 and permits the Secretary to adopt the initial set through an interim final rule. Section 3004(b)(3) of the PHSA directs the Secretary to ''adopt additional standards, implementation specifications, and certification criteria as necessary and consistent with the schedule'' developed by the HIT Standards Committee under section 3003(b)(3) of the PHSA [1] for the assessment of policy recommendations developed by the HIT Policy Committee.

[1] PHSA section 3004(b)(3) incorrectly references section 3003(b)(2) when referring to the schedule developed by the HIT Standards Committee. We have used the correct citation: 3003(b)(3).

B. Regulatory History

1. Initial Set of Standards, Implementation Specifications, and Certification Criteria for Electronic Health Record Technology; Interim Final Rule and Final Rule

On January 13, 2010, the Department of Health and Human Services (HHS) published in the **Federal Register** an interim final rule with a request for comment, which adopted an initial set of standards, implementation specifications, and certification criteria (75 FR 2014). The certification criteria adopted in that interim final rule established the required capabilities and specified the related standards and implementation specifications that certified electronic health record (EHR) technology would need to include to, at a minimum, support the achievement of meaningful use Stage 1 as proposed by the Centers for Medicare & Medicaid Services (CMS) for eligible professionals and eligible hospitals under the Medicare and Medicaid EHR Incentive Programs. For consistency with other regulations, hereafter, references to ''eligible hospitals'' shall mean eligible hospitals, critical access hospitals, or both, as defined in 42 CFR 495.4.

On July 28, 2010, HHS published in the **Federal Register** a final rule (75 FR 44590) to complete the Secretary's adoption of the initial set of standards, implementation specifications, and certification criteria, and to more closely align such standards, implementation specifications, and certification criteria with final meaningful use Stage 1 objectives and measures (the ''Standards and Certification Criteria Final Rule''). Complete EHRs and EHR Modules are tested and certified according to adopted certification criteria to ensure that they have properly implemented adopted standards and implementation specifications and otherwise comply with the adopted certification criteria.

2. Revisions to Initial Set of Standards, Implementation Specifications, and Certification Criteria for EHR Technology; Interim Final Rule

On October 13, 2010, HHS published in the **Federal Register** an interim final rule (75 FR 62686) with a request for comment to remove the implementation specifications related to public health surveillance from the adopted standard and certification criterion. In response to public comment on the interim final rule published on January 13, 2010, we adopted in the Standards and Certification Criteria Final Rule the following implementation specifications for HL7 2.5.1: Public Health Information Network HL7 Version 2.5 Message Structure Specification for National Condition Reporting Final Version 1.0 and the Errata and Clarifications National Notification Message Structural Specification (45 CFR 170.205(d)(2)). After publication of the Standards and Certification Criteria Final Rule, various stakeholders and state public health agencies made numerous inquiries and expressed concerns about the appropriateness of these implementation specifications. Upon further review of the implementation specifications and consultation with the Centers for Disease Control and Prevention (CDC), we determined that these implementation specifications were adopted in error. Therefore, we revised 45 CFR 170.205(d)(2) to remove these particular adopted implementation specifications and removed from 45 CFR 170.302(l) the text ''(and applicable implementation specifications)'' to provide additional clarity.

C. The President's Council of Advisors on Science and Technology (PCAST) Report

On December 8, 2010, the President's Council of Advisors on Science and Technology (PCAST) released a report entitled ''Realizing the Full Potential of Health Information Technology to Improve Healthcare for Americans: The Path Forward'' (the PCAST Report).[2] PCAST is an advisory group of the nation's leading scientists and engineers who directly advise the President and the Executive Office of the President. PCAST makes policy recommendations in many areas where the understanding of science, technology, and innovation is key to strengthening our economy and forming policy that works for the American people. PCAST is administered by the Office of Science and Technology Policy (OSTP) within the Executive Office of the President. Generally speaking, the PCAST Report included both a broad vision and specific recommendations to accelerate the nation's progress toward electronic health information exchange. Many of the PCAST Report's recommendations are related to electronic health information exchange activities that ONC could directly affect.

1. Request for Information on PCAST Report Recommendations Affecting ONC Activities

On December 10, 2010, the Office of the National Coordinator for Health Information Technology (ONC) issued a Request for Information (RFI) to seek public comment on the PCAST Report's vision and recommendations and how they may be best addressed (75 FR 76986). The RFI sought specific feedback on nine questions which are best organized according to the following categories:

- The standards, implementation specifications, certification criteria, and certification processes for EHR technology and other types of HIT that would be required to implement some of the PCAST Report's recommendations;
- The current state of information technology solutions needed to support the PCAST Report's vision as well as lessons that could be learned from other industry implementations;
- The steps that could be taken to best integrate the changes envisioned by the PCAST Report into future stages of meaningful use; and
- The impact of the PCAST recommendations on ONC programs and ongoing activities.

In total, ONC received 105 timely comments on the RFI from stakeholders throughout the health care industry. These comments were consolidated into a summary report to inform the deliberations of the PCAST Workgroup formed under the HIT Policy Committee (discussed below). The following major themes emerged from public comments: timelines; the effects on ONC programs; implementation of the PCAST recommendations; privacy and security; and standards.

- *Timelines.* Several commenters supported the PCAST recommendations to increase information exchange capacity before meaningful use Stage 2. A significant majority of commenters, however, were concerned that attempting to fully implement the PCAST recommendations in the midst of meaningful use Stages 2 and 3 along with other changing standards such as the International Classification of Diseases, 9th Revision (ICD–9) transition to International Classification of Diseases, 10th Revision (ICD–10) could have potential negative effects. Many commenters suggested that the recommendations serve to inform a long term strategy rather than direct an immediate deviation from already laid groundwork created by meaningful use Stage 1 and other ONC electronic health information exchange activities.
- *Effects on ONC Programs.* A majority of commenters encouraged ONC to leverage the success of ongoing programs and avoid reinventing the wheel in the midst of the Medicare and Medicaid EHR Incentive Programs. Many commenters stated that fully implementing the PCAST Report's recommendations would require redesigning many of the ongoing federal HIT grants and contracts which could impose substantial costs to current participants. Some suggested that ONC begin with pilots to develop and test PCAST technology solutions before moving into broader implementation efforts.
- *Implementation of PCAST Recommendations.* Commenters generally agreed that health information exchanges (HIEs) and the electronic exchange of health information should be the focus of future stages of meaningful use. Regarding the exchange of individual data elements outside of a document structure, many agreed with the value of exchanging individual data elements but recommended that such a program begin with pilot testing that takes into account patient-linking and public trust issues.
- *Privacy and Security.* Several commenters supported the concept of giving patients granular consent as envisioned in the PCAST Report. However, many expressed concern that tagging patient privacy preferences to the data would lead to a static, rather than a dynamic, data control environment which could prevent patients from updating their privacy preferences once the data was released. The research community largely supported PCAST's concept of creating a subset of de-identified data for the purpose of research.
- *Standards.* Most commenters believed that ONC should learn from and leverage existing standards that incorporate metadata concepts. Some commenters asserted that ONC should pursue the metadata approach outlined in the PCAST Report because current standards do not allow for innovation, flexibility, or scalability and that today's predominantly document-centric environment would not support PCAST's

[2] *http://www.whitehouse.gov/administration/eop/ostp/pcast*

vision. Others contended that the PCAST Report's interoperability and electronic exchange goals could be met with existing and emerging standards.

2. The PCAST Workgroup

In January 2011, ONC asked the HIT Policy Committee to provide a more detailed assessment of the PCAST Report's ONC-related recommendations, how implementing the recommendations could affect ONC's programs, and potential approaches ONC could pursue to realize the vision described in the PCAST Report. To respond to this request, the HIT Policy Committee, in conjunction with the HIT Standards Committee, formed an interdisciplinary PCAST Workgroup to analyze the RFI comments as well as solicit expert testimony through a public hearing held in February 2011.

In April 2011, the HIT Policy Committee transmitted to ONC an analysis report that suggested incremental steps for ONC to pursue to achieve the vision described in the PCAST Report. As a feasible first step, the HIT Policy Committee suggested that ONC focus on facilitating the development and adoption of a minimal set of standards for metadata that could be ''wrapped around'' or attached to a summary care record when a patient seeks to download their health information from, for example, a health care provider's patient portal or when a patient directs his or her health care provider to transmit his or her health information to a personal health record (PHR). Generally speaking, the term ''metadata'' is often used to mean ''data about data'' or, in other words, ''data that provides more information or detail about a piece of data.''

The HIT Policy Committee suggested that it would be practical to include this capability as part of the EHR certification requirements to support meaningful use Stage 2 under the Medicare and Medicaid EHR Incentive Programs. Moreover, in the context of this first ''use case,'' the HIT Policy Committee noted that a minimum set of metadata (and accompanying standards) should focus on these three categories: patient identity (data elements about a patient), provenance (data elements about the source of the clinical data), and privacy (data elements about the type(s) and sensitivity of clinical data included). Additionally, the HIT Policy Committee noted that if these metadata are available, they could potentially increase the level of trust that receiving providers would place in clinical information that they receive through patient-mediated exchange, such as from a PHR, and could enable patients to more easily sort and re-share their own health information.

D. Analysis of Metadata Standards

1. ONC–Commissioned Analysis

In parallel with the work being done by the PCAST Workgroup, ONC commissioned an in-depth analysis of several widely implemented standards that include metadata. This analysis examined the various data elements each standard includes and identified certain categories of metadata that could be readily adopted as metadata standards. On April 20, 2011, this analysis was presented to the HIT Standards Committee, which included metadata options for patient identity, provenance, and privacy.

- *Patient Identity Metadata:* The analysis generally described patient identity metadata as the necessary data required to uniquely select a patient from a population with a guaranteed degree of accuracy. The research also indicated that patient identity metadata should include a patient's current full name, previous names with associated date ranges (as an optional element), date of birth, postal code, and one type of patient identification data (ID) along with the origin of that ID. The following standards were reviewed and compared relative to how patient identity metadata is represented: Health Level 7 Version 2 (HL7 V2) messages; Integrating the Healthcare Enterprise Cross Enterprise Document Sharing (IHE XDS) Metadata; Health Level 7 Clinical Document Architecture Release 2 (HL7 CDA R2); American Society for Testing and Materials (ASTM) Continuity of Care Record (CCR); Google CCR; and National Information Exchange Model (NIEM).
- *Provenance Metadata:* The analysis generally described provenance metadata as data that provides information on a dataset's history, origin, and modifications. Research suggested that provenance metadata should include information that describes the event that led to the creation of the tagged data as well as other associated events that provide causal links to the data. The research also indicated that provenance metadata include information about when and how the tagged data had been exchanged in the past. It emphasized that digital signatures could be used as metadata as a way to ensure that the data had not been altered since its creation. The report gave comparisons on the NIEM, IHE XDS Metadata, HL7 CDA R2, and Clinical Data Interchange Standards Consortium (CDISC) standards related to providing the above information on provenance.
- *Privacy Metadata:* For privacy metadata, the commissioned analysis of metadata standards examined what data could be used to convey and communicate patient preferences (permissions or limits) associated with the sharing of his or her health information. The analysis first concluded that it was not feasible to include the privacy policy with each tagged data element because policy can change over time, and that a pointer to an external registry would be most appropriate. Noting that there was not sufficient information to determine how such privacy policy registries would be implemented, the research indicated that privacy metadata related to the underlying contents (*i.e.,* what kind of information is within a document or message) and its sensitivity (*i.e.,* by whom, and what the recipient(s) of the data is/may be obligated or prevented from doing after accessing the data) would be the most useful to include in an initial set of metadata. The research compared the ability of Platform for Privacy Preferences (P3P), Enterprise Privacy Authorization Language (EPAL), Basic Patient Privacy Consents (BPPC), IHE XDS, and Clinical Document Architecture Release 2: Patient Consent Directives (CDA R2 PCD) metadata standards to convey the above information.

2. HIT Standards Committee Analysis and Recommendations

In April 2011, after the receipt of the ONC-commissioned analysis on metadata standards, the HIT Standards Committee formed a ''metadata power team'' to further consider this analysis in order to identify metadata standards that would be appropriate for electronic health information exchange. On May 18, 2011, after a series of public meetings, the metadata power team presented to the HIT Standards Committee their review of the metadata elements that would be best to consider for patient identity and provenance. On May 25, 2011, the metadata power team held another meeting which focused on the analysis of privacy metadata elements.

On June 22, 2011, the metadata power team submitted its complete analysis and a set of recommendations to the HIT Standards Committee on the data elements that should be included as part of metadata standards for patient identity, provenance, and privacy. The HIT Standards Committee discussed and subsequently approved the metadata power team's findings. The HIT Standards Committee submitted its recommendations on metadata elements and standards to the National Coordinator and expressed its expectation that ONC would conduct further testing and evaluation prior to proposing these standards for adoption through rulemaking.

Upon receipt of the HIT Standards Committee's metadata standards recommendations, the National Coordinator followed the process outlined in the sections 3001(c)(1)(A) and (B) of the PHSA. These provisions require the National Coordinator to ''(A) review and determine whether to endorse each standard, implementation specification, and certification criterion for the electronic exchange and use of health information that is recommended by the HIT Standards Committee under section 3003 for purposes of adoption under section 3004; [and] (B) make such determinations under subparagraph (A), and report to the Secretary such determinations, not later than 45 days after the date the recommendation is received by the Coordinator * * *''

The National Coordinator endorsed the HIT Standards Committee recommendations on metadata standards and reported this determination to the Secretary for consideration under section 3004(a) of the PHSA. Per section 3004(a)(2), if the Secretary determines ''to propose adoption of any grouping of such standards, implementation specifications, or certification criteria, the Secretary shall, by regulation under section 553 of title 5, United States Code, determine whether or not to adopt such grouping of standards, implementation specifications, or certification criteria.'' In accordance with section 3004(a)(3), the Secretary must also provide for publication in the **Federal Register** all determinations made by the Secretary under this provision. This ANPRM constitutes publication of the Secretary's determination.

II. Metadata Standards Under Consideration

Section 3001 of the HITECH Act establishes ONC by statute and requires, under section 3001(b), the National Coordinator to ''perform the duties under [section 3001](c) in a manner consistent with the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information * * *'' Since the HITECH Act's enactment in February 2009, ONC has developed a portfolio of initiatives to foster a nationwide health information technology infrastructure. The PCAST Report, published in December 2010, built on our progress to date and complemented our existing initiatives. It expressed a vision, with associated policy goals, that focused on key challenges ONC could undertake to accelerate its efforts in several electronic health information exchange areas. One such area, a cornerstone of the PCAST Report's vision, was to increase the health care industry's ability to understand and parse the health care data under its stewardship at a more granular level. The PCAST Report noted that the development of metadata standards was a critical first step to facilitating more granular understanding of data and to establishing a ''universal exchange language (UEL).'' The PCAST Report described the UEL as, ''some kind of extensible markup language (an XML variant, for example) capable of exchanging data from an unspecified number of (not necessarily harmonized) semantic realms. Such languages are structured as individual data elements, together with metadata that provide an annotation for each data element.''

We believe that the use of metadata holds great promise and the adoption of metadata standards can help rapidly advance electronic health information exchange across a variety of different exchange architectures. The purpose of this ANPRM is to seek broad public comment on the metadata standards we are considering proposing for adoption in the next notice of proposed rulemaking with regard to the standards, implementation specifications, and certification criteria intended to support meaningful use Stage 2. We are considering whether to propose, as a requirement for certification, that EHR technology be capable of applying the metadata standards in the context of the use case selected by the HIT Policy Committee (i.e., when a patient downloads a summary care record from a health care provider's EHR technology or requests for it to be transmitted to their PHR). For example, if a patient seeks to obtain an electronic copy of her health information, her doctor's EHR technology would have to be capable of creating a summary care record and subsequently assigning metadata to the summary care record before the patient receives it. From an EHR technology developer's perspective, we believe this approach would be the least difficult to implement in support of meaningful use Stage 2. However, generally speaking, we believe this capability may also be able to be applied to other directed transfers of summary care records (e.g., as part of requirements concerning transitions of care). Additionally, looking prospectively, once EHR technology is capable of applying metadata, we believe that the health care industry could gradually develop innovative ways to repurpose this general capability to create more specialized extensions to meet future specific policy and organizational objectives. For instance, the EHR technology's capability to assign metadata to documents or more granular data elements could be used within an organization to appropriately filter data prior to making a disclosure or to process information more efficiently for quality improvement and measurement. In addition to the specific metadata standards discussed below, we also request public comments on any other metadata categories, metadata elements, or metadata syntax that we should consider.

Consistent with the recommendations of the HIT Standards Committee, ONC is interested in learning about and requests public comment on any real-life testing or use of these or other metadata standards relating to patient identity, provenance, or privacy. ONC also intends to seek pilot testing of these metadata standards to gain insights into any implementation-level challenges that may exist.

A. Metadata Standards Discussed and Specific Questions for Public Comment

This section discusses the metadata standards we are considering for each of the three categories (patient identity, provenance, and privacy) as recommended by the HIT Standards Committee and includes specific questions for the public's consideration. Consistent with the recommendations of the HIT Standards Committee, we are considering proposing that the metadata would need to be expressed according to the requirements in the HL7 CDA R2 header (section 4.2 of HL7 CDA R2). We are also considering whether to propose the adoption of additional metadata elements for certain information that is not currently required as part of the HL7 CDA R2 header. The HIT Standards Committee recommended the use of the HL7 CDA R2 header based on its belief that the HL7 CDA R2's XML format for describing generic clinical documents would best support the implementation of its recommendations. It specifically noted that among its many benefits the HL7 CDA R2 could best accommodate the international representation of names and could potentially support additional information if desired. The HIT Standards Committee first recommended the use of the HL7 CDA R2 header for patient identity metadata. Subsequently, it acknowledged and determined that even though other standards could support the metadata elements under consideration in the provenance and privacy categories that the use of the HL7 CDA R2 header for these two categories would complement its already recommended use for patient identity metadata. Its overall rationale for the selection and recommendation of the HL7 CDA R2 header was that it provides wide coverage across metadata elements and working from a single standard would make implementation easier.

At the end of this section, we provide a complete example of how the metadata could be expressed. We request public comment on the metadata standards discussed below and in response to the specific questions listed below.

1. Patient Identity Metadata Standards

We are considering the following standard set of patient identity metadata recommended by HIT Standards Committee. This standard set would include the following data elements expressed according to the requirements explained below.

- *Name:* Would include the patient's name prefix (e.g., Mr. Ms. Dr.), given names (e.g., first and middle names/middle initial), family names, and name suffix. Inclusion of ''other name'' components, such as patient's maiden name, previous names, or mother's name for newborns would be optional.
- *Date of birth:* Would include the patient's date of birth.
- *Address:* Would include the patient's current primary address.
- *Zip code:* Would represent the zip code of the patient's current primary address. Zip codes for other addresses would be optional but, if included, would need to include date ranges for when the zip codes were applicable.
- *Patient identifier(s):* would include one or more of the identifiers used by a health care provider to uniquely identify the patient to which the underlying metadata pertain. For example, the last four digits of the social security number; the patient's driver's license number; the patient identification number assigned to the patient by a health care provider; or any combination of the above.

For each of the above elements, consistent with the HIT Standards Committee's recommendation, we would consider requiring that they be expressed according to HL7 CDA R2 header syntax. We would not expect, however, to require the implementation of the surrounding structure that a complete, valid HL7 CDA R2 header would include. Rather, our intent would be to leverage the way in which the HL7 CDA R2 header expresses how each data element would be represented and not to require that the HL7 CDA R2 header's structure also be implemented.

Question 1: Are there additional metadata elements within the patient identity category that we should consider including? If so, why and what purpose would the additional element(s) serve? Should any of the elements listed above be removed? If so, why?

Question 2: In cases where individuals lack address information, would it be appropriate to require that the current health care institution's address be used?

In addition to the patient identity metadata that we would expect to be expressed using the HL7 CDA R2 header, we are considering requiring an additional metadata element to be included for ''display name.'' In this case, and as discussed by the HIT Standards Committee, we currently believe that extending name metadata beyond the HL7 CDA R2 header requirements[3] to include a display name is important to accommodate names that do not always follow a ''first

[3] The HL7 CDA R2 schema's definition of name only supports the following components: Delimiter, family, given, prefix and suffix.

name, middle name, last name'' format or to identify newborns whose names have not yet been assigned. We would expect to require that the display name metadata element be an XML element whose value is a string that captures the patient's name as it should be displayed or written. Without this addition, we believe that many systems may accidentally parse parts of a patient's name incorrectly due to the fact that in some cultures names are not structured according to first, middle, and last name segments. For example, the naming conventions in some cultures do not follow this structure and can result in the last name being incorrectly parsed or transposed. Therefore, for this metadata element, we are considering whether to propose that a full name string element be included to facilitate matching in cases where name components are incorrectly categorized.

Question 3: How difficult would it be today to include a ''display name'' metadata element? Should a different approach be considered to accommodate the differences among cultural naming conventions?

We are also considering whether to propose as a second extension, beyond the HL7 CDA R2, the use of a uniform resource identifier (URI) to act as a namespace for the patient identifier metadata as opposed to the use of an object identifier (OID) as specified in HL7 CDA R2. Currently, the definition of the ''id root'' attribute in the HL7 CDA R2 header is defined to only accept OIDs, universally unique identifiers (UUIDs), or specific HL7 reserved identifiers, none of which can hold a URI. A URI could be used as a means to identify the associated ID type that would be used. For instance, <id extension=''1234567'' root=''*http://www.nh.gov/safety/divisions/dmv*''/> indicates that the ID type is a New Hampshire driver's license. This extension would allow for an extensible, flexible mechanism to uniquely identify an individual, without having to explicitly specify what type of identifier is used. In the event multiple types of identifiers are used, a means to properly attribute the right information to each identifier would be necessary. We believe a URI can effectively serve this purpose.

2. Provenance Metadata Standards

We are considering the following standard set of provenance metadata recommended by the HIT Standards Committee. The standard set would include the following data elements expressed according to the requirements explained below—a tagged data element (TDE) identifier; a time stamp; and the actor, the actor's affiliation, and the actor's digital certificate. These provenance metadata function as part of a ''wrapper'' that would convey the ''who, what, where, and when'' of the data being electronically exchanged. As with patient identity metadata, we would expect these provenance metadata elements to be expressed according to HL7 CDA R2 header syntax requirements, where applicable.

- *TDE identifier:* Would allow for other TDEs to link to this particular instance, thus preserving clinical context, and allow users to keep a log of the set of TDEs used for a particular task. For example, a TDE containing diagnostic study information could contain the identifier of another TDE that describes the encounter that led to that study.
- *Time stamp:* Would express when the content to which the metadata pertains was digitally signed.
- *Actor and actor's affiliation:* Would, in the form of a digital certificate, include the name of the actor who digitally signed the content to which the metadata pertains and the organizational affiliation of the actor. The HIT Standards Committee noted that this scheme allows for exchanges to occur involving either organizational actors or individual actors.

The HIT Standards Committee also recommended that the X.509 standard for certificates be used to digitally sign the content to which the metadata pertains. It noted that that digital certificates and digital signatures could be used to provide non-repudiation and tamper-resistance. The HIT Standards Committee further acknowledged that while its expectation was that an actor and its affiliation would be expressed in an X.509 certificate that there should be optional metadata fields for actor and actor affiliation for reasons including situations where EHR technology can understand the XML format of the HL7 CDA R2 header syntax, but cannot process more complex cryptographic signatures. As a final recommendation on provenance, the HIT Standards Committee recommended an optional portion of the actor/affiliation metadata should point to the entity record in the Enterprise-Level Provider Directory, which may be a URL (this concept is included in the metadata example illustrated below).

Question 4: Are there additional metadata elements within the provenance category that we should consider including? If so, why and what purpose would the additional element(s) serve? Should any of the elements listed above be removed? If so, why?

Generally, as recommended by the HIT Standards Committee, the metadata elements for time stamp, the actor, the actor's affiliation, and the actor's digital certificate all rely on one security architecture, the use of digital certificates. We are considering whether for the purposes of adopting metadata standards it would be beneficial to decouple the metadata elements from a particular security architecture. In short, we are contemplating whether it would be more effective and appropriate to adopt provenance metadata elements that do not rely on a single security architecture, but rather can be used in various security architectures.

Question 5: With respect to the provenance metadata elements for time stamp, actor, and actor's affiliation, would it be more appropriate to require that those elements be expressed in XML syntax instead of relying on their inclusion in a digital certificate? For example, time stamp could express when the document to which the metadata pertain was created as opposed to when the content was digitally signed. Because this approach would decouple the provenance metadata from a specific security architecture, would its advantages outweigh those of digital certificates?

3. Privacy Metadata Standards

At the outset, we note that the HIT Standards Committee made its recommendations on privacy metadata standards with the underlying assumption that any personally identifiable information would be exchanged in an appropriately secure manner (*i.e.,* encrypted). In its assumed model, the HIT Standards Committee basically envisioned clinical content which is ''double wrapped''—first according to the metadata standards we are considering and then encrypted prior to the entire package of data being transported—meaning only the recipient of the entire package would be able to view the metadata once it has been decrypted. In other words, and from ONC's perspective, if circumstances would require the content to which the metadata pertain to be encrypted, the metadata would also be encrypted.

As recommended by the HIT Standards Committee, we are considering the following standard set of privacy metadata which would include the following data elements expressed according to the requirements explained below—a ''policy pointer'' and content metadata elements.

- *Policy pointer:* would be a Uniform Resource Locator (URL) that points to the privacy policy in effect at the time the tagged data element is released. This metadata element would support the potential for external privacy policy registries to be used.
- *Content metadata:* would be used to represent those elements needed to implement and reflect organizational policies as well as those federal and state laws that would be applicable to the underlying data to which this metadata would pertain. Content metadata would be comprised of two components:
  - *Data type:* would describe the underlying data to which this metadata pertains from a clinical perspective. For this metadata element, we are considering whether to propose that Logical Observation Identifiers Names and Codes (LOINC) codes be used to provide additional granularity.
  - *Sensitivity:* HL7 vocabulary for sensitivity would be used to indicate at a more granular level the type of underlying data to which this metadata pertains in order for the potential for automated privacy filters to apply more stringent protections to the data in the event it is selected for a future disclosure.

Again, we would expect that these privacy metadata would be expressed according to the HL7 CDA R2 header syntax requirements.

Question 6: Are there additional metadata elements within the privacy category that we should consider including? If so, why and what purpose would the additional element(s) serve? Should any of the elements listed above be removed? If so, why?

Question 7: What experience, if any, do stakeholders have regarding policy pointers? If implemented, in what form and for what purpose have policy pointers been used (for instance, to point to state, regional, or organizational policies, or to capture in a central location a patient's preferences regarding the sharing of their health information)? Could helpful concepts be drawn from the Health Information

Technology Standards Panel (HITSP) Transaction Package 30 (TP30) ''Manage Consent Directives?''

Question 8: Is a policy pointer metadata element a concept that is mature enough to include as part of the metadata standards we are considering? More specifically, we request comment on issues related to the persistence of URLs that would point to privacy policies (i.e., what if the URL changes over time) and the implication of changes in privacy policies over time (i.e., how would new policy available at the URL apply to data that was transmitted at an earlier date under an older policy that was available at the same URL)?

Question 9: Assuming that a policy pointer metadata element pointed to one or more privacy policies, what standards would need to be in place for these policies to be computable?

Question 10: With respect to the privacy category and content metadata related to ''data type,'' the HIT Standards Committee recommended the use of LOINC codes to provide additional granularity. Would another code or value set be more appropriate? If so, why?

Question 11: The HIT Standards Committee recommended developing and using coded values for sensitivity to indicate that the tagged data may require special handling per established policy. It suggested that a possible starter set could be based on expanded version of the HL7 ConfidentialityByInfoType value set and include: ''substance abuse; mental health; reproductive health; sexually transmitted disease; HIV/AIDS; genetic information; violence; and other.'' During this discussion, several members of the HIT Standards Committee raised concerns that a recipient of a summary care record tagged according to these sensitivity values could make direct inferences about the data to which the metadata pertain. Consistent with this concern, HL7 indicates in its documentation that for health information in transit, implementers should avoid using the ConfidentialityByInfoType value set. HL7 also indicates that utilizing another value set, the ConfidentialityByAccessKind value set which describes privacy policies at a higher level, requires careful consideration prior to use due to the fact that some items in the code set were not appropriate to use with actual patient data. In addition, the HIT Standards Committee recommended against adopting an approach that would tag privacy policies directly to the data elements. What kind of starter value set would be most useful for a sensitivity metadata element to indicate? How should those values be referenced? Should the value set be small and general, or larger and specific, or some other combination? Does a widely used/commonly agreed to value set already exist for sensitivity that we should considering using?

Question 12: In its recommendations on privacy metadata, the HIT Standards Committee concluded that it was not viable to include the policy applicable to each TDE because policy changes over time. Is this the appropriate approach? Are there circumstances in which it would be appropriate to include privacy preferences or policy with each data tagged element? If so, under what circumstances? What is the appropriate way to indicate that exchanged information may not be re-disclosed without obtaining additional patient permission? Are there existing standards to communicate this limitation?

B. Metadata Example

The following is a complete example of how the standard sets of metadata elements for the three categories discussed above could be expressed.

Metadata element	Expressed according to HL7 CDA R2 requirements (where applicable)	Notes
Provenance—TDE ID ...	<id extension="*http://stelsewhere.com/id/12345*" *assigningAuthority="St. Elsewhere Hospital"*/>	
Privacy—Content Data Type.	<code code="11488–4" displayName="Consultation note" codeSystemName="LOINC"/>	
Provenance—Timestamp.	<effectiveTime value="20101217093047"/>	
Privacy—Content Sensitivity.	<confidentialityCode code="Other"/>	
Patient ID—ID	<id extension="1234567" root="*http://www.nh.gov/safety/divisions/dmv/*">	Note that in a CDA R2 Header, the root attribute would typically be an OID
Patient ID—Address	<addr use="HP"> <streetAddressLine>1234 Main St. Apt 3</streetAddressLine> <city>Bedford</city> <state>MA/state> <postalCode>01730</postalCode> </addr>	
Patient ID—Name	<name> <prefix qualifier="AC">Dr.</prefix> <given> John</given> <given>William</given> <family>Smith</family> <displayName>Dr. John William Smith</displayName> </name>	Note that displayName is not part of the HL7 CDA R2 header.
Patient ID—DOB	<birthTime value="19600427"/>	
Provenance—Actor	<assignedPerson> <providerDirectory Entry href="*http://providerdirectory.org/1234*"/> <name> <family>Smith</family> <given>John</given> <prefix>Dr.</prefix> </name> </assignedPerson>	Note that providerDirectory Entry is not part of the HL7 CDA R2 header.
Privacy—Policy Pointer	<id extension="*http://policy.example.org/9876543*" *root="policy_pointer_oid"*/>	
Provenance—Affiliation	<representedOrganization> <id extension="http://stelsewhere.com/" assigningAuthority="St. Elsewhere Hospital"/> <name>St. Elsewhere Hospital</name> <telecom use="1–800–555–1234"/>	

Metadata element	Expressed according to HL7 CDA R2 requirements (where applicable)	Notes
	</representedOrganization>	

III. Additional Questions

To better inform future proposals, we seek public comment on the following specific questions. Commenters are also welcome to provide feedback on any of the considerations and expectations we expressed above even where a specific question is not asked.

Question 13: With respect to the first use case identified by the HIT Policy Committee for when metadata should be assigned (i.e., a patient obtaining their summary care record from a health care provider), how difficult would it be for EHR technology developers to include this capability in EHR technology according to the standards discussed above in order to support meaningful use Stage 2?

Question 14: Assuming we were to require that EHR technology be capable of meeting the first use case identified by the HIT Policy Committee, how much more difficult would it be to design EHR technology to assign metadata in other electronic exchange scenarios in order to support meaningful use Stage 2? Please identify any difficulties and the specific electronic exchange scenario(s).

Question 15: Building on Question 14, and looking more long term, how would the extension of metadata standards to other forms of electronic health information exchange affect ongoing messaging and transactions? Are there other potential uses cases (e.g., exchanging information for treatment by a health care provider, for research, or public health) for metadata that we should be considering? Would the set of metadata currently under consideration support these different use cases or would we need to consider other metadata elements?

Question 16: Are there other metadata categories besides the three (patient identity, provenance, and privacy) we considered above that should be included? If so, please identify the metadata elements that would be within the category or categories, your rationale for including them, and the syntax that should be used to represent the metadata element(s).

Question 17: In addition to the metadata standards and data elements we are considering, what other implementation factors or contexts should be considered as we think about implementation specifications for these metadata standards?

Question 18: Besides the HL7 CDA R2 header, are there other standards that we should consider that can provide an equivalent level of syntax and specificity? If so, do these alternative standards offer any benefits with regard to intellectual property and licensing issues?

Question 19: The HL7 CDA R2 header contains additional ''structural'' XML elements that help organize the header and enable it to be processed by a computer. Presently, we are considering leveraging the HL7 CDA R2 header insofar as the syntax requirement it expresses relate to a metadata element we are considering. Should we consider including as a proposed requirement the additional structures to create a valid HL7 CDA R2 header?

Question 20: Executive Order (EO) 13563 entitled ''Improving Regulation and Regulatory Review'' directs agencies ''to the extent feasible, [to] specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt;'' (EO 13563, Section 1(b)(4)). Besides the current standards we are considering, are there performance-oriented standards related to metadata that we should consider?

Dated: August 4, 2011.

Kathleen Sebelius,

Secretary.

[FR Doc. 2011–20219 Filed 8–8–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAR Case 2009–042; Docket 2011–0087, Sequence 1]

RIN 9000–AM09

Federal Acquisition Regulation; Documenting Contractor Performance; Correction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule; correction and extension of comment date.

SUMMARY: This document corrects the proposed changes published in the **Federal Register** of June 28, 2011, regarding the proposed rule for Documenting Contractor Performance and extends the comment closing date by 30 days.

DATES: The comment period for the proposed rule published June, 28, 2011, at 76 FR 37704, is extended. Comments will be received until September 8, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at (202) 501–1448. Please cite FAR Case 2009–042.

SUPPLEMENTARY INFORMATION: This document corrects the proposed changes published in the **Federal Register** of June 28, 2011, regarding the proposed rule for Documenting Contractor Performance (75 FR 37704) and extends the comment closing date by 30 days. Text already in the Federal Acquisition Regulation was inadvertently omitted from the restatement of section 42.1503. The text was not intended to be removed, and is being restored at 42.1503(d) and 42.1503(h)(1) in the proposed rule.

Correction

In the proposed rule FR Doc. 2011–16169, beginning on page 37705, in 3rd column, in the issue of Tuesday, June 28, 2011, make the following correction, in the instructions of section 42.1503.

42.1503 [Corrected]

1. Section 42.1503 is corrected to read as follows:

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service. Agency procedures shall identify and assign past performance evaluation roles and responsibilities to those individuals responsible for preparing interim and final performance evaluations (*e.g.,* contracting officer representatives and program managers). If agency procedures do not specify the individuals responsible for past performance evaluation duties, the contracting officer will remain responsible for this function. Those individuals identified may obtain information for the evaluation of performance from the program office, administrative contracting office, audit office, end users of the product or service, and any other technical or business advisor, as appropriate. Interim evaluations shall be prepared on an annual basis, in accordance with agency procedures.

(b)(1) The evaluation report should reflect how the contractor performed. The report should include clear relevant information that accurately depicts the contractor's performance, and be based on objective facts supported by program and contract performance data. The evaluations should be tailored to the contract type, size, content, and complexity of the contractual requirements.

(2) Evaluation factors for each assessment shall include, at a minimum, the following:

(i) Technical or Quality.

(ii) Cost Control (as applicable).

(iii) Schedule/Timeliness.

(iv) Management or Business Relations.

(v) Small Business Subcontracting (as applicable).

(3) These evaluation factors, including subfactors, may be tailored, however, each factor and subfactor shall be evaluated and supporting narrative provided.

(4) Each evaluation factor, as listed in paragraph (b)(2) of this section, shall be rated in accordance with a five scale rating system (*e.g.,* exceptional, very good, satisfactory, marginal, and unsatisfactory). Rating definitions shall reflect those contained in the CPARS Policy Guide available at *http://www.cpars.gov/*.

(c)(1) When the contract provides for incentive fees, the incentive-fee contract performance evaluation shall be entered into CPARS. (See 16.401(f).)

(2) When the contract provides for award fee, the award fee-contract performance adjectival rating as described in 16.401(e)(3) shall be entered into CPARS.

(d) Agency evaluations of contractor performance, including both negative and positive evaluations, prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked ''Source Selection Information''. Evaluation of Federal Prison Industries (FPI) performance may be used to support a waiver request (see 8.604) when FPI is a mandatory source in accordance with subpart 8.6. The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized.

(e) Agencies shall require—

(1) Performance issues be documented promptly during contract performance to ensure critical details are included in the evaluation;

(2) The award fee determination, if required, align with the contractor's performance and be reflected in the evaluation;

(3) Timely assessments and quality data (see the quality standards in the CPARS Policy Guide at *http://www.cpars.gov/*) in the contractors past performance evaluation; and

(4) Frequent assessment (*e.g.,* monthly or quarterly) of agency compliance with the reporting requirements in 42.1502, so agencies can readily identify delinquent past performance reports and monitor their reports for quality control.

(f) Agencies shall prepare and submit all past performance reports electronically into the CPARS at *http://www.cpars.gov/*. These reports are transmitted to the Past Performance Information Retrieval System (PPIRS) at *http://www.ppirs.gov*. Past performance reports for classified contracts and special access programs shall not be reported in CPARS, but will be reported as stated in this subpart and in accordance with agency procedures.

Agencies shall ensure that appropriate management and technical controls are in place to ensure that only authorized personnel have access to the data and the information safeguarded in accordance with 42.1503(b).

(g) Agencies shall use the past performance information in PPIRS that is within the last three years (six for construction and architect-engineer contracts) and information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS), *e.g.,* termination for default or cause.

(h) *Other contractor performance information.* (1) Agencies shall ensure information is reported in the FAPIIS module of CPARS within 3 working days after a contracting officer—

(i) Issues a final determination that a contractor has submitted defective cost or pricing data;

(ii) Makes a subsequent change to the final determination concerning defective cost or pricing data pursuant to 15.407–1(d);

(iii) Issues a final termination for cause or default notice; or

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience.

(2) Agencies shall establish CPARS focal points who will register users to report data into the FAPIIS module of CPARS (available at *http://www.cpars.gov/,* then select FAPIIS).

(3) The primary duties of the CPARS focal point is to administer CPARS and FAPIIS access. Agencies must also establish PPIRS group managers. The primary duties of the PPIRS group managers are to grant or deny access to PPIRS. The CPARS Reference Material, on the Web site, includes reporting instructions.

Dated: August 3, 2011.

Rodney P. Lantier,

Deputy Director for Acquisition Policy.

[FR Doc. 2011–20089 Filed 8–8–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2011–0057; MO 92210–0–0008 B2]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Nueces River and Plateau Shiners as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the Nueces River shiner (*Cyprinella* sp.) and plateau shiner (*Cyprinella lepida*) as threatened or endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After review of all available scientific and commercial information, we find that listing the Nueces River and plateau shiners is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to the Nueces River and plateau shiners or their habitats at any time.

DATES: The finding announced in this document was made on August 9, 2011.

ADDRESSES: This finding is available on the Internet at *http://*

www.regulations.gov at Docket Number [FWS–R2–ES–2011–0057]. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, Austin Ecological Services Field Office (see **ADDRESSES**); by telephone at 512–490–0057, extension 248; or by facsimile at 512–490–0974. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register.**

Previous Federal Actions

On June 25, 2007, we received a petition dated June 18, 2007, from Forest Guardians (now WildEarth Guardians), requesting that 475 species in the southwestern United States, including the Nueces River and plateau shiners, be listed under the Act and critical habitat be designated. We acknowledged the receipt of the petition in a letter to the petitioner, dated July 11, 2007. In that letter we also stated that the petition was under review by staff in our Southwest Regional Office.

On March 19, 2008, WildEarth Guardians filed a complaint alleging that the Service failed to comply with its mandatory duty to make a preliminary 90-day finding on the June 18, 2007, petition to list 475 southwest species. We subsequently published an initial 90-day finding for 270 of the 475 petitioned species on January 6, 2009 (74 FR 419), concluding that the petition did not present substantial information that listing of those 270 species may be warranted. This initial 90-day finding did not include the Nueces River and plateau shiners. Subsequently, on March 13, 2009, the Service and WildEarth Guardians filed a stipulated settlement agreement, agreeing that the Service would submit to the **Federal Register** a finding as to whether their petition presented substantial information indicating that the petitioned action may be warranted for the remaining 192 southwestern species by December 9, 2009. On December 16, 2009 (74 FR 66866), we published a second 90-day finding for the remaining 192 southwestern species, which included a determination that listing the Nueces River and plateau shiners may be warranted, and initiated a status review. This notice constitutes the 12-month finding on the June 18, 2007, petition to list the Nueces River and plateau Shiners as threatened or endangered with critical habitat.

Species Information

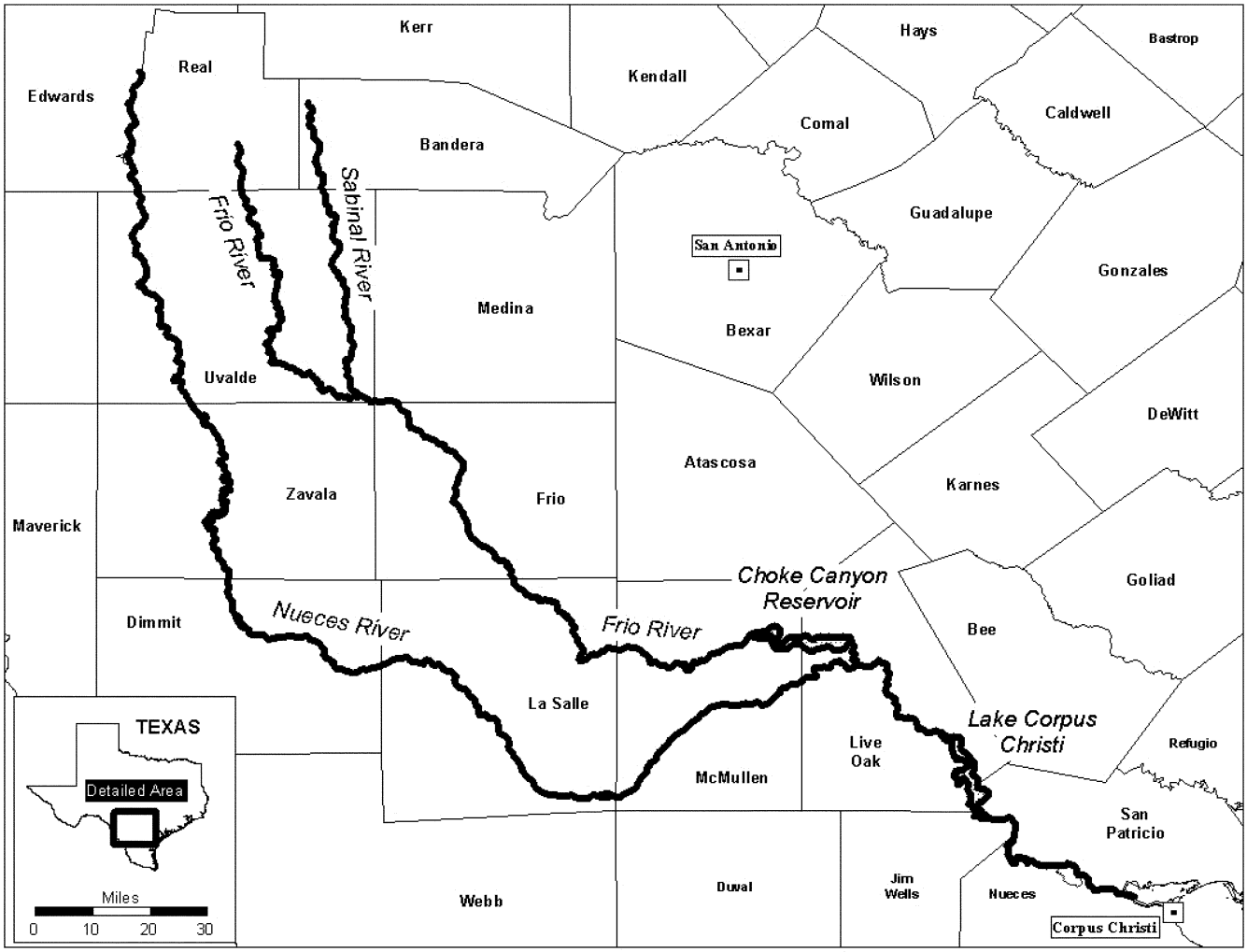
Taxonomy and Species Description

There has been some confusion and inconsistency regarding the taxonomy of the Nueces River and plateau shiners. Currently, there are approximately 30 species that belong to the genus *Cyprinella,* of which both species of shiners are members (Nelson *et al.* 2004, p. 69; Schonhuth and Mayden 2010, p. 77). The taxonomy within this genus has been associated with extensive confusion because similarities in body characteristics have made it difficult to differentiate between species (Schonhuth and Mayden 2010, p. 77). Fortunately, much of this confusion is being resolved with advances in genetic analysis (Schonhuth and Mayden 2010, pp. 77–98). However, there are still outstanding taxonomic issues that need to be resolved to clarify any potential confusion between the Nueces River and plateau shiners.

When first described, the Nueces River and plateau shiners were not considered separate species. They were both originally described as the plateau shiner, *Cyprinella lepida,* by Girard in 1856 (Richardson and Gold 1995, p. 29). Nearly 100 years later, both species were still thought to be one species. For example, Hubbs (1954, pp. 277–291) recognized only one species as distinct, the plateau shiner, *Notropis* (=*Cyprinella*) *lepidus,* occurring in the Nueces, Frio, and upper Guadalupe Rivers. However, Mayden (1989, p. 60) later pointed out that the shiner Hubbs (1954, pp. 277–291) referred to in the upper Guadalupe River was actually a red shiner species, *Notropis* (=*Cyprinella*) *lutrensis,* and not the plateau shiner.

Morphological studies conducted by Matthews (1987, pp. 616–637) and Mayden (1989, pp. 58–60) provided support that *Cyprinella lepida* was a distinct and valid species occurring in the Nueces, Frio, and Sabinal Rivers of the Nueces River basin (Figure 1). However, Matthews (1987, p. 269) noted that there were morphological differences between specimens collected in the Nueces and Frio Rivers, but did not suggest that there were two separate taxonomic entities. One of the main differences was breeding coloration in male specimens collected in the Frio River; these male specimens had red on the tip of their snouts (Matthews 1987, pp. 632–634). The male specimens collected in the Nueces River exhibited no breeding coloration (Matthews 1987, pp. 632–634).

FIGURE 1. Map of Nueces, Frio, and Sabinal Rivers, Texas.



These morphological differences between the Nueces and Frio Rivers' shiners were validated by genetic investigations that revealed two distinct lineages within populations of *Cyprinella lepida.* In 1987 and 1988, Richardson and Gold (1995, p. 29) conducted a genetic study on *Cyprinella lepida,* in which they (Richardson and Gold 1995, p. 29) collected individuals from the Nueces, Frio, and Sabinal Rivers. The results of their genetic analysis showed that *Cyprinella lepida* in the Frio and Sabinal Rivers was a distinct species from *Cyprinella lepida* collected in the Nueces River (Richardson and Gold 1995, pp. 31–33). Specimens collected in the Frio River were very similar genetically to specimens collected in the Sabinal River (Richardson and Gold 1995, p. 31). However, specimens collected from the Frio and Sabinal Rivers were quite different genetically from specimens collected in the Nueces River (Richardson and Gold 1995, p. 31). The genetic differences, along with the observed morphological differences, led Richardson and Gold (1995, pp. 31–33) to conclude that *Cyprinella* in the Frio and Sabinal Rivers was a distinct species from those in the Nueces River. Since 1995, the population in the Nueces River has been referred to as the Nueces River shiner, an unnamed species within *Cyprinella,* while populations in the Frio and Sabinal Rivers have kept the kept the name plateau shiner, *Cyprinella lepida.* Formal naming of the Nueces River shiner, *Cyprinella* sp., is still pending.

Further genetic investigations by Richardson and Gold (1999) supported their previous conclusion that *Cyprinella* in the Frio and Sabinal Rivers is a distinct species from those in the Nueces River. In this study, Richardson and Gold (1999, p. 50) focused on variation in mitochondrial genes in the five species of the shiner group inhabiting the southwestern United States, which included specimens of *Cyprinella lepida* from the Frio River and *Cyprinella* sp. from the Nueces River. Based on results of this study, Richardson and Gold (1999, p. 55) were hesitant to promote a sister relationship between the Nueces River shiner, *Cyprinella* sp., and the plateau shiner, *Cyprinella lepida,* meaning that the two lineages were not closely related. Instead, they concluded that the Nueces River shiner and plateau shiner were not as closely related to each other as they were to other species within the *Cyprinella* genus (Richardson and Gold 1999, p. 55).

Another genetic study agreed that the Nueces River shiner and plateau shiner are distinct species. In 2000, Broughton and Gold (pp. 1–10) conducted a genetic analysis of all *Cyprinella* species found

in the United States. As part of their methodology, Broughton and Gold (2000, p. 5) grouped the Nueces and Plateau shiners into the same species, *Cyprinella lepida,* but did make the distinction that ''*Cyprinella lepida*-a'' from the Frio River were not closely related to ''*Cyprinella lepida*-b'' from the Nueces River.

In an effort to clarify some of the genus' taxonomic confusion, Schonhuth and Mayden (2010, pp. 77–98) conducted a genetic study of all species within the *Cyprinella* genus, with a more exhaustive focus on the problematic taxa. Results from Schonhuth and Mayden's (2010, p. 91) genetic analysis were consistent with previous genetic studies: *Cyprinella lepida* in the Sabinal and Frio Rivers are genetically separate and distinct from the *Cyprinella* sp. found in the Nueces River. Genetic differences between specimens from the Sabinal and Frio Rivers were very different from those collected in the Nueces River, enough so that Schonhuth and Mayden (2010, p. 91) recommended leaving them as separate species.

Despite the morphological and genetic studies of the Nueces River and plateau shiners, the scientific community has been inconsistent in recognizing these shiners as separate species. The Texas Parks and Wildlife Department (TPWD) recognizes the plateau shiner (*Cyprinella lepida*) and Nueces River shiner (*Cyprinella* sp.) as separate species (Norris *et al.* 2005, p. 10). However, Phillips *et al.* (2010, p. 130) failed to recognize the Nueces River shiner as a separate species during a study on sound production and spawning behavior. In fact, Phillips *et al.* (2010, p. 130) stated that they collected *Cyprinella lepida* with seines from the Nueces River 0.5 mi (0.8 km) west of Camp Wood, Real County, Texas, during December 2002 and March 2003, and transferred them to a lab to do an acoustic study on spawning behavior. It is not clear whether Phillips *et al.* (2010) collected actual plateau shiners from the Nueces River, or whether they collected Nueces River shiners but mistakenly called them plateau shiners. Phillips *et al.* (2010) did not mention the name Nueces River shiner, *Cyprinella* sp., nor did they mention how they determined that the fish were *Cyprinella lepida.* To add further confusion, acceptance of the Nueces River shiner, *Cyprinella* sp., as a separate species from the plateau shiner, *Cyprinella lepida,* by the American Fisheries Society (2004, p. 69) is still pending. On the other hand, Hubbs *et al.* (2008, p. 19) recognized the Nueces River and plateau shiners as separate species in their annotated checklist of the freshwater fishes of Texas. Because there is still inconsistency, a formal systematic description by the scientific community of the Nueces River shiner, *Cyprinella* sp., is needed.

Based on the best available science, we accept the characterization of the Nueces River shiner, *Cyprinella* sp., and the plateau shiner, *Cyprinella lepida,* as separate species. We base this distinction on the morphological and genetic research conducted by Richardson and Gold (1995, pp. 28–37), Edwards *et al.* (2008, pp. 1–30), and Schonhuth and Mayden (2010, pp. 77–98), and due to the fact that this research has been accepted by much of the scientific community (Hubbs *et al.* 2008, p. 19). However, we recognize there is a need for more extensive morphological, genetic, and life history research with more thorough species characterizations and formal descriptions of these two shiners, especially for the Nueces River shiner. Because we recognize these two shiners as separate species, we conduct separate five-factor analyses below under section 4(a)(1) of the Act to determine whether either species meets the definition of threatened or endangered. However, we address both species in this finding because they occur in nearby watersheds and could be subject to the similar threats.

Distribution

Because of the inconsistencies in taxonomy and species descriptions of the Nueces River and plateau shiners, there has been similar confusion and inconsistencies regarding these shiners' distribution. However, one thing that has been clearly understood is that both the historic and current range of both shiners is the uppermost headwaters of the Nueces, Frio, and Sabinal Rivers of the Nueces River basin (Figure 1). The Nueces River basin covers approximately 17,000 square miles (44,030 square kilometers), encompassing all or part of 23 counties in south-central Texas (Nueces River Authority 2010, p. 1). Rivers within the basin include Nueces, Frio, Leona, Sabinal, and Atascosa Rivers (Nueces River Authority 2010, p. 1). Because the Nueces River basin is so large, running from the Edwards Plateau region of Texas to the Gulf Coast of Mexico, there are large physical and chemical differences between streams in the upper and lower parts of the basin (Norris *et al.* 2005, p. 1; Nueces River Authority 2010, p. 1). The differences between the upper and lower parts may be why the Nueces River and plateau shiners are only found in the upper, cooler headwaters.

The upper Nueces River basin, where the Nueces River and plateau shiners are found, is composed of three main tributary systems: The Nueces, Frio, and Sabinal Rivers (Edwards *et al.* 2008, p. 2). The plateau shiner is an endemic (native to and generally confined to a particular region) minnow that inhabits clear, spring-fed streams over gravel limestone substrates in the uppermost headwaters of the Frio and Sabinal Rivers on the Edwards Plateau (Edwards *et al.* 2004, p. 261; Edwards *et al.* 2008, p. 2; Hubbs *et al.* 2008, p. 19). Meanwhile, the Nueces River shiner is an endemic minnow that is only found in the uppermost headwaters of the Nueces River, which is also on the Edwards Plateau (Edwards *et al.* 2004, p. 261; Hubbs *et al.* 2008, p. 19).

An example of the inconsistency in the species' distribution occurred when TPWD associated the plateau and Nueces River shiners with the wrong stream segments in their 2005 designation of ecologically significant stream segments, which are stream segments designated based on factors related to biological function, hydrologic function, presence of riparian conservation areas, high water quality, exceptional aquatic life, high aesthetic value, threatened or endangered species, and uniqueness (Norris *et al.* 2005, pp. 16–19). Norris *et al.* (2005, pp. 16–19) stated that the Nueces River shiner occurred in the Frio and Sabinal River, and the plateau shiner occurred in the Nueces River (p. 17). However, this inconsistency may have occurred because of the confusion associated with the species' taxonomy, even though TPWD recognized the Nueces River and plateau shiners as two separate species (Norris *et al.* 2005, p. 10).

In a recent study, Edwards *et al.* (2008, p. 3) attempted to estimate the current distributional range of plateau shiner in the Frio and Sabinal Rivers, and Nueces River shiner in the Nueces River. During their seasonal sampling from 2007 to 2008, Edwards *et al.* (2008, p. 5) captured over 11,700 individuals of 24 species, including the Nueces River and plateau shiners. They noted that the Frio, Sabinal, and Nueces Rivers were all dominated by fishes that are typical of spring-fed headwater central Texas streams, but added that there is still incomplete knowledge of the current range of the plateau shiner in the Frio and Sabinal Rivers, and of the Nueces River shiner in the upper Nueces River (Edwards *et al.* 2008, p. 3). Based on the best available information, we believe that the Nueces River and

plateau shiners' historical and current ranges are the uppermost headwaters of the Sabinal, Frio, and Nueces Rivers in the Edwards Plateau region of Texas, but the extent of their ranges remains to be determined.

Habitat

There is limited information in the literature regarding the Nueces River and plateau shiners' habitat. Edwards *et al.* (2004, p. 261) noted that the plateau shiner inhabited clear, spring-fed streams over gravel limestone substrates. Phillips *et al.* (2010, p. 133) noted that *Cyprinella* collected out of the Nueces River in 2002 and 2004 were crevice spawners (females release their eggs in crevices), like the majority of other *Cyprinella* species. Also, Phillips *et al.* (2010, p. 133) noted that the specimens they collected relied on spring or spring-fed water. Although not specified to species, we assume that the *Cyprinella* Phillips *et al.* (2010, p. 133) referred to were Nueces River shiners based on where the specimens were collected. In any case, it is apparent that both shiners' habitat is spring-fed streams, which are typically found in the headwaters. Furthermore, the headwater streams where both Nueces River and plateau shiners occur are characterized by limestone bedrock with significant gravel and cobble bottoms, clear evidence of spring-flows with emergent vegetation and relatively shallow depths, relatively high pH values typical of limestone bedrock streams of the Edwards Plateau, relatively stable water temperatures, and dissolved oxygen levels generally around 10 parts per million (Edwards *et al.* 2008, p. 21). Though limited, this information is consistent with what is known about the shiners' habitat.

Population Abundance

There has been much speculation and very little research actually surveying and documenting the abundance of the Nueces River and plateau shiners. A genetic study by Richardson and Gold (1995, p. 35) noted that the plateau shiner's abundance appeared to have decreased considerably over the previous 20 years prior to their study. However, their note of plateau shiner abundance was not based on actual surveys or data collection (Richardson and Gold 1995, p. 35). Also, we could not find any evidence or documentation that either of these shiners' abundance actually declined over this time period. Therefore, we cannot conclude that there was a decline in the Nueces River or plateau shiners over the 20 years prior to Richardson and Gold's (1995) study.

Because of Richardson and Gold's (1995, p. 35) statement regarding the presumed decline of the two shiners, other researchers cited Richardson and Gold while making the same conjecture. For example, Hoagstrom *et al.* (2011, p. 24) claimed that 41 endemic fishes, including plateau and Nueces River shiners, were declining in the plains of North America because of dewatering, low flows, habitat fragmentation, nonnative species, and pollution. However, this presumption was based on the Richardson and Gold (1995) genetic study discussed above rather than on actual abundance data or surveys.

There has been a noted decline throughout Texas for many of the State's native fishes (Hubbs *et al.* 2008, p. 2). Nonnative species, as well as degradation of water and habitat quality, are thought to be major components of the native fishes' decline (Hubbs *et al.* 2008, p. 5). As part of the annotated checklist of the freshwater fishes of Texas, Hubbs *et al.* (2008, p. 19) identified both the Nueces River and plateau shiners as species of special concern. Hubbs *et al.* (2008, p. 5) defined a species of ''special concern'' as a taxon whose abundance or range has been reduced to the degree that it may be threatened with extinction or whose range is only peripherally in Texas and could be easily extirpated. Some species were included in this category of special concern because up-to-date information concerning their status was unavailable or fragmentary (Hubbs *et al.* 2008, p. 5). In any case, Hubbs *et al.* (2008) provided no evidence for categorizing the Nueces River and plateau shiners as species of special concern. There was no supporting information on abundance, range reduction, or any other reason for classifying these two fishes as species of special concern. Therefore, it is reasonable to assume that Hubbs *et al.* (2008) classified the Nueces River and plateau shiners as a species of special concern because there was no up-to-date information concerning their status.

Contrary to the information above, other studies have noted that the Nueces River and plateau shiners were abundant within the past decade in the headwaters of the Sabinal, Frio, and Nueces Rivers (Figure 1). In fact, Edwards *et al.* (2004, p. 261) stated that the plateau shiner was moderately abundant in the Edwards Plateau region. To obtain a more thorough assessment on the status of the Nueces River and plateau shiners, Edwards *et al.* (2008, p. 6) conducted a sampling study from 2007 to 2008 in the Nueces, Frio, and Sabinal Rivers and found that the Nueces River and plateau shiners were two of the most abundant fishes in each of these rivers out of 21 different species collected.

Even though there have been claims in the scientific literature that the Nueces River and plateau shiners were declining, these claims appear to be unsubstantiated by actual survey data. On the other hand, a recent study conducted by Edwards *et al.* (2008, pp. 1–30) that surveyed abundance of the Nueces River and plateau shiners found large numbers of these species. In conclusion, there is insufficient evidence to determine population trends for either species.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this finding, information pertaining to the Nueces River and plateau shiners in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. In making our 12-month finding on the petition, we considered and evaluated the best available scientific and commercial information. We reviewed the petition, information available in our files, and other available published and unpublished information. We also consulted with recognized fish experts and biologists with TPWD and The Nature Conservancy.

Summary of Information Pertaining to the Five Factors for Nueces River Shiner

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The following factors have the potential to affect the habitat or range of the Nueces River shiner: Livestock grazing, water quantity, water quality,

and land use. Below, we discuss in detail each of these factors and determine whether or not they constitute a threat to the species.

Livestock Grazing

While we know that livestock grazing occurs within the range of the species, we could find no information on the extent or intensity of historical or current livestock grazing practices or the impact grazing might have on the Nueces River shiner and its habitat. In areas where livestock are grazed inappropriately, impacts could include, but are not limited to, runoff from disturbed stream banks, livestock urine and manure deposited into streams, disturbance and erosion from trampled banks, and increased solar exposure due to reduced shade from streamside vegetation and loss of undercut streambanks. Any of these impacts could affect the Nueces River shiner by degrading water quality and negatively impacting the species. Richardson and Gold (1995, p. 35) concluded that much of the land in the Nueces River basin is used for agriculture, and that overgrazing by cattle posed serious problems for aquatic fauna. However, we found no monitoring data indicating that water quality degradation associated with livestock grazing is occurring within the range of the Nueces River shiner. Based on the best available information, we could find no evidence that overgrazing is posing a threat to the Nueces River shiner or is likely to in the future. Therefore, because the best available information does not indicate that livestock grazing is negatively impacting the species, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of livestock grazing.

Water Quantity

Diminished water flows can cause losses in habitat diversity, reduce stream productivity, and degrade water quality for many fish species (Norris *et al.* 2005, p. 1). Richardson and Gold (1995, p. 35) suggested that groundwater (underground aquifer) levels for much of south-central Texas had decreased substantially over the decade preceding their study (1980s), resulting in significantly reduced water flow in spring-fed rivers, including the habitat of the Nueces River shiner. Although there is evidence of stream flow fluctuations that most likely relate to annual rainfall events, the best available information does not indicate that reduced stream flows are occurring within the range of the Nueces River shiner at a level that may adversely impact the species. As we have noted previously, the Nueces River shiner is an endemic minnow that is only found in the uppermost headwaters of the Nueces River within the Edwards Plateau (Edwards *et al.* 2004, p. 261; Hubbs *et al.* 2008, p. 19). Over the past century in the Edwards Plateau region of Texas, there has been evidence of some loss of natural spring and headwater stream flows (Edwards *et al.* 2004, p. 253). Yet, water users in the Edwards Plateau are altering their usage of waters from the aquifers of the Edwards Plateau. Reduced water usage has allowed for the conservation of regional spring flows (Edwards *et al.* 2004, p. 263). Additionally, stream flow monitoring is occurring at various sites within the Nueces River shiner's range by the United States Geological Survey (Edwards *et al.* 2008, p. 25), and Edwards *et al.* (2008, p. 25) analyzed these stream flow measurements in the Frio, Sabinal, and Nueces Rivers for the last decade. Results of Edward's *et al.* (2008, p. 25) analysis showed that there was a normal range of flow variation in each of the streams due to natural rainfall events. Edwards *et al.* (2008, p. 6) also noted that the Nueces River shiner was one of the most abundant fishes in the upper stream segments of the Nueces River. Thus, the stream flow variation was occurring at a level that had no known impact on the species. While there may be fluctuations in stream flow, there is no evidence indicating that reduced water flow is a threat to the species either now or in the foreseeable future. Therefore, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of reduced water flow.

Water Quality

Within the last 12 years, there has been cause for concern along certain stream segments of the Nueces River. In 1999, a 91-mile (mi) (147-kilometers (km)) stream segment of Nueces River that flows from Holland Dam in La Salle County to its confluence with the Frio River at the Choke Canyon Reservoir in Live Oak County was included in the State of Texas' Clean Water Act 303(d) list as impaired due to concentrations of dissolved oxygen below the minimum standards criteria in the lower 25-mi (40-km) portion of the stream (Bonner *et al.* 2005, p. 1; Nueces River Authority 2010, p. 13). Adequate dissolved oxygen is necessary for respiration and other essential processes of aquatic organisms; thus, low levels may be detrimental to the health of aquatic organisms. The majority of this lower 25-mi (40-km) portion of the stream occurs in McMullen County, which lies in the South Texas Brush Country region of Texas, well outside the historical and current range of the Nueces River shiner. As noted above in the *Species Information* section, the Nueces River shiner's range occurs in the uppermost headwaters in the Edwards Plateau region of Texas. Therefore, the concerns about low dissolved oxygen content associated with this segment of Nueces River do not relate to the Nueces River shiner or its range.

Based on the best available scientific and commercial information, there is no evidence that pollution causing diminished water quality may be having an impact on the Nueces River shiner or its habitat. In 2005, the TPWD reported the Nueces River as having high water quality and exceptional aquatic life (Norris *et al.* 2005, p. 17). Also, the TPWD designated stream segments in the upper Nueces River as ecologically significant based on low levels of development in the watershed, no point sources of pollution, no channelization, and no atypical nonpoint sources of pollution (Norris *et al.* 2005, p. 5). Furthermore, water quality monitoring has been conducted in the uppermost reaches of the Nueces River where the majority of Nueces River shiners occur, and no problems have been found (Nueces River Authority 2010, p. 17). Therefore, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of diminished water quality caused by pollution.

Land Use

The decline of native fishes in the southern United States generally is attributable to pervasive, complex habitat degradation across the landscape that both reduces and fragments habitat and increases isolation of fish populations (Warren *et al.* 2000, p. 8). Often, physical habitat alteration in the form of channelization, impoundment, sedimentation, and flow modification are frequently associated with fish declines (Warren *et al.* 2000, p. 8).

Edwards *et al.* (2008, p. 3) mentioned potential impacts to the Nueces River from existing agricultural practices, land use changes, and groundwater pumping, and stated that these have combined to create stream segments identified as impaired under section 303(d) of the Clean Water Act. One of the main purposes of the Edwards *et al.* (2008, p. 3) study was to find out if these potential impacts may actually be a factor in population and range declines among native fishes, including the Nueces River shiner. In order to determine the extent of these potential

impacts, Edwards *et al.* (2008, p. 27) looked at the biological integrity of streams in the upper Nueces River and found that the Nueces River had high water quality within the range of the Nueces River shiner. Also, Edwards *et al.* (2008, p. 29) noted that the fish fauna sampled are typically associated with high-quality spring-fed streams within the southern Edwards Plateau. On the other hand, Edwards *et al.* (2008, p. 27) noted some impacts along the upper Nueces River, such as development along the watercourse and recreational pressures during the summer months. Even with these impacts, the headwater streams of the Nueces River basin maintained much of their integrity as evidenced by such fish as the Nueces River shiner (Edwards *et al.* 2008, p. 27). In fact, Edwards *et al.* (2008, p. 6) stated that the Nueces River shiner was one of the most abundant fishes in the upper stream segments of the Nueces River. Further, The Nature Conservancy of Texas is currently engaged in watershed protection in the upper Nueces River basin, mainly as a participant in the City of San Antonio's Aquifer Protection Program (Edwards *et al.* 2008, p. 3). The Nature Conservancy holds several conservation easements and is exploring ways to increase conservation efforts in this part of the river basin (Edwards *et al.* 2008, p. 3). Therefore, we find no evidence indicating that land uses are negatively impacting the Nueces River shiner now or in the foreseeable future.

Summary of Factor A

We relied on the best available scientific and commercial information, which does not indicate that these or any factors are impacting the Nueces River shiner at a level that may impact the species. Therefore, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of destruction, modification, or curtailment of its habitat or range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Based on the best available scientific and commercial information, there is no evidence that impacts are occurring to the Nueces River shiner or its habitat under this factor. Other than the scientific studies referenced in this finding, this shiner is not used for any commercial, recreational, or educational purposes. Therefore, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of overutilization for commercial, recreational, scientific, or educational purposes.

Factor C. Disease or Predation

We are not aware of any research that has been conducted to examine disease or predation in the Nueces River shiner. Also, we are not aware of any nonnative species that may prey on the Nueces River shiner. Therefore, based on the best available scientific and commercial information, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of disease or predation.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

To determine if existing regulatory mechanisms are adequate to protect the Nueces River shiner, we evaluated agreements and laws in effect within the range of the species. One regulatory mechanism is the Clean Water Act (CWA), which was established in 1972. The CWA is the primary Federal law addressing water pollution in the United States. The purpose of the CWA is to stop pollutants from being discharged into waterways and to maintain water quality to provide a safe environment for fishing, swimming, and drinking. All navigable waters in the United States are covered under the CWA. The CWA provides guidelines and offers Federal financial assistance for identifying the causes of pollution. There are standards and regulations that must be adhered to by industries that discharge into waterways. The CWA sets forth water quality standards that are site-specific allowable pollutant levels for individual water bodies, such as rivers, lakes, streams, and wetlands. State agencies are required by the CWA to set water quality standards by designating uses for the water body (*e.g.,* recreation, water supply, aquatic life, and agriculture) and applying water quality criteria to protect the designated uses.

In Texas, the Texas Commission on Environmental Quality (TCEQ), formerly known as Texas Natural Resource Conservation Commission, is the environmental agency that oversees water quality standards as required by the CWA (TCEQ 2010b, p. 19). The TCEQ strives to protect Texas' human and natural resources consistent with sustainable economic development, by providing clean air, clean water, and the safe management of waste (TCEQ 2010b, p. 4). The TCEQ key operations include, but are not limited to, issuing, administering, renewing, and modifying permits, water rights, licenses, or certifications for organizations and individuals whose activities have some potential or actual environmental impact that must be formally authorized by the agency; monitoring the current condition of a geographic area or natural resource, often through sampling or surveys; and identifying, verifying, and tracking violations of regulations and initiating enforcement actions in response to violations (TCEQ 2010b, p. 21). The TCEQ developed the Clean Rivers Program to implement the goals of the Texas Clean Rivers Act (TCRA), described below.

The TCRA, which was passed in 1991 by the Texas legislature, requires that basinwide water quality assessments be conducted for each river basin in Texas (Nueces River Authority 2010, p. 1). The goal of the TCRA is to provide waterways in the State with coordinated monitoring and protection, to identify the locations of water quality problems, and develop solutions on a river basin by river basin basis. The Clean Rivers Program is a partnership involving the TCEQ, other State agencies, river authorities, local governments, industry, and citizens (Nueces River Authority 2010, p. 1). Also, the Nueces River Authority was created in 1935 by special act of the 44th Texas Legislature codified as Article 8280–115 (Texas Water Code Auxiliary Laws, as amended). Under supervision of the TCEQ, the Nueces River Authority has broad authority to preserve, protect, and develop surface water resources, including flood control, irrigation, navigation, water supply, wastewater treatment, and water quality control. The Nueces River Authority serves all or parts of 22 counties in Texas, covering over 17,000 square miles (44,030 square kilometers), including the drainage area of the Nueces River and its tributaries and the adjoining coastal basins.

Under the Clean Rivers Program and using a watershed management approach, the Nueces River Authority and TCEQ work together to identify and evaluate surface water quality issues and to establish priorities for corrective action within the Nueces River basin (Nueces River Authority 2010, p. 1). The Nueces River Authority and TCEQ conduct quarterly water quality monitoring at routine monitoring sites, testing for such things as wastewater discharge, runoff from quarry operations, accidental spills, ammonia excreted by animals or from fertilizers, and agricultural runoff, among many other things (Nueces River Authority 2010, pp. 2–3). If water quality issues are detected, the Nueces River Authority and TCEQ may take appropriate corrective actions.

Lastly, the TPWD recognized the upper reaches of the West Nueces, Nueces, Frio, and Sabinal Rivers as ecologically significant river and stream

segments (Norris *et al.* 2005, p. 3). Designation of a stream segment as ecologically unique offers a certain degree of protection from activities such as reservoir construction (Norris *et al.* 2005, p. 5). This designation does not impart protection from degradation, but rather prohibits a State agency or political subdivision of the State from financing the actual construction of a reservoir in a specific river or stream segment designated as ecologically significant by the legislature under section 16.051(f) of the Texas Water Code (Norris *et al.* 2005, p. 4).

Summary of Factor D

In conclusion, there are Federal and State regulatory protections currently in place offering some levels of protection for the Nueces River shiner from such factors as degraded water quality, pollution, and reservoir construction. However, as discussed in other *Factors* of the Nueces River shiner, we have not identified any threats to the species that are likely to negatively affect the status of the species such that an inadequacy of existing regulatory mechanisms is likely to be a threat to the species. Therefore, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of inadequacy of existing regulatory mechanisms.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Global climate change, and associated effects on regional climatic regimes, is not well understood, but model predictions are that temperatures in the southwestern United States will continue to increase, with extreme weather events (such as heat waves, drought, and flooding) occurring with more frequency (Archer and Predick 2008, p. 24). Also, there is some scientific information suggesting that fish in streams in southwestern North America may be vulnerable to extirpation or extinction due to global climate change because many fish species are already living near their lethal thermal limits (Mathews and Zimmerman 1990, p. 26). Endemic species, like the Nueces River shiner, which only inhabits the spring-fed headwaters of the Nueces River, could be more vulnerable to rising stream temperatures because they may not be able to move to more suitable areas. On the other hand, spring-fed streams have nearly constant environmental conditions, such as temperature, due to the constancy of groundwater chemistry and discharge (Hoagstrom *et al.* 2011, p. 22). Thus, areas with substantial connections to aquifers may sustain endemic fishes because groundwater responds slowly to climate change, buffering against fluctuations in climate conditions (Hoagstrom *et al.* 2011, p. 22). Additionally, we are not aware of any research that has been conducted on water temperature tolerance of the Nueces River shiner. Because the Nueces River shiner's water temperature tolerance is unknown, the point at which rising stream temperatures may impact the species is also unknown.

Likewise, recent models on climate change have indicated that annual mean precipitation in the southwestern United States is likely to decrease (Intergovernmental Panel on Climate Change (IPCC) 2007, p. 887). Decreased precipitation could result in diminished water flows, which may cause losses in habitat diversity, reduce stream productivity, and degrade water quality (Norris *et al.* 2005, p. 1). While it appears reasonable to assume that climate change could affect the Nueces River shiner by reduced water flows, we lack sufficient certainty to know specifically how climate change will affect the species. We have not identified, nor are we aware of, any data on an appropriate scale to evaluate habitat or population trends for the Nueces River shiner within its range, or to make predictions on future trends and whether the species will actually be impacted.

There are multiple hypothetical outcomes associated with climate change that could potentially affect the Nueces River shiner, but we lack predictive local or regional models on how climate change will specifically affect the Nueces River shiner or its habitat. Currently, we have no certainty regarding the timing, magnitude, or effects of impacts. Therefore, we find at this time that it is not possible to make reliable predictions of climate change effects on the status of the Nueces River shiner due to current limitations in available data and climate models. Based on the best available information and our current knowledge and understanding, we find that the Nueces River shiner is not in danger of extinction now or in the foreseeable future as a result of natural or other manmade threats affecting its continued existence.

Finding for the Nueces River Shiner

As required by the Act, we considered the five factors in assessing whether the Nueces River shiner is threatened or endangered throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with recognized species experts and State agencies.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of threatened or endangered under the Act.

Our review of all the available information does not support a determination that any current activities or activities in the foreseeable future threaten the Nueces River shiner or its habitat to the point that the species meets the definition of threatened or endangered under the Act. There is no evidence indicating that reduced water flow, improper grazing of livestock, pollution, and land use are affecting the species or its habitat. Overutilization, disease, and predation are not known concerns for this species. We find that no existing regulatory mechanisms are inadequate to limit or prevent possible negative impacts from human activities. Climate change could affect the habitat of the Nueces River shiner in the future, but we have no certainty regarding the timing, magnitude, or effects of impacts to the species.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that there are no threats to indicate that the Nueces River shiner is in danger of extinction (endangered) or likely to become endangered within the foreseeable future (threatened)

throughout its range. Therefore, we find that listing the Nueces River shiner as endangered or threatened is not warranted throughout its range at this time.

Summary of Information Pertaining to the Five Factors for Plateau Shiner

The plateau shiner's range is in close proximity to the Nueces River shiner's range. Subsequently, many of the factors that may affect the Nueces River shiner also may affect the plateau shiner. Therefore, much of the information presented in this section is similar to that presented above for the Nueces River shiner. However, the plateau shiner does inhabit separate headwaters of the Sabinal and Frio Rivers in the Edwards Plateau region of Texas, whereas the Nueces River shiner inhabits the headwaters of the Nueces River. The Sabinal and Frio Rivers are part of the Nueces River basin because they flow into and become part of the Nueces River in south-central Texas. Because the plateau shiner occupies separate headwaters than the Nueces River shiner, we will discuss any potential threats that might uniquely affect the plateau shiner, but because these two shiner species occupy nearby headwaters and are very similar species, we will refer to the information above, where appropriate.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The following factors have the potential to affect the habitat or range of the plateau shiner: Livestock grazing, reduced water quantity, impaired water quality, and land use. Below, we discuss each of these factors and determine whether or not they constitute a threat to the plateau shiner.

Livestock Grazing

While we know that livestock grazing occurs within the range of the species, we could find no information on the extent or intensity of historical, current, or future livestock grazing practices or impacts that grazing may be having on the species. As previously mentioned, Richardson and Gold (1995, p. 35) cited a personal communication in their study to conclude that much of the land in the Nueces River basin was used for agriculture, and that overgrazing by cattle posed serious problems for aquatic fauna. However, based on the best available information, we could find no evidence or data to indicate that improper livestock grazing affects the plateau shiner or its habitat. Therefore, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of livestock grazing.

Water Quantity

Please see *Factor A* discussion of the Nueces River shiner for a more thorough discussion of the potential impacts of reduced water flow on these fish. As stated above and based on the best available information, we have no evidence to indicate that reduced stream flow is occurring within the range of the plateau shiner at a level that may be impacting the species. As we have noted previously, Edwards *et al.* (2008, p. 25) analyzed stream flow measurements in the Frio, Sabinal, and Nueces Rivers for the last decade and showed that there was a normal range of flow variation in each of the streams. Therefore, based on the best available information, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of reduced water flows.

Water Quality

Based on the best available information, there is no evidence that diminished water quality caused by pollution may be occurring within the range of the plateau shiner at a level that affects the species or its habitat. In 2005, the TPWD noted the Frio and Sabinal Rivers as having high water quality and exceptional aquatic life (Norris *et al.* 2005, pp. 16, 19). However, water quality tests have been conducted on other areas where plateau shiners are known to occur, such as the uppermost reaches of the Sabinal River, and water quality impairment has been detected (Nueces River Authority 2010, p. 16). Even though a stream segment in the upper Frio River remains on the State of Texas' Clean Water Act 303(d) list as impaired and is within the range of the species, there does not appear to be adverse impacts to the plateau shiner or its habitat.

In 2000, a 47-mi (76-km) stream segment from where the West Frio River and the East Frio River flow together in Real County, at a point 110 yards (yd) (100 meters (m)) upstream of Highway 90 in Uvalde County, was included on the State of Texas' Clean Water Act 303(d) list as impaired due to concentrations of dissolved oxygen below criteria associated with exceptional aquatic life (Bonner *et al.* 2004, pp. 1–3). The dissolved oxygen criteria was established based on the fact that organisms that live in water need oxygen to live, and in waters with depressed dissolved oxygen levels, organisms may not have sufficient oxygen to survive (Nueces River Authority 2010, p. 3). Following this designation as impaired in 2000, TCEQ initiated a project to verify the impairment through the collection of additional physical, chemical, and biological data (Bonner *et al.* 2004, p. 3). As a result, Bonner *et al.* (2004, p. 1) conducted a 3-year monitoring study of water quality at several stations along the upper Frio River from 2002 through 2004. Based upon the 24-hour dissolved oxygen data collected for this study, Bonner *et al.* (2004, p. 20) found no impairment due to depressed levels of dissolved oxygen in the water and concluded that the upper Frio River was meeting the exceptional aquatic life use standard. Routine water samples yielded no significant levels of nutrient impairment (Bonner *et al.* 2004, p. 20). Therefore, Bonner *et al.* (2004, p. 1) recommended removing the upper Frio River from the State's list of impaired waters.

As part of the impairment verification monitoring project on this 47-mi (76-km) stream segment in the upper Frio River, Ecological Communications Corporation conducted biological data collection and analysis in September 2002, August 2003, and October 2003 (Walther and Palma 2004, p. 3). Based on the biological and habitat data collected by Ecological Communications Corporation, it appeared that the number and diversity of aquatic organisms were lower than the established standards set forth in the Texas Clean Water Act (Walther and Palma 2004, p. 8).

In 2008 and 2010, this same stream segment of the Frio River continued to remain on the 303(d) list because of concerns for impaired habitat, fish community, and organisms living at the bottom of the water (Nueces River Authority 2008, pp. 56–58; Nueces River Authority 2010, p. 17; TCEQ 2010a, p. 86). However, all testing resulted in data that were within TCEQ's normal range, which included dissolved oxygen, pH, total phosphorus, nitrates, ammonia, chlorophyll-a, nutrients, and bacteria (Nueces River Authority 2008, pp. 56–58; Nueces River Authority 2010, p. 17). Also, no hypotheses were given for the reasons this stream segment had aquatic life uses that were lower than established standards (Nueces River Authority 2008, 2010). Edwards *et al.* (2008, p. 29) analyzed the biological integrity of streams in the upper headwaters of the Nueces River basin, and noted that the water quality was generally high and the fish fauna present were typical of high-quality spring-fed streams. Also, Edwards *et al.* (2008, p. 6) stated that the plateau shiner was one of the most abundant fishes surveyed.

Another stretch of the Frio River, a segment 158 mi (254 km) long, from 110 yds (100 m) upstream of Highway 90 in Uvalde County to the confluence with Choke Canyon Reservoir in McMullen County, was placed on the 303(d) list as impaired for bacteria in 2008 and 2010 (Nueces River Authority 2008, pp. 66–71; Nueces River Authority 2010, p. 20; TCEQ 2010a, p. 86). However, this stretch of the Frio River is further downstream in south-central Texas, outside of the plateau shiner's range. Therefore, factors affecting this stream segment are not likely to affect the plateau shiner or its habitat.

As previously noted above under *Factor A* analysis for the Nueces River shiner, Edwards *et al.* (2008, p. 3) conducted a study to find out if there were potential impacts that may be factors in population and range declines among native fishes, including the plateau shiner, in the upper headwaters of the Nueces River basin. Edwards *et al.* (2008, p. 27) analyzed the biological integrity of streams in the upper Nueces River basin, including the Sabinal and Frio Rivers where the plateau shiner is found. Edwards *et al.* (2008, p. 27) found that the Sabinal and Frio Rivers had exceptional water quality within the range of the plateau shiners. Also, Edwards *et al.* (2008, p. 29) noted that the water quality was generally high and the fish fauna present were typical of high-quality spring-fed streams within the southern Edwards Plateau. On the other hand, Edwards *et al.* (2008, p. 29) noted a number of significant impacts, such as development along the watercourse, low-head dams along the Sabinal River, and at times intense recreational pressures during the summer months, especially along the Frio River. Even with these impacts to the streams, the headwaters of the Sabinal and Frio Rivers maintained much of their integrity as evidenced by the numerous indicator fishes (fishes thought to be sensitive to, and serve as an early warning indicator of, environmental changes), such as the plateau shiner (Edwards *et al.* 2008, p. 27). In fact, Edwards *et al.* (2008, p. 6) stated that the plateau shiner was one of the most abundant fishes. Because the plateau shiner was one of the most abundant species surveyed, it does not appear that factors related to development along the watercourse, low-head dams, and recreational use are negatively impacting the plateau shiner.

In conclusion, even though a portion of the Frio River is listed as impaired by the State of Texas under the Clean Water Act 303(d) because of concerns for impaired habitat, fish community, and organisms living at the bottom of the water, a study conducted by Edwards *et al.* (2008) found no evidence of actual impacts on the plateau shiner. Likewise, Bonner *et al.* (2004, p. 20) previously found no impairment due to depressed levels of dissolved oxygen in the water and concluded that the upper Frio River was meeting the exceptional aquatic life use standard. In addition, all water quality monitoring in the impaired stream segment resulted in water parameters within the normal range (Nueces River Authority 2008, pp. 56–58; Nueces River Authority 2010, p. 17). Based on the best available information, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of degraded water quality.

Land Use

The primary land use factors that could affect the plateau shiner are recreation, agricultural activities, and land development. The upper Frio River is used extensively for recreation, and the extensive recreational usage is expected to continue in the future (Walther and Palma 2004, p. 1; Nueces River Authority 1998, p. 2). Although we could find no evidence to indicate that recreational usage may be impacting plateau shiner in the Sabinal River, it is reasonable to assume that recreational use does occur in this river. The Frio River is very popular for recreational activities such as canoeing, tubing, fishing, and wildlife viewing (Norris *et al.* 2005, p. 15). A study was conducted on the upper Frio River to evaluate the impact of recreational use and land development on water quality and the aquatic biological community (Nueces River Authority 1998, p. 2). Impacts were evaluated through the collection and interpretation of information on land uses and historic utilization, and by conducting biological assessments, toxicity testing, and water quality analysis (Nueces River Authority, p. 2). The Nueces River Authority (1998, p. 3) noted that the upper Frio River was primarily forest and rangeland with some agricultural activities, mainly orchards and nurseries, and very limited urban land development, primarily related to tourist and camping accommodations. Overall, the chemical and physical water quality of the upper Frio River was found to be very good, and recreational use had little impact on river quality during the spring and summer visitation period (Nueces River Authority 1998, p. 10). This is further supported by an Edwards *et al.* (2008, p. 27) study, which found that the Sabinal and Frio Rivers had exceptional water quality. Based on our review of the best available information, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of recreational use or any other type of land use.

Summary of Factor A

We relied on the best available scientific and commercial information, which does not indicate that any of the factors discussed above are impacting the plateau shiner at a level that constitutes a threat to the species. Therefore, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of the present or foreseeable destruction, modification, or curtailment of its habitat or range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Based on the best available scientific and commercial information, there is no evidence that impacts are occurring to the plateau shiner or its habitat under this factor. Other than the scientific studies referenced in this finding, the plateau shiner is not used for any commercial, recreational, or educational purposes. Therefore, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of overutilization for commercial, recreational, scientific, or educational purposes.

Factor C. Disease or Predation

As with the Nueces River shiner, we are not aware of any research that has been conducted to specifically examine disease or predation in the plateau shiner. There was no mention of disease or predation in our review of the best available information. Also, we are not aware of any nonnative species that may prey on the plateau shiner. Therefore, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of disease or predation.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

As we discussed in more detail above under *Factor D* analysis for the Nueces River shiner, there are Federal and State regulatory protections currently in place offering some levels of protection for the plateau shiner, particularly from such factors as degraded water quality, pollution, and reservoir construction. The *Factor D* analysis for the Nueces River shiner presented above also pertains to the plateau shiner's habitat and range. However, as discussed in other *Factors* for the plateau shiner, we have not identified any threats to the

species that are negatively affecting the status of the species, such that an inadequacy of regulatory mechanisms is likely to be a threat to the species. Therefore, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result of inadequacy of regulatory mechanisms.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

The same impacts discussed above under the *Factor E* analysis for the Nueces River shiner also apply to the plateau shiner. As with the Nueces River shiner, there are multiple hypothetical outcomes associated with climate change that could potentially affect the plateau shiner, but we lack predictive local or regional models on how climate change will specifically affect the plateau shiner or its habitat. Currently, we have no certainty regarding the timing, magnitude, or effects of impacts from climate change. Therefore, we conclude that at this time it is not possible to make reliable predictions of climate change effects on the status of the plateau shiner due to current limitations in available data and climate models. Based on the best available information, we find that the plateau shiner is not in danger of extinction now or in the foreseeable future as a result other natural or manmade factors affecting its continued existence.

Finding for the Plateau Shiner

As required by the Act, we considered the five factors in assessing whether the plateau shiner is threatened or endangered throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with recognized species experts and State agencies.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of threatened or endangered under the Act.

Our review of the best available information does not support a determination that any current activities or activities in the foreseeable future threaten the plateau shiner or its habitat to the point that the species meets the definition of threatened or endangered under the Act. There is no evidence indicating that reduced water flow, improper grazing by livestock, diminished water quality caused by pollution, or land use is affecting the species or its habitat. Overutilization, disease, and predation are not concerns for this species. We find no existing regulatory mechanisms that are inadequate to limit or prevent possible negative impacts from human activities. Climate change is another factor that could affect the habitat of the plateau shiner in the future, but we have no certainty regarding the timing, magnitude, or effects of impacts to the species.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that there are no threats to indicate that the species is in danger of extinction (endangered), or likely to become endangered within the foreseeable future (threatened), throughout its range. Therefore, we find that listing the plateau shiner as a threatened or endangered species is not warranted throughout its range at this time.

Significant Portion of the Range and Distinct Vertebrate Population Segments

After assessing whether the two species are threatened or endangered throughout their ranges, we next consider whether either a significant portion of the Nueces River and plateau shiners' ranges or a distinct population segment (DPS) of either or both species meets the definition of endangered or is likely to become endangered in the foreseeable future (threatened).

Significant Portion of the Range

Having determined that the Nueces River and plateau shiners do not meet the definition of a threatened or endangered species throughout all of their ranges, we must next consider whether there are any significant portions of the range where either species are in danger of extinction or is likely to become endangered in the foreseeable future.

The Act defines an endangered species as one ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as one ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The term ''significant portion of its range'' is not defined by the statute. For the purposes of this finding, a portion of the species' range is ''significant'' if it is part of the current range of the species, and it provides a crucial contribution to the representation, resiliency, or redundancy of the species. For the contribution to be crucial it must be at a level such that, without that portion, the species would be in danger of extinction.

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant'' (*i.e.,* the loss of that portion clearly would not reasonably be expected to increase the vulnerability to extinction of the entire species to the point that the species would then be in danger of extinction), such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is threatened or endangered in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address either the ''significant'' question first, or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is in endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.''

Applying the process described above for determining whether a species is threatened or endangered in a significant portion of its range, we consider status first to determine if any threats or potential threats acting individually or collectively threaten or endanger the species in a portion of its range. We have analyzed the threats to the degree possible, and determined they are essentially uniform throughout both species' ranges.

There is no information to suggest that any portion of the ranges of either species contributes more significantly to species than any other portion of their ranges. There is no information to suggest that any portion of their ranges is of better quality than any other portion, or that any portion includes important concentrations of certain types of habitat that are necessary for the species to carry out its life-history functions. As a result, we conclude that there is no information that a particular portion of the Nueces River or plateau shiners' range warrants further consideration as threatened or endangered.

Conclusion of 12-Month Finding

We do not find the Nueces River shiner or plateau shiner to be in danger of extinction now, nor is either species likely to become endangered within the foreseeable future throughout all or a significant portion of their range. Therefore, listing either species as threatened or endangered under the Act is not warranted at this time.

We request that you submit any new information concerning the status of, or threats to, the species to our Austin Ecological Services Field Office (see **ADDRESSES** section) whenever it becomes available. New information will help us monitor the Nueces River and plateau shiners and encourage their conservation. If an emergency situation develops for the Nueces River shiner, plateau shiner, or any other species, we will act to provide immediate protection.

Distinct Vertebrate Population Segment

Under the Service's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (61 FR 4722, February 7, 1996), three elements are considered in the decision concerning the establishment and classification of a possible DPS. These are applied similarly for additions to or removal from the Federal List of Endangered and Threatened Wildlife. These elements include:

(1) The discreteness of a population in relation to the remainder of the species to which it belongs;

(2) The significance of the population segment to the species to which it belongs; and

(3) The population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification (*i.e.,* is the population segment endangered or threatened).

Discreteness

Under the DPS policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either one of the following conditions:

(1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.

(2) It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

We determine, based on a review of the best available information, that neither the Nueces River shiner nor the plateau shiner meet the discreteness conditions of the 1996 DPS policy. Neither species has populations that are known to be markedly separate from other populations of the same taxon, nor does either species have populations delimited by international governmental boundaries. Therefore, these population segments do not qualify as a DPS under our policy and are not listable entities under the Act.

The DPS policy is clear that significance is analyzed only when a population segment has been identified as discrete. Because no population segment met the discreteness element for either the Nueces River or plateau shiners, neither species qualifies as a DPS under the Service's DPS policy. Therefore, we will not conduct an evaluation of significance.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Austin Ecological Services Field Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are staff members of the Southwest Regional Office.

Authority: The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 27, 2011.

James J. Slack,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2011–20054 Filed 8–8–11; 8:45 am]

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Notices

Federal Register

Vol. 76, No. 153

Tuesday, August 9, 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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Fifty-fourth Plenary Session. The appended recommendations address electronic rulemaking, rulemaking comments, contractor ethics, and video hearings.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2011–1, Emily Schleicher Bremer, Attorney Advisor; for Recommendations 2011–2 and 2011–3, Reeve Bull, Attorney Advisor; and for Recommendation 2011–4, Funmi Olorunnipa, Attorney Advisor. For all four recommendations the address and phone number is: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW., Washington, DC 20036; Telephone 202–480–2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *http://www.acus.gov.*

At its Fifty-fourth Plenary Session, held June 16–17, 2011, the Assembly of the Conference adopted four recommendations. Recommendation 2011–1, ''Legal Considerations in e-Rulemaking,'' provides guidance on issues that have arisen in light of the change from paper to electronic rulemaking procedures. It recommends that agencies (1) consider using content analysis software to reduce the need for agency staff to spend time reading identical or nearly identical comments, (2) provide timely, online access to all studies and reports upon which they rely, (3) implement appropriate procedures for the handling of confidential, trade secret, or other protected information, (4) consider the potential need to revise Privacy Act notices and recordkeeping schedules to accommodate e-Rulemaking, and (5) replace paper files with electronic records in the rulemaking docket and in the record for appellate review.

Recommendation 2011–2, ''Rulemaking Comments,'' recognizes innovations in the commenting process that could promote public participation and improve rulemaking outcomes. The recommendation encourages agencies (1) to provide public guidance on how to submit effective comments, (2) to leave comment periods open for sufficient periods, generally at least 60 days for significant regulatory actions and 30 days for other rulemakings, (3) to post comments received online within a specified period after submission, (4) to announce policies for anonymous and late-filed comments, and (5) to consider when reply and supplemental comment periods are useful.

Recommendation 2011–3, ''Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information'' responds to agencies' need to protect integrity and the public interest when they rely on contractors. The Conference recommends that the Federal Acquisition Regulatory Council provide model language for agency contracting officers to use when negotiating or administering contracts that pose particular risks that employees of contractors could have personal conflicts of interest or could misuse non-public information.

Recommendation 2011–4, ''Agency Use of Video Hearings: Best Practices and Possibilities for Expansion,'' encourages agencies, especially those with a high volume of cases, to consider the use of video teleconferencing technology for hearings and other administrative proceedings. The recommendation sets forth factors agencies should consider when deciding whether to use video teleconferencing and best practices for the implementation of this technology.

The Appendix (below) sets forth the full text of these four recommendations. The Conference will transmit them to affected agencies, to appropriate committees of the United States Congress, and (in the case of 2011–1) to the Judicial Conference of the United States. The recommendations are not binding, so the relevant agencies, the Congress and the courts will make decisions on their implementation.

The Conference based these recommendations on research reports that it has posted at: *http://www.acus.gov/events/54th-plenary-session/.* The transcript of the Plenary Session is available at the same web address.

Dated: August 4, 2011.

Paul R. Verkuil,

Chairman.

Appendix—Recommendations of the Administrative Conference of the United States

Administrative Conference Recommendation 2011–1

Legal Considerations in e-Rulemaking

Adopted June 16, 2011

Agencies are increasingly turning to e-Rulemaking to conduct and improve regulatory proceedings. ''E-Rulemaking'' has been defined as ''the use of digital technologies in the development and implementation of regulations'' [1] before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA). It may include many types of activities, such as posting notices of proposed and final rulemakings, sharing supporting materials, accepting public comments, managing the rulemaking record in electronic dockets, and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.

A system that brings several of these activities together is operated by the eRulemaking program management office (PMO), which is housed at the Environmental Protection Agency and funded by contributions from partner Federal agencies. This program contains two components: Regulations.gov, which is a public Web site where members of the public

[1] Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process at 2 (2004) (working paper), *http://lsr.nellco.org/upenn_wps/108.*

can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which includes FDMS.gov, a restricted-access Web site agency staff can use to manage their internal files and the publicly accessible content on Regulations.gov. According to the Office of Management and Budget, FDMS ''provides * * * better internal docket management functionality and the ability to publicly post all relevant documents on regulations.gov (e.g., **Federal Register** documents, proposed rules, notices, supporting analyses, and public comments).'' [2] Electronic docketing also provides significant costs savings to the Federal government, while enabling agencies to make proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,[3] have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.[4]

Federal regulators, looking to embrace the benefits of e-Rulemaking, face uncertainty about how established legal requirements apply to the web. This uncertainty arises because the APA, enacted in 1946, still provides the basic framework for notice-and-comment rulemaking. While this framework has gone largely unchanged, the technological landscape has evolved dramatically.

The Conference has therefore examined some of the legal issues agencies face in e-Rulemaking and this recommendation provides guidance on these issues. The Conference has examined the following issues:

• *Processing large numbers of similar or identical comments.* The Conference has considered whether agencies have a legal obligation to ensure that a person reads every individual comment received, even when comment-processing software reports that multiple comments are identical or nearly identical.

• *Preventing the publication of inappropriate or protected information.* The Conference has considered whether agencies have a legal obligation to prevent the publication of certain types of information that may be included in comments submitted in e-Rulemaking.

• *Efficiently compiling and maintaining a complete rulemaking docket.* The Conference has considered issues related to the maintenance of rulemaking dockets in electronic form, including whether an agency is obliged to retain paper copies of comments once they are scanned to electronic format and how an agency that maintains its comments files electronically should handle comments that cannot easily be reduced to electronic form, such as physical objects.

• *Preparing an electronic administrative record for judicial review.* The Conference has considered issues regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those that do not participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.[5] With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it. It bears noting, however, that agencies may face other legal issues in e-Rulemaking, particularly when using wikis, blogs, or similar technological approaches to solicit public views, that are not addressed in this recommendation. Such issues, and other broad issues not addressed herein, are beyond the scope of this recommendation, but warrant further study.[6]

Recommendation

Considering Comments

1. Given the APA's flexibility, agencies should:

(a) Consider whether, in light of their comment volume, they could save substantial time and effort by using reliable comment analysis software to organize and review public comments.

(1) While 5 U.S.C. 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.

(2) Agencies should also work together and with the eRulemaking program management office (PMO), to share experiences and best practices with regard to the use of such software.

(b) Work with the eRulemaking PMO and its interagency counterparts to explore providing a method, including for members of public, for flagging inappropriate or protected content, and for taking appropriate action thereon.

(c) Work with the eRulemaking PMO and its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.

(d) Confirm they have procedures in place to review comments identified as containing confidential or trade secret information. Agencies should determine how such information should be handled, in accordance with applicable law.

Assessing Privacy Concerns

2. Agencies should assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov. This could include working with the eRulemaking PMO to consider whether changes to the FDMS System of Records Notice are warranted.

Maintaining Rulemaking Dockets in Electronic Form

3. The APA provides agencies flexibility to use electronic records in lieu of paper records. Additionally, the National Archives and Records Administration has determined that agencies are not otherwise legally required, at least under certain circumstances, to retain paper copies of comments properly scanned and included in an approved electronic recordkeeping system. The circumstances under which such destruction is permitted are governed by each agency's records schedules. Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate.

4. To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.[7]

5. Agencies should include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.

Providing Rulemaking Records to Courts for Judicial Review

6. In judicial actions involving review of agency regulations, agencies should work with parties and courts early in litigation to provide electronic copies of the rulemaking record in lieu of paper copies, particularly where the record is of substantial size. Courts should continue their efforts to embrace electronic filing and minimize requirements to file paper copies of rulemaking records.

[2] Office of Mgmt. & Budget, Executive Office of the President, FY 2009 Report to Congress on the Implementation of the E-Government Act of 2002, at 10 (2009), *http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2009_egov_report.pdf.*

[3] *See* Public Law 107–347 § 206.

[4] Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies, p. D–1 (Nov. 30, 2010), *http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.* Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission, which has its own electronic comment filing system (*http://fjallfoss.fcc.gov/ecfs/*).

[5] This report follows up on previous work of the Administrative Conference. On October 19, 1995, Professor Henry H. Perritt, Jr. delivered a report entitled ''Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication.'' Although never published, the Perritt Report continues to be a helpful resource and is available at: *http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.*

[6] The Conference has a concurrent recommendation which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking. *See* Administrative Conference of the United States, Recommendation 2011–2, *Rulemaking Comments.*

[7] *See also* Exec. Order No. 13,563, § 2(b), 76 FR 3,821 (Jan. 18, 2011) (requiring agencies to provide timely online access to ''relevant scientific and technical findings'' in the rulemaking docket on regulations.gov).

The Judicial Conference should consider steps to facilitate these efforts.

Complying With Recordkeeping Requirements in e-Rulemaking

7. In implementing their responsibilities under the Federal Records Act, agencies should ensure their records schedules include records generated during e-Rulemaking.

Administrative Conference Recommendation 2011–2

Rulemaking Comments

Adopted June 16, 2011

One of the primary innovations associated with the Administrative Procedure Act (''APA'') was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.[1] The procedure created by the APA has come to be called ''notice-and-comment rulemaking,'' and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled ''Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century,'' the Subcommittee on Commercial and Administrative Law of the United States House of Representatives' Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.[2] These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a ''reply comment'' period?
- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently ''stale'' that they could not support a final rule without further comment?
- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the ''comment'' portion of the notice-and-comment rulemaking process. The Conference also has a concurrent recommendation that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking. See Administrative Conference of the United States, Recommendation 2011–1, Legal Considerations in e-Rulemaking.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of ''best practices'' designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.

Recommendation

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency Web site, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for ''[s]ignificant regulatory action[s]'' as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.[3]

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet and should also scan and post all comments submitted in paper format.[4]

4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (*e.g.,* the agency's Web site, Regulations.gov) and in individual **Federal Register** notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.[5]

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.[6]

7. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available

[1] 5 U.S.C. 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 Duke L.J. 511, 514 (1989) (describing the ''notice-and-comment procedures for rulemaking'' under the APA as ''probably the most significant innovation of the legislation'').

[2] Subcomm. on Commercial & Admin. Law of the Comm. on the Judiciary, 109th Cong., Interim Rep. on the Admin. Law, Process and Procedure Project for the 21st Century at 3–5 (Comm. Print 2006).

[3] *See also* Administrative Conference of the United States, Recommendation 93–4, *Improving the Environment for Agency Rulemaking* (1993) (''Congress should consider amending section 553 of the APA to * * * [s]pecify a comment period of 'no fewer than 30 days.' ''); Exec. Order No. 13,563, 76 FR 3,821, 3,821–22 (Jan. 18, 2011) (''To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.'').

[4] *See also* Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) (''OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.'').

[5] *See, e.g.,* Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that ''[c]omments received after the comment closing date will be included in the DOCKET, and we will consider late comments to the extent practicable'').

[6] *See also* Administrative Conference of the United States, Recommendation 76–3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto ''present new and important issues or serious conflicts of data''); Administrative Conference of the United States, Recommendation 72–5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an ''opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M–11–10, at 2 (Feb. 2, 2011) (''[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.'').

mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

Administrative Conference Recommendation 2011–3

Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information

Adopted June 17, 2011

The Conference believes that it is important to ensure that services provided by government contractors—particularly those services that are similar to those performed by government employees—are performed with integrity and that the public interest is protected. In that light, the Conference recommends that the Federal Acquisition Regulatory Council (''FAR Council'') promulgate model language in the Federal Acquisition Regulation (''FAR'') [1] for agency contracting officers to use when negotiating or administering contracts that pose particular risks of government contractor employee personal conflicts of interest or misuse of non-public information. In order to ensure that, in its effort to protect the public interest, this recommendation does not create excessive compliance burdens for contractors or unnecessary monitoring costs for agencies, the Conference is limiting its recommendation to those areas that it has identified as the top priorities—contractor employees who perform certain activities identified as posing a high risk of personal conflicts of interest or misuse of non-public information.

Background

In recent years, the Federal government has increasingly relied upon private contractors to perform services previously provided in-house by civil servants.[2] Despite this expansion in the use of government contractors, there continues to be a substantial disparity between the ethics rules regulating government employees and those applicable to government contractor employees. Whereas an array of statutes and regulations creates an extensive ethics regime for government employees, the rules currently applicable to contractor employees vary significantly by agency.

Government employees are subject to various statutes and regulations that create a comprehensive ethics regime governing, among other things, their financial interests, use of government resources, outside activities, and activities in which they may engage after leaving government.[3] By contrast, the compliance standards applicable to contractor employees are much less comprehensive and can vary significantly from contract to contract. A handful of statutes apply to contractor employees and prohibit their offering bribes or illegal gratuities,[4] serving as foreign agents,[5] disclosing procurement information,[6] or offering or receiving kickbacks.[7] The FAR requires contracting officers to identify organizational conflicts of interest (in which the *contractor* has a corporate interest that may bias its judgment or the advice it provides to the government) and either address or waive such conflicts.[8] The FAR also requires that contracting firms that have entered into one or more government contracts valued in excess of $5 million and requiring 120 days or more to perform have in place ''codes of business ethics and conduct.'' [9] A handful of agencies have adopted ethics regulations supplementing the FAR,[10] and still other agencies impose additional ethics requirements by contract.[11]

Finally, certain contracting firms, most notably some performing work for the Department of Defense, have voluntarily adopted internal ethics codes, some of which provide fairly detailed rules relating to such important ethical issues as personal conflicts of interest, confidentiality, gifts and gratuities, protection of government property, and other major ethical areas, and that establish internal disciplinary processes for employee violations of such codes.[12] Nevertheless, the corporate codes do not generally require that unethical conduct that is not otherwise illegal or unlawful be reported to the contracting agency.[13] Furthermore, though the corporate codes provide certain protections for the government,[14] they generally only require contractor employees to protect against personal conflicts with their *employer's* interest rather than the *government's* interest.[15] Finally, many contractors (particularly those outside of the defense setting) do not have internal ethics codes.

Scope of the Problem

By dint of their work for and as part of the government, contractors performing certain services, particularly those that can influence government decisions or have access to non-public information, are in a position of public trust and responsibility for the protection of public resources, as is the government itself. It is therefore critical that their employees behave with the same high degree of integrity as government employees and do not exploit positions of public trust for improper personal gain. Whether or not there is any widespread pattern of ethical abuses, the existence of significant ethical risks can erode public confidence in the government procurement process and in the government itself. Accordingly, it is entirely appropriate to hold those contractors and their employees to a high ethical standard of conduct.

[1] The FAR is a set of uniform policies and procedures that all executive agencies must use in procurements from sources outside of the government. 48 CFR 1.101. All executive agencies must comply with the FAR when purchasing from contractors, though individual agencies can also adopt agency-specific supplements to the FAR by regulation or provide additional requirements in individual contracts. *See, e.g.,* 48 CFR ch. 2 (Defense Federal Acquisition Regulation Supplement for the Department of Defense). The FAR Council consists of the Administrator for Federal Procurement Policy, the Secretary of Defense, the Administrator of National Aeronautics and Space, and the Administrator of General Services. *See* 41 U.S.C. 1102, 1302.

[2] Specifically, Federal spending on service contracts increased by 85% in inflation adjusted dollars between 1983 and 2007. Kathleen Clark, *Ethics for an Outsourced Government* Table 3 (forthcoming), *available at http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics.* Over the same period, the number of executive branch employees declined by 18%. Id. In this light, the relative significance of the contractor workforce vis-à-vis the Federal employee workforce has increased substantially in the last few decades.

[3] *Id.* at 7.

[4] 18 U.S.C. 201(b)–(c).

[5] *Id.* § 219.

[6] 41 U.S.C. § 2102.

[7] *Id.* §§ 8701–07 (prohibiting kickbacks to contractors, subcontractors, and their employees).

[8] 48 CFR 9.500 *et seq.* The FAR provision applies only to organizational conflicts of interest, wherein the *firm itself* possesses such business interests, and not to personal conflicts of interest, wherein one of the *firm's employees* has a business or financial interest that could influence his or her decisionmaking in performing a contract.

[9] *Id.* §§ 3.1000–04. These codes must ensure that the firm has adequate systems for detecting, preventing, and reporting illegal conduct and violations of the civil False Claims Act and that it ''[o]therwise promote[s] an organizational culture that encourages ethical conduct.'' *Id.* § 52.203–13. The FAR does not dictate, however, what types of potential ethical misconduct the internal corporate codes must address.

[10] Agencies that have adopted ethics regimes supplementing those contained in the FAR include the Department of Energy, Department of Health and Human Services, Department of the Treasury, Environmental Protection Agency, Nuclear Regulatory Commission, and United States Agency for International Development. Clark, *supra* note 2, Table VII. These supplemental regimes are not comprehensive, however, and generally apply only to specific types of contracts. By contrast, the Federal Deposit Insurance Corporation, though it is not covered by the FAR, has implemented a comprehensive ethics system that applies to all of its contractor employees. *Id.; see also* 12 CFR 366.0 *et seq.*

[11] *See, e.g.,* USAID Acquisition Regulation 148, available at *http://www.usaid.gov/policy/ads/300/aidar.pdf.*

[12] See generally Def. Indus. Initiative on Bus. Ethics & Conduct, Public Accountability Report (2009), *available at http://www.dii.org/files/annual-report-2008.pdf.* Many of the most extensive internal codes are implemented by companies that are members of the Defense Industry Initiative (''DII''), which includes 95 defense contractors that agree to implement such ethics codes and comply with certain values in maintaining an ethical workplace. Contractor employees can be disciplined internally for violating their company's ethics code, and companies commit to disclose violations of the law and ''instances of significant employee misconduct'' to the contracting agency. *Id.* at 49.

[13] *See id.* at 49–50 (contractors are only *required* to report those violations covered by FAR § 52.203–13).

[14] *See id.* at 33 (noting that DII member company codes require them to protect government property).

[15] *See id.* at 34 (''Employees are prohibited from having personal, business, or financial interests that are incompatible with their responsibility to their employer.''); *see also* U.S. Gov't Accountability Office, GAO–08–169, Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees 3 (2008) (''Most of the contractor firms have policies requiring their employees to avoid a range of potential interests—such as owning stock in competitors—that conflict with the *firm's* interest. However, only three of these contractors' policies directly require their employees to disclose potential personal conflicts of interest with respect to their work at DOD so they can be screened and mitigated by the firms.'').

As noted above, a significant disparity currently exists between the ethical standards applicable to government employees, which are comprehensive and consist predominantly of specific rules, and those applicable to contractor employees, which are largely developed and applied on an ad hoc basis and involve significantly vaguer standards.[16] Many contractors have undertaken laudable efforts to promote a culture of compliance through the implementation of company-specific ethics standards,[17] but not every contractor has such internal standards. The Conference believes that adoption of contractor ethics standards applicable to certain high-risk activities would protect the public interest and promote integrity in government contracting. In addition, the Conference aims to promote public confidence in the system of government contracting and in the integrity of the government.

Of course, the mere existence of a disparity between government employee and contractor ethics standards is not itself conclusive evidence that contractor employee ethics standards should be expanded. Indeed, simply applying the rules governing the ethics of government employees (particularly those dealing with financial disclosures to guard against personal conflicts of interest) directly to contractors could create excessive and unnecessary compliance burdens for contractors and monitoring costs for agencies.[18] To address this concern, the Conference has focused on the most significant ethical risks that arise in government contracts as well as the activities most likely to implicate those risks. Specifically, the Conference has identified contractor employees' personal conflicts of interest and use of non-public information as two areas calling for greater measures to prevent misconduct. Of course, those are not necessarily the only risks in the current system, and individual agencies have chosen or may hereafter choose to impose ethics requirements in other areas as well. The Conference, however, believes those two identified areas warrant more comprehensive measures to prevent misconduct. The Conference believes those two identified areas call for ethics standards, although agencies should be mindful of risks requiring more particularized treatment that may be present in their specific contexts.

Personal Conflicts of Interest and Misuse of Certain Non-Public Information

The most common ethical risks currently addressed in specific agency supplements to the FAR (as well as in contractors' own internal codes of conduct) include personal conflicts of interest, gifts, misuse of government property, and misuse of non-public information.[19] Of these major ethical risks, existing criminal laws regulate contractors' offering or receipt of gifts and misuse of government property. With respect to gifts, criminal bribery laws would prohibit a contractor employee's *offering* anything of value to a Federal employee to obtain favorable treatment,[20] and the Anti-Kickback Act would prohibit a contractor employee from *accepting* gifts from a potential sub-contractor or other party that are aimed at improperly obtaining favorable treatment under the contract.[21] With respect to misuse of property, traditional criminal laws against larceny and embezzlement would prohibit a contractor employee's misappropriating public property, and Federal criminal law prohibits a contractor employee's misusing or abusing government property.[22]

On the other hand, a contractor employee is less likely to face sanctions under existing laws if he or she acts despite a personal conflict of interest or exploits non-public information for personal gain. Though the Anti-Kickback Act would prevent a contractor employee's directing business to a third party in exchange for an actual payment,[23] nothing under current law would prevent a contractor employee from directing business towards a company in which he or she owns stock (i.e., a personal conflict of interest). Similarly, though insider trading laws would apply if a contractor employee bought securities based upon information learned from government contracts,[24] nothing under current law would prevent a contractor employee from purchasing other items, such as land that will appreciate upon announcement of construction of a military base, on the basis of information learned while performing his or her contractual duties.

In this light, various governmental entities that have studied issues of contractor ethics have singled out preventing personal conflicts of interest and misuse of non-public information as areas that need to be strengthened.[25] By focusing on these two areas of risk, the Conference does not intend to discourage agencies from adopting additional ethics requirements regarding procurement activities by regulations or contract. Indeed, some agencies may choose to adopt rules regulating ethical risks such as contractor employee receipt of gifts or misuse of property as an additional prophylactic measure, notwithstanding the existence of criminal penalties covering similar conduct. Rather, the Conference believes that personal conflicts of interest and protection of non-public information are two areas for which greater measures to prevent misconduct are particularly appropriate, and it therefore recommends targeted measures designed to address those risks. The recommendation would serve as a floor upon which agencies could build and would not be intended to deter adoption of a more expansive ethics regime, either individually or through the FAR Council, to the extent the agencies find it appropriate.

''High Risk'' Contracts

PCI-Risk Contracts: The Conference has sought to identify those types of activities most likely to create risks of personal

[16] There are pending FAR rules relating to protection of non-public information, 76 FR 23,236 (Apr. 26, 2011), and preventing personal conflicts of interest for contractor employees performing acquisition activities closely related to inherently governmental functions, 74 FR 58,584 (Nov. 13, 2009), but these proposed rules are not yet adopted and also cover only some of the topics addressed in this recommendation.

[17] *See generally* Def. Indus. Initiative on Bus. Ethics & Conduct, supra note 12.

[18] Report of the Acquisition Advisory Panel 418 (Jan. 2007). Various agencies have extended certain aspects of the ethics standards applicable to government employees to contractor employees, *see, e.g.,* 12 CFR 366.0 *et seq.* (FDIC contractor regulations), and their decision to do so has not necessarily created excessive compliance or monitoring costs. Nevertheless, extending *all* government employee ethics rules to *all* contractor employees serving all agencies, without consideration of the specific ethical risks presented, would likely impose costs that are excessive in relation to the benefits received. Accordingly, the Conference believes that the FAR Council and individual agencies should proceed carefully in ensuring that any expansion of the current ethics regime is cost-effective, while at the same time protecting the government's interests.

[19] *See id.;* Kathleen Clark, *supra* note 2, Table VII; Marilyn Glynn, *Public Integrity & the Multi-Sector Workforce,* 52 Wayne L. Rev. 1433, 1436–38 (2006); Def. Indus. Initiative on Bus. Ethics & Conduct, *supra* note 12, at 29–60.

[20] 18 U.S.C. 201(c).

[21] 41 U.S.C. 8702. Of course, in light of the severity of criminal sanctions, many instances of misconduct are likely to go unpunished under the current regime. For instance, resource constraints may make it unlikely that a United States Attorney would prosecute a contractor employee for accepting a lavish meal from a prospective sub-contractor. Nevertheless, the mere threat of criminal prosecution may deter potential misconduct.

[22] 18 U.S.C. 641; *Morissette* v. *United States,* 342 U.S. 246, 272 (1952). In addition, agencies often stipulate by contract that government property may not be used for personal benefit (*e.g.,* a contractor employee's using government computers for personal use). Glynn, *supra* note 19, at 1437.

[23] 41 U.S.C. 8702.

[24] *Dirks* v. *Sec. Exch. Comm'n,* 463 U.S. 646, 655 n.14 (1983); 17 CFR 240.10b5–2(b).

[25] *See, e.g.,* Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 FR 58,584, 58,588–89 (proposed Nov. 13, 2009) (setting forth proposed FAR rules regulating personal conflicts of interest and use of non-public information for private gain in the case of contractors performing acquisition activities closely related to inherently governmental functions); Glynn, *supra* note 19, at 1436–37 (article by general counsel of the Office of Government Ethics recommending, inter alia, extending ethics rules to include contractor employee conflicts of interest and misuse of non-public information); U.S. Gov't Accountability Office, supra note 15, at 31 (''We recommend * * * personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required for DOD's Federal employees.''); U.S. Gov't Accountability Office, GAO–10–693, Stronger Safeguards Needed for Contractor Access to Sensitive Information 30 (2010) (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on ''establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information''); Office of Gov't Ethics, Report to the President & to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 38–39 (2006) (noting ''expressions of concern'' the Office has received regarding personal conflicts of interest and highlighting the possibility of agencies' including contract clauses to deal with such issues); Report of the Acquisition Advisory Panel, *supra* note 18, at 423–25 (concluding that additional safeguards were necessary in order to protect against contractor employee personal conflicts of interest and misuse of confidential or proprietary information).

conflicts of interest, situations in which a contractor employee may have some interest that may bias his or her judgment. Several statutes and regulations prohibit contractors from performing ''inherently governmental functions,'' which are defined as functions ''so intimately related to the public interest'' as to require performance by government employees.[26] The FAR also contains a list of activities that ''approach'' being classified as ''inherently governmental functions.''[27] As a recent proposed policy letter from the Office of Federal Procurement Policy recognizes, contractors performing activities that are similar to ''inherently governmental functions'' should be subject to close scrutiny, given that the work that they perform is near the heart of the traditional role of the Federal government.[28] Several of the functions listed as ''approach[ing] * * * inherently governmental functions'' involve activities wherein the contractor either advises in agency policymaking or participates in procurement functions, which raise particular risks of employee personal conflicts of interest. Other activities identified as raising particular risks of employee personal conflicts of interest include ''advisory and assistance services'' and ''management and operating'' functions.[29]

The FAR contains provisions identifying activities that ''approach'' being ''inherently governmental functions,''[30] feature ''advisory and assistance services,''[31] or involve ''management and operating'' functions.[32] Many of these activities, such as those in which a contractor employee performs tasks that can influence government action, including the expenditure of agency funds, may pose a significant risk of personal conflicts of interest. Several contracting tasks, by their nature, elevate the risk of such conflicts. Those include substantive (as compared to administrative or process-oriented) contract work (hereinafter referred to as ''PCI-Risk'' contracts[33]) such as:

- Developing agency policy or regulations.
- Providing alternative dispute resolution services on contractual matters; legal advice involving interpretation of statutes or regulations; significant substantive input relevant to agency decision-making; or professional advice for improving the effectiveness of Federal management processes and procedures.
- Serving as the primary authority for managing or administering a project or operating a facility.
- Preparing budgets, and organizing and planning agency activities.
- Supporting substantive acquisition planning[34] or research and development activities.
- Evaluating another contractor's performance or contract proposal.
- Assisting in the development of a statement of work or in contract management.
- Participating as a technical advisor to a source selection board or as a member of a source evaluation board (i.e., boards designed to select or evaluate bids or proposals for procurement contracts).

Information-Risk Contracts: Existing regulations also do not comprehensively protect against contractor employees' disclosure or misuse of non-public governmental, business, or personal information learned while performing government contracts.[35] As with personal conflicts of interest, specific activities pose a grave risk of contractor disclosure or misuse of non-public information, which include (hereinafter referred to as ''Information-Risk'' contracts[36]):

- Contracts in which certain employees will receive access to information relating to an agency's deliberative processes, management operations, or staff that is not generally released to the public.
- Contracts in which certain employees will have access to certain business-related information, including trade secrets, non-public financial information, or other non-public information that could be exploited for financial gain.[37]
- Contracts in which certain employees will have access to personally identifying or other non-public personal information, such as social security numbers, bank account numbers, or medical records.[38]

Recommendation

1. The Federal Acquisition Regulatory Council (''FAR Council'') should promulgate model language for use in contracts posing a high risk of either personal conflicts of interest or misuse of certain non-public information.[39] Current law does not adequately regulate against the risks of contractor employee personal conflicts of interest and misuse of non-public information. On occasion certain agencies impose additional ethics requirements by supplemental regulation or contract. In addition, certain contractors, especially large companies, have adopted and enforced internal ethics codes. Nevertheless, coverage varies significantly from agency to agency and contract to contract. In order to bring consistency to this process and ensure that the government's interests are adequately protected, the FAR Council should draft model language in the Federal Acquisition Regulation (''FAR'') for agency contracting officers to use, with modifications appropriate to the nature of the contractual services and risks presented, when soliciting and negotiating contracts that are particularly likely to raise issues of personal conflicts of interest or misuse of non-public information.

2. The model FAR provisions or clauses should apply to PCI-Risk and Information-Risk Contracts.[40] The proposed FAR

[26] Federal Activities Inventory Reform Act of 1998, Public Law 105–270, § 5(2)(A), 112 Stat. 2382, 2384; 48 CFR 2.101; OMB, Circular A–76, Performance of Commercial Activities, Attachment A § B.1.a. Though each of these authorities uses slightly different wording in defining ''inherently governmental function,'' the differences are apparently of no legal significance. Office of Management & Budget, Work Reserved for Performance by Federal Government Employees, 75 FR 16,188, 16,190 (proposed Mar. 31, 2010).

[27] 48 CFR 7.503(d).

[28] Work Reserved for Performance by Federal Government Employees, 75 FR at 16,193–94.

[29] Report of the Acquisition Advisory Panel, *supra* note 18, at 411.

[30] 48 CFR 7.503(d).

[31] *Id.* § 2.101.

[32] *Id.* § 17.601.

[33] The Conference believes that these activities are particularly likely to pose a risk of personal conflicts of interest. To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate contracts for such activities.

[34] The FAR Council has issued a proposed rule that would establish personal conflict of interest standards for contractor employees performing acquisition activities closely associated with inherently governmental functions. Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 FR at 58,588. To the extent it is ultimately implemented, this rule would obviate the need for any additional FAR contract clause with respect to these contracts.

[35] U.S. Gov't Accountability Office, Stronger Safeguards Needed for Contractor Access to Sensitive Information, *supra* note 25, at 30 (recommending that the FAR Council provide guidance on the use of non-disclosure agreements as a condition to contractors' accessing sensitive information and on ''establishing a requirement for prompt notification to appropriate agency officials of a contractor's unauthorized disclosure or misuse of sensitive information'').

[36] The Conference believes that these activities are particularly likely to pose a risk of disclosure or misuse of non-public information. This recommendation does not define the term ''non-public information;'' the FAR Council would be responsible for drafting language more precisely defining the types of information and services covered. In doing so, the FAR Council could choose to draw on existing definitions created for similar purposes. *See, e.g.,* 5 CFR 2635.703 (defining ''nonpublic information'' and prohibiting government employees from misusing such information, including information routinely withheld under 5 U.S.C. § 552(b) (FOIA exemptions)); U.S. Gov't Accountability Office, Stronger Safeguards Needed for Contractor Access to Sensitive Information, *supra* note 25, at 4–5 (defining a category of information that requires safeguards against unauthorized disclosure). To the extent that the FAR Council or individual agencies believe that other activities pose similar risks, they should remain free to regulate such activities through appropriate solicitation provisions or contract clauses.

[37] For instance, if an employee of a contractor performing auditing functions for the government were to learn that a large manufacturing firm intends to open a new plant in coming months, the employee could purchase property near the plant and reap a substantial financial windfall. The contemplated regime would require that the contractor train employees privy to such information on their obligations to keep the information confidential and to avoid transacting business on the basis of such information, penalize employees who violate such obligations, and report any employee violations to the contracting agency.

[38] U.S. Gov't Accountability Office, Stronger Safeguards Needed for Contractor Access to Sensitive Information, *supra* note 24, at 6.

[39] The Conference takes no position on whether the contractual language adopted in individual contracts should ''flow down'' to sub-contractors and other persons besides prime contractors performing work on government contracts. That issue is best left to the discretion of the FAR Council.

[40] The draft language would appear in part 52 of the FAR and would consist of draft solicitation provisions (which are used in soliciting contracts) and contract clauses (which are integrated into negotiated contracts). The use of the plural forms ''provisions'' and ''clauses'' is not intended to exclude the possibility that the FAR Council could implement the recommendations with a single

provisions or clauses would apply only to PCI-Risk and Information-Risk contracts (or solicitations for such contracts). At the same time, contracting agencies should remain free to incorporate contract language (or to promulgate agency-specific supplemental regulations) dealing with other ethical risks they deem important whether or not the contract at issue qualifies as a PCI-Risk or Information-Risk contract. Thus, the model FAR provisions or clauses adopted in response to this recommendation would serve as a floor upon which agencies could build if they deemed it appropriate, but would not supplant existing programs that now provide or may in the future provide more demanding or expansive ethical protections.

3. Agencies should have the discretion whether to use or modify the model FAR provisions or clauses. An agency contracting officer would have the option to use the model FAR provisions or clauses when soliciting and/or contracting for activities falling into the PCI-Risk or Information-Risk categories. Because the provisions or clauses would be optional, the contracting agency would enjoy the discretion to modify the FAR language on a case-by-case basis to fit the circumstances, and to decide to forego including any such language if it deems that the particular contract at issue is unlikely to pose a significant risk of personal conflicts of interest or misuse of non-public information by contractor personnel. Nevertheless, the FAR Council should encourage contracting officers to use the model FAR language when applicable.

4. The FAR should include model provisions or clauses for use in PCI-Risk procurements. The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving PCI–Risk procurements.

The proposed FAR provisions or clauses should require the contractor to certify [41] that none of its employees who is in a position to influence government actions [42] has a conflict of interest or that conflicted employees will be screened from performing work under any contract. Once a contractor is selected, the contract itself should include a clause requiring the contractor to train employees on recognizing conflicts, to implement a system for employees who can influence government action to report conflicts to the contractor, to screen any conflicted employees from contract performance, to report to the agency periodically on its efforts to protect against employee conflicts, and to disclose to the agency any instances of employee misconduct (as well as disciplinary action taken against any offending employee). A contractor's failure to implement an adequate system for employee conflict certification, to disclose or correct instances of employee misconduct, or to take appropriate disciplinary measures against employees who commit misconduct may be grounds for contract termination. In addition, a contractor that repeatedly proves incapable or unwilling to honor such contractual obligations may be subject to suspension or debarment in appropriate circumstances.

5. The FAR should include model provisions or clauses for use in Information-Risk procurements. The FAR Council should encourage agencies to include these model provisions or clauses in contracting actions involving Information-Risk procurements.

The FAR language should require the contractor to ensure that its employees who have access to certain non-public information identified as posing an information risk are made aware of their duties to maintain the secrecy of such information and to avoid using it for personal gain. To the extent an employee breaches either of these obligations, the contractor should be responsible for reporting the breach to the government, minimizing the effects of the breach, and, where appropriate, disciplining the offending employee. A contractor's failure to observe these contractual requirements may be grounds for contract termination. In addition, a contractor that proves repeatedly incapable or unwilling to fulfill its duties may be subject to suspension or debarment in appropriate circumstances.

6. Agencies not covered by the FAR also should consider using or modifying the model FAR provisions or clauses when negotiating contracts for activities falling in either of the ''high risk'' categories. Agencies and government instrumentalities not covered by the FAR should nevertheless familiarize themselves with the FAR language promulgated in response to this recommendation. To the extent that they plan to enter into contracts for activities listed in the PCI-Risk or Information-Risk categories, they should consider employing or, if necessary, modifying these solicitation provisions and/or contract clauses.

provision or clause. See the Preamble for the definition of ''PCI-Risk'' and ''Information-Risk'' contracts.

[41] The FAR should include a certification requirement rather than a disclosure process in order to minimize the burden on contractors. In order to fully perform their contractual obligations, contractors should be required to train their key personnel on recognizing and disclosing personal conflicts of interest. In the case of an anticipated conflict, a contractor employee should disclose the issue to the contractor, who must screen the employee from performing under the contract. The contractor should be responsible for disciplining employees who fail to disclose conflicts or honor a screening policy, and for disclosing such violations to the government.

[42] Every employee performing under the contract need not certify that he or she does not possess conflicting financial interests. For instance, in the case of a contractor assisting in the development of agency policy (a function falling within one of the ''high risk'' categories), employees performing administrative or other non-discretionary (particularly ministerial) tasks, such as those making copies of the report that the contractor will submit, need not perform such a certification.

Administrative Conference Recommendation 2011–4

Agency Use of Video Hearings: Best Practices and Possibilities for Expansion

Adopted June 17, 2011

Since the early 1990s, video teleconferencing technology (''VTC'') has been explored by various entities in the public and private sectors for its potential use in administrative hearings and other adjudicatory proceedings.[1] In the last 10 years, advances in technology and carrier services coupled with reduced personnel and increased travel costs have made the use of VTC more attractive to local, state and Federal governments. The rise in the use of VTC by Federal and state courts has also been noted by academics.[2] Similarly, in the past 10 years, there has been an increase in the use of video hearings by Federal agencies with high volume caseloads. Since pilot programs for video hearings at agencies first began in the early 1990s, VTC technology has become more advanced, more readily available and less expensive.

Certain Federal agencies, such as the Social Security Administration's Office of Disability Adjudication and Review (''ODAR''), the Department of Veteran Affairs' Board of Veteran Appeals (''BVA'') and the Department of Justice's Executive Office for Immigration Review (''EOIR'') have taken advantage of VTC for various adjudicatory proceedings. For example, in 2010, ODAR conducted a total of 120,624 video hearings, and a cost-benefit analysis conducted for the agency by outside consultants found that ODAR's current use of video hearings saves the agency a projected estimated amount of approximately $59 million dollars annually and $596 million dollars over a 10-year period. A study by the agency has also determined that the use of VTC has no effect on the outcome of cases.

Other agencies, such as the Railroad Retirement Board, the United States Postal Service, the Department of Health and Human Services' Office of Medicare Hearings and Appeals, specifically have regulations allowing for the use of video teleconferencing.[3] Similarly, agencies such as the U.S. Merit Systems Protection Board and the Commerce Trademark Trial and Appeal Board use VTC to conduct administrative hearings and other adjudicatory proceedings as a matter of practice under the broad statutory and/or regulatory discretion given to them.[4]

Despite the fact that some agencies within the Federal government have been using VTC to conduct mass adjudications for years, other agencies have yet to employ such technology. This may be because the use of VTC for administrative hearings is not without controversy. Some applaud the use of VTC by administrative agencies because it offers potential efficiency benefits, such as

[1] *See, e.g.,* Robert Anderson, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future,* 66 S. Cal. L. Rev. 1762, 1770 (1993).

[2] *See, e.g.,* Richard K. Sherwin, Neal Feigenson, & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law,* 12 B.U. J. Sci. & Tech. L. 227, 229 (2006); Cathy Catterson, *Changes in Appellate Caseload and Its Processing,* 48 Ariz. L. Rev. 287, 295 (2006); Fredric Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High Technology Courtrooms,* (State Justice Inst. 1999), *reprinted in* 50 S.C. L. Rev. 799, 801 (2000).

[3] *See, e.g.,* 20 CFR 260.5; 39 CFR 966.9; and 42 CFR 405.

[4] *See, e.g.,* 5 U.S.C. 1204(a)(1) and 37 CFR 2.129(a).

reducing the need for travel and the costs associated with it, reducing caseload backlog, and increasing scheduling flexibility for agencies and attorneys as well as increasing access for parties.[5] Critics, however, have suggested that hearings and other adjudicatory proceedings conducted by video may hamper communication between a party and the decision-maker; may hamper communication between parties and their attorneys or representatives; and/or may hamper a decision-maker's ability to make credibility determinations.[6]

Recognizing both the praise for and critique of the use of VTC in administrative hearings and other adjudicatory proceedings, the Administrative Conference issues this Recommendation regarding the use of VTC in Federal agencies with high volume caseloads. The Conference has a long standing commitment to the values inherent in the agency adjudicatory process: Efficiency, fairness and acceptability/satisfaction.[7] These values should drive decisions to use VTC. Therefore, this Recommendation suggests that agencies should use VTC only after conducting an analysis of the costs and benefits of VTC use and determining that such use would improve efficiency (i.e., timeliness and costs of adjudications) and would not impair the fairness of the proceedings or the participants' satisfaction with them. In addition, this Recommendation supports the Conference's statutory mandate of making improvements to the regulatory and adjudicatory process by improving the effectiveness and fairness of applicable laws. *See generally* Administrative Conference Act, 5 U.S.C §§ 591–596.

Accordingly, this Recommendation is directed at those agencies with high volume caseloads that do not currently use VTC as a regular practice in administrative hearings and/or other adjudicatory proceedings and that may benefit from the use of it to improve efficiency and/or reduce costs. Agencies with high volume caseloads are likely to receive the most benefit and/or cost savings from the use of VTC. However, the Conference encourages all agencies (including those with lower volume caseloads) to consider whether the use of VTC would be beneficial as a way to improve efficiency and/or reduce costs while also preserving the fairness and participant satisfaction of proceedings. This Recommendation sets forth some non-exclusive criteria that agencies should consider. For those agencies that determine that the use of VTC would be beneficial, this Recommendation also sets forth best practices provided in part by agencies currently using VTC.

Recommendation

1. Federal agencies with high volume caseloads should consider using video teleconferencing technology (''VTC'') to conduct administrative hearings and other aspects of adjudicatory proceedings. Agencies with lower volume caseloads may also benefit from this recommendation.

2. Federal agencies with high volume caseloads should consider the following non-exclusive criteria when determining whether to use video teleconferencing technology in administrative hearings and other adjudicatory proceedings:

(a) Whether an agency's use of VTC is legally permissible under its organic legislation and other laws;

(b) Whether the nature and type of administrative hearings and other adjudicatory proceedings conducted by the agency are conducive to the use of VTC;

(c) Whether VTC can be used without affecting the outcome of cases heard by the agency;

(d) Whether the agency's budget would allow for investment in appropriate and secure technology given the costs of VTC;

(e) Whether the use of VTC would create cost savings, such as savings associated with reductions in personnel travel and with increased productivity resulting from reductions in personnel time spent on travel;

(f) Whether the use of VTC would result in a reduction of the amount of wait time for an administrative hearing;

(g) Whether users of VTC, such as administrative law judges, hearing officers and other court staff, parties, witnesses and attorneys (or other party representatives), would find the use of such technology beneficial;

(h) Whether the agency's facilities and administration, both national and regional (if applicable), can be equipped to handle the technology and administration required for use of VTC;

(i) Whether the use of VTC would adversely affect the representation of a party at an administrative hearing or other adjudicatory proceeding; and

(j) Whether the communication between the various individuals present at a hearing or proceeding (including parties, witnesses, judges, hearing officers and other agency staff, translators and attorneys (or other party representatives)) would be adversely affected.

3. Federal agencies with high volume caseloads that decide to use video teleconferencing technology to conduct administrative hearings and other adjudicatory proceedings should consider the following best practices:

(a) Use VTC on a voluntary basis and allow a party to have an in-person hearing or proceeding if the party chooses to do so.

(b) Periodically evaluate the use of VTC to make sure that the use is outcome-neutral (i.e., does not affect the decision rendered) and that the use is meeting the needs of its users.

(c) Solicit feedback and comments (possibly through notice-and-comment rulemaking) about VTC from those who would use it regularly (e.g., administrative law judges, hearing officers and other administrative staff, parties, witnesses and attorneys (or other party representatives)).

(d) Begin the use of VTC with a pilot program and then evaluate the pilot program before moving to wider use.

(e) Structure training at the outset of implementation of VTC use and have technical support available for troubleshooting and implementation questions.

(f) Consult the staff of the Administrative Conference of the United States and/or officials at other agencies that have used VTC for best practices, guidance, advice, and the possibilities for shared resources and collaboration.

[FR Doc. 2011–20138 Filed 8–8–11; 8:45 am]

BILLING CODE 6110–01–P

[5] See Meghan Dunn & Rebecca Norwick, Federal Judicial Center Report of a Survey of Videoconferencing in the Court of Appeals (2006), pp. 1–2, *available at http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf.*

[6] *See* American Bar Association's Commission on Immigration Report entitled ''*Reforming the Immigration System*'' (2010), pp. 2–26–2–27.

[7] *See* Roger C. Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 591–93 (1972) (Professor Cramton is a former Chairman of the Conference); *see also* Paul R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976) (describing the values of efficiency, fairness and satisfaction) (Mr. Verkuil is the current Chairman of the Conference). The balancing of these procedural values was undertaken in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976).

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–LS–11–0065]

Plan for Estimating Daily Livestock Slaughter Under Federal Inspection; Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this document announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for an extension of the currently approved information collection used to compile and generate the Federally Inspected Estimated Daily Slaughter Report.

DATES: Comments must be received by October 11, 2011.

ADDRESSES: Comments should be submitted electronically at *http://www.regulations.gov.* Comments may also be submitted to Jennifer Porter, Deputy Director, Livestock and Grain Market News Division, Livestock and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; Stop 0252; 1400 Independence Avenue SW.; Room 2619–S; Washington, DC 20250–0252. All comments should reference document number AMS–LS–11–0065 and note the date and page number of this issue of the **Federal Register**.

Submitted comments will be available for public inspection at *http://www.regulations.gov* or at the above address during regular business hours. Comments submitted in response to this

document will be included in the records and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the above address.

FOR FURTHER INFORMATION CONTACT: Jennifer Porter, Deputy Director, Livestock and Grain Market News Division, AMS, USDA, by telephone at (202) 720–6231, or via e-mail at *Jennifer.Porter@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Plan for Estimating Daily Livestock Slaughter Under Federal Inspection.

OMB Number: 0581–0050.

Expiration Date of Approval: 01–31–2012.

Type of Request: Extension of a currently approved information collection.

Abstract: The Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), section 203(g) directs and authorizes the collection and dissemination of marketing information including adequate outlook information, on a market area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and to bring about a balance between production and utilization.

Under this market news program, USDA issues a market news report estimating daily livestock slaughter under Federal inspection. This report is compiled by AMS on a voluntary basis in cooperation with the livestock and meat industry. Market news reporting must be timely, accurate, and continuous if it is to be useful to producers, processors, and the trade in general. The daily livestock slaughter estimates are provided at the request of industry and are used to make production and marketing decisions.

The Daily Estimated Livestock Slaughter Under Federal Inspection Report is used by a wide range of industry contacts, including packers, processors, producers, brokers and retailers of meat and meat products. The livestock and meat industry requested that USDA issue slaughter estimates (daily and weekly), by species, for cattle, calves, hogs and sheep in order to assist them in making immediate production and marketing decisions and as a guide to the volume of meat in the marketing channel. The information requested from respondents includes their estimation of the current day's slaughter at their plant(s) and the actual slaughter for the previous day. Also, the Government is a large purchaser of meat and related products and this report assists other Government agencies in providing timely information on the quantity of meat entering the processing channels.

The information must be collected, compiled, and disseminated by an impartial third-party, in a manner which protects the confidentiality of the reporting entity. AMS is in the best position to provide this service.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .0333 hours per response.

Respondents: Business or other for-profit entities, individuals or households, farms, and the Federal Government.

Estimated Number of Respondents: 72.

Estimated Number of Responses: 18,720.

Estimated Number of Responses per Respondent: 260.

Estimated Total Annual Burden on Respondents: 624 hours.

Comments are invited on: (1) 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) 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.

All responses to this document will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: August 3, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–20113 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of the Advisory Committee on Biotechnology and 21st Century Agriculture Meeting

AGENCY: Office of the Under Secretary, Research, Education, and Economics, Agricultural Research Service.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, 5 U.S.C. App., the United States Department of Agriculture announces a meeting of the Advisory Committee on Biotechnology and 21st Century Agriculture (AC21).

DATES: August 30–31, 2011.

ADDRESSES: Rooms 104A and 107A, USDA Jamie L. Whitten Federal Building, 12th Street and Jefferson Drive, SW., Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Michael Schechtman, Designated Federal Official, Office of the Deputy Secretary, USDA, 202B Jamie L. Whitten Federal Building, 12th and Independence Avenue, SW., Washington, DC 20250; Telephone (202) 720–3817; Fax (202) 690–4265; E-mail *AC21@ars.usda.gov.*

SUPPLEMENTARY INFORMATION: The first meeting of the reconstituted AC21 has been scheduled for August 30–31, 2011. The AC21 consists of members representing the biotechnology industry, the organic food industry, farming communities, the seed industry, food manufacturers, state government, consumer and community development groups, as well as academic researchers and a medical doctor. In addition, representatives from the Departments of Commerce, Health and Human Services, and State, and the Environmental Protection Agency, the Council on Environmental Quality, and the Office of the United States Trade Representative have been invited to serve as ''ex officio'' members. The Committee meeting will be held from 8:30 a.m. to 5 p.m. on each day. The topics to be discussed will include: (1) Rules of procedure for the AC21; (2) assessment of informational needs of AC21 members; (3) organization of the AC21's work in developing practical recommendations on approaches for bolstering coexistence among different agricultural production methods; and (4) preliminary presentations and introductory discussions on above work topic.

Background information regarding the work and membership of the AC21 will

be made available on the USDA Web site at *http://www.usda.gov/wps/portal/usda/usdahome?contentid=AC21Main.xml&contentidonly=true.* Members of the public who wish to make oral statements should also inform Dr. Schechtman in writing or via e-mail at the indicated addresses at least three business days before the meeting. On August 30, 2011, if time permits, reasonable provision will be made for oral presentations of no more than five minutes each in duration.

The meeting will be open to the public, but space is limited. If you would like to attend the meetings, you must register by contacting Ms. Dianne Fowler at (202) 720–4074, by fax at (202) 720–3191 or by e-mail at *Dianne.fowler@ars.usda.gov* at least 7 days prior to the meeting. Please provide your name, title, business affiliation, address, telephone, and fax number when you register. If you are a person with a disability and request reasonable accommodations to participate in this meeting, please note the request in your registration. All reasonable accommodation requests are managed on a case by case basis.

Dated: July 29, 2011.

Catherine E. Woteki,

Under Secretary, Research, Education and Economics.

[FR Doc. 2011–20121 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Study of the Effectiveness of Efforts To Increase Supplemental Nutrition Assistance Program Participation Among Medicare's Extra Help Population Pilot Projects

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collection. The proposed collection is a new collection for the purpose of conducting the Study of the Effectiveness of Efforts to Increase Supplemental Nutrition Assistance Program Participation Among Medicare's Extra Help Population Pilot Projects.

DATES: Written comments must be received on or before October 11, 2011.

ADDRESSES: Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Steven Carlson, Office of Research and Analysis, Food and Nutrition Service/USDA, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steven Carlson at 703–305–2576 or via e-mail to *Steve.Carlson@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, VA 22302, Room 1014.

All responses to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Steven Carlson at 703–305–2017.

SUPPLEMENTARY INFORMATION:

Title: Study of the Effectiveness of Efforts to Increase Supplemental Nutrition Assistance Program Participation Among Medicare's Extra Help Population Pilot Projects

Form Number: Not yet assigned.

OMB Number: 0584–New.

Expiration Date: Not yet assigned.

Type of Request: New collection of Information.

Abstract: The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (Pub. L. 111–80) provides the Food and Nutrition Service (FNS) with funds to test the effectiveness of pilot projects designed to increase elderly participation in the Supplemental Nutrition Assistance Program (SNAP; formerly known as the Food Stamp Program). Historically, elderly individuals who are eligible for SNAP have the lowest participation rates among all demographic groups. The pilot projects will attempt to increase participation in SNAP among beneficiaries of Medicare's Extra Help by using data from Extra Help applications that are forwarded to State Medicaid offices. Because Extra Help and SNAP eligibility requirements do not directly correspond, these pilot projects will evaluate methods of using these Medicaid data to increase SNAP participation among Extra Help beneficiaries.

FNS invited State agencies to submit grant applications to use data from the Extra Help program to reduce the barriers to SNAP participation experienced by Extra Help applicants. FNS is funding three pilot projects to address some of these challenges through three approaches: (1) Targeted outreach in Washington, (2) simplified eligibility criteria in Pennsylvania, and (3) standardized SNAP benefits in New Mexico.

The overarching goal of the evaluation is to understand how the pilot programs operated, who they served, and the extent to which they generated any measurable effects on participation, cost, and SNAP benefits. As part of the evaluation, FNS will (1) Obtain a detailed description of each pilot project; (2) obtain a detailed description of the implementation process of each pilot project; (3) assess the effect of each pilot project on SNAP participation among the target population; (4) assess the effect of each pilot project on SNAP benefits; (5) assess the federal, State, and local administrative costs of each pilot project, including both implementation costs and operational costs; (6) assess the overall pilot experience among SNAP participants and non-participants within the target group; (7) assess the effect of each pilot project on SNAP case and payment errors; (8) assess the sustainability of each pilot project and the prerequisites for statewide expansion, including describing administrative barriers that may hinder replication of the pilot projects, and (9) assess and compare the relative promise of alternative models.

The information collection being requested for this project is to address the assessment of overall pilot experience among SNAP participants and eligible non-participants (objective 6 above). In order to accomplish this, the evaluation will solicit feedback from

participants and non-participants through a 20-minute telephone survey and through 60-minute focus groups in order to better understand the client experience with SNAP in general and the pilot project more specifically. In pilot locations, the evaluation will also ask about respondents' impressions of the pilot initiative.

Affected Public: Individuals/Households.

Respondent Type: SNAP participants and eligible non-participants in States with a pilot project.

Estimated Number of Respondents: The total estimated number of sample members to the survey is 6,000. This includes 1,000 individuals in New Mexico, 2,000 in Washington, and 3,000 in Pennsylvania. The total estimated number of respondents to the survey is 4,803, or 80% of the sample in each State (85% of the participant sample and 75% of the nonparticipant sample). The total estimated number of sample members to the focus group is 138. The total number of focus group participants is 110, or 80% of the focus group sample in each State. This includes two groups with 10 people each in Pennsylvania, five groups with 10 people each in Washington, and four groups with 10 people each in New Mexico.

Estimated Number of Responses per Respondent: For the survey, there will be one interview per SNAP participant or nonparticipant. Participants in the focus groups will only participate once. The focus group participants in each State will be recruited from the survey sample in that State.

Estimated Time per Response: The estimated average response time is 20 minutes for the survey and 60 minutes to participate in the focus group.

Estimated Total Annual Burden on Respondents: The total estimated response time is 1,659.25 hours for the survey and 111.40 hours for the focus groups, for a total of 1,770.65 hours. See the table below for estimated total annual burden.

State	Respondent type	Type of instrument		Estimated number of respondents	Frequency of responses	Estimated total annual responses	Time per respondent (hours)	Annual burden hours
WA	SNAP participants and eligible non-participants.	Survey questionnaire.	Completed	1,606	1	1,606	0.333	534.80
			Attempted	394	1	394	0.050	19.70
WA	Eligible non-participants.	Focus group	Completed	50	1	50	1	50.00
			Attempted	13	1	13	0.050	0.65
NM	SNAP participants and eligible non-participants.	Survey questionnaire.	Completed	798	1	798	0.333	265.73
			Attempted	202	1	202	0.050	10.10
NM	Eligible non-participants.	Focus group	Completed	40	1	40	1	40.00
			Attempted	10	1	10	0.050	0.50
PA	SNAP participants and eligible non-participants.	Survey questionnaire.	Completed	2,399	1	2,399	0.333	798.87
			Attempted	601	1	601	0.050	30.05
PA	Eligible non-participants.	Focus group	Completed	20	1	20	1	20.00
			Attempted	5	1	5	0.050	0.25
Total				6,138		6,138		1,770.65

Dated: July 29, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–20081 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Characteristics and Circumstances of Zero-Income SNAP Households

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a new collection for the Food and Nutrition Service to examine the characteristics, circumstances, program dynamics, and benefit redemption patterns of participants whose households reported zero gross income in their applications for participation in the Supplemental Nutrition Assistance Program (SNAP).

DATES: Written comments on this notice must be received on or before October 11, 2011.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; and (c) ways to enhance the quality, utility and clarity of the information to be collected.

Written comments may be sent to: Steven Carlson, Office of Research and Analysis, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steven Carlson at (703) 305–2576 or via e-mail to *Steve.Carlson@fns.usda.gov*. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations,gov*, and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Room 1014, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will be also become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Steven Carlson at 703–305–2017. Information requests submitted through e-mail should refer to the title of this proposal and/or the OMB approval number in the subject line.

SUPPLEMENTARY INFORMATION:

Title: Characteristics and Circumstances of Zero-Income SNAP Households.

OMB Number:

Expiration Date of Approval: Not yet determined.

Type of Request: New collection.

Abstract: Recent data suggest that the percentage of zero-gross-income Supplemental Nutrition Assistance Program (SNAP) units has been increasing steadily over the past decade, and increasing at a higher rate than the Nation's unemployment rate. FNS is seeking to carry out a study to examine the characteristics, circumstances, program dynamics, and benefit redemption patterns of these zero income SNAP households. The study will conduct 50 in-person, semi-structured interviews with heads of zero-gross income SNAP households, with a particular focus on working-age, able-bodied adults.

Estimate of Burden: Zero-Income Household Interviews: Public burden is estimated at 90 minutes for one response each with a total of 75 hours for 50 respondents.

Type of respondent	Number of respondents	Frequency of response	Total annual responses	Average burden hours per response	Total annual hour burden
Adults (18–65 years old)	50	1	50	1.5	75

Dated: July 29, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–20082 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Hiawatha East Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Hiawatha East Resource Advisory Committee will meet in Kincheloe, Michigan. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to review project proposals.

DATES: The meeting will be held on August 25, 2011, and will begin at 6 p.m.

ADDRESSES: The meeting will be held at the Chippewa County 911 Center, 4657 Industrial Park Drive, Kincheloe, MI. Written comments should be sent to Janel Crooks, Hiawatha National Forest, 2727 North Lincoln Road, Escanaba, MI 49829. Comments may also be sent via e-mail to *HiawathaNF@fs.fed.us,* or via facsimile to 906–789–3311.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Hiawatha National Forest, 2727 North Lincoln Road, Escanaba, MI. Visitors are encouraged to call ahead to 906–786–4062 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Janel Crooks, RAC coordinator, USDA, Hiawatha National Forest, 2727 North Lincoln Road, Escanaba, Michigan 49862; (906) 786–4062; e-mail *HiawathaNF@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Discuss options for monitoring approved projects, (2) Review budget, if received at that time, and (3) Public Comment. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: August 1, 2011.

Stevan J. Christiansen,

Designated Federal Officer.

[FR Doc. 2011–20110 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

White Pine-Nye Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting cancellation.

SUMMARY: The White Pine-Nye Resource Advisory Committee meeting scheduled in Eureka, Nevada has been cancelled. 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.

DATES: The cancelled meeting was scheduled to be held August 8, 2011, 9 a.m.

FOR FURTHER INFORMATION CONTACT: Steven Williams, RAC Designated Federal Official, Austin Ranger District, 100 Midas Canyon Road, P.O. Box 130, Austin, Nevada 89310, 775–964–2671, e-mail *swilliams01@fs.fed.us.*

Dated: August 2, 2011.

JoEllen J. Keil,

Acting Forest Supervisor.

[FR Doc. 2011–20087 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Central Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 110–343), the Salmon-Challis National Forest's Central Idaho Resource Advisory Committee will conduct a business meeting which is open to the public.

DATES: Tuesday, August 30, 2011, beginning at 10:30 a.m.

ADDRESSES: Salmon-Challis N.F. South Zone Office, Highway 93, Challis, Idaho.

SUPPLEMENTARY INFORMATION: Agenda topics will include, presentation of proposed projects, evaluation of projects proposals, and approval and recommendation of some projects for Title II funding for 2012. Some RAC members may attend the meeting by conference call, telephone, or electronically.

FOR FURTHER INFORMATION CONTACT: Frank Guzman, Forest Supervisor, at 208–756–5111.

August 2, 2011.

Frank V. Guzman,

Forest Supervisor and Designated Federal Officer.

[FR Doc. 2011–20209 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Gallatin Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Gallatin National Forest's Gallatin Resource Advisory Committee will meet in Bozeman, Montana. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is of the meeting is to review the status of project proposals, discuss and make final recommendations to the DFO and public comments.

DATES: The meeting will be held on August 30, 2011, and will begin at 1 p.m.

ADDRESSES: The meeting will be held at the Bozeman Public Library, 626 East Main Street, Bozeman, MT. Written comments should be sent to Babete Anderson, Custer National Forest, 1310 Main Street, Billings, MT 59105. Comments may also be sent via e-mail to *branderson@fs.fed.us,* or via facsimile to 406–657–6222.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Custer National Forest, 1310 Main Street, Billings, MT 59105. Visitors are encouraged to call ahead to 406–657–6205 ext 239.

FOR FURTHER INFORMATION CONTACT: Babete Anderson, RAC coordinator, USDA, Custer National Forest, 1310 Main Street, Billings, MT 59105; (406) 657–6205 ext 239; E-mail *branderson@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., Mountain Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: Review the status of project proposals, Discuss forth year of funding and Public Comments. Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. Public input sessions will be provided and indiviuals who made written request by August 23, 2011 will have the opportunity to address the Committee at those sessions.

Dated: August 2, 2011.

Michael Elson,

Acting Deputy Forest Supervisor.

[FR Doc. 2011–20136 Filed 8–8–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Economic Development Administration (EDA).

Title: Revolving Loan Fund Reporting and Compliance Requirements.

OMB Control Number: 0610–0095.

Form Number(s): ED–209, ED–209I.

Type of Request: Regular submission (revision of a currently approved information collection).

Number of Respondents: 617.

Average Hours per Response: 2 hours for ED–209; and 45 minutes for ED–209I.

Burden Hours: 2,699.

Needs and Uses: The collected information will be used by EDA personnel to monitor the compliance of Revolving Loan Fund (RLF) grantees with legal and programmatic requirements, and to ensure that EDA exercises adequate fiduciary responsibility over its portfolio. The revision involves a change in reporting including 100% electronic collection, elimination of two paper forms and combining into one electronic form, and other refinements to ease the burden of reporting.

Affected Public: Recipients of EDA RLF grants.

Frequency: Semi-annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Nicholas Fraser, (202) 395–5887.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Nicholas Fraser, OMB Desk Officer, FAX number (202) 395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov.*

Dated: August 3, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–20095 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–34–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Billfish Certificate of Eligibility.

OMB Control Number: 0648–0216.

Form Number(s): NA.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 200.

Average Hours per Response: Initial dealer information, 20 minutes; subsequent dealers' information, 2 minutes.

Burden Hours: 43.

Needs and Uses: Under the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et. seq.*), NOAA is responsible for management of the Nation's marine fisheries. In addition, NOAA must comply with the United States' (U.S.) obligations under the Atlantic Tunas Convention Act of 1975 (16 U.S.C. 971 *et. seq.*). A Certificate of Eligibility (COE) for Billfishes is required under 50 CFR part 635 to accompany all billfish, except for a billfish landed in a Pacific state and remaining in the state of landing. This documentation certifies that the accompanying billfish was not harvested from the applicable Atlantic Ocean management unit (described on the NOAA sample certificate at *http://www.nmfs.noaa.gov/sfa/hms/GPEA/0216%20Billfish%20COEform.pdf*), and identifies the vessel landing the billfish, the vessel's homeport, the port of offloading, and the date of offloading. The certificate must accompany the billfish to any dealer or processor who subsequently receives or possesses the billfish. The certificate is required for all first receivers of billfish, and dealers or processors who subsequently receive or possess billfish must also retain a copy of the certificate while processing or handling the billfish. A standard certificate format is not currently required to document the necessary information, provided it contains all of the information required. The continuation of this collection is necessary to implement the Consolidated Highly Migratory Species Fishery Management Plan, which contains an objective to reserve Atlantic billfish for the recreational fishery.

Affected Public: Business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: August 3, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–20096 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–807]

Certain Steel Concrete Reinforcing Bars From Turkey; Notice of Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* August 9, 2011.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3874.

SUPPLEMENTARY INFORMATION:

Amended Final Results

On November 7, 2008, the Department of Commerce (the Department) published the final results of its administrative review of the antidumping duty order on certain steel concrete reinforcing bars (rebar) from Turkey. *See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part,* 73 FR 66218 (Nov. 7, 2008). The period of review (POR) is April 1, 2006, through March 31, 2007.

As part of this decision, the Department, following the methodology used in the 2005–2006 administrative review, depreciated an ''asset'' recorded in respondent Ekinciler Demir ve Celik Sanayi A.S.'s/Ekinciler Dis Ticaret A.S.'s (Ekinciler's) financial statements which was later determined to be capitalized expenses from a proprietary event in an earlier period.

Following the publication of the final results, Ekinciler filed a lawsuit with the United States Court of International Trade (CIT) challenging the Department's final results of administrative review. *See Ekinciler Demir ve Celik Sanayi A.S. & Ekinciler Dis Ticaret A.S.* v. *United States,* Court No. 08–00415. Further, in litigation related to the 2005–2006 administrative review, the Court of Appeals for the Federal Circuit determined that the Department did not have the authority to depreciate the asset in question. *See Nucor Corporation* v. *United States, Ekinciler, et al.,* Court No. 2009–1476 (April 12, 2010).

The United States and Ekinciler have now entered into an agreement to settle this dispute. Pursuant to the terms of the agreement between the United States and Ekinciler, we calculated the following amended final margin for Ekinciler for the POR and are amending the final results of the antidumping duty administrative review of rebar from Turkey as follows:

Manufacturer/Producer/Exporter	Margin Percentage
Ekinciler Demir ve Celik Sanayi A.S./Ekinciler Dis Ticaret A.S.	0.36

Assessment

The Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), for all sales made by Ekinciler, because we have the reported entered value of the U.S. sales, we have calculated importer-specific

assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales.

Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.,* less than 0.50 percent).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by Ekinciler for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

We are issuing this determination and publishing these amended final results and notice in accordance with 19 U.S.C. 1516a(e).

Dated: August 2, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–20050 Filed 8–8–11; 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 August 29, 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: 11–046. *Applicant:* University of California Los Angeles, 595 Charles E. Young Drive East, 3806 Geology Building, Los Angeles, CA 90095. *Instrument:* Luminescence Reader. *Manufacturer:* Technical University of Denmark, Riso National Laboratory, Denmark. *Intended Use:* The instrument will be used to study the age of rock and sediment samples using thermoluminescence, optically stimulated luminescence and infrared luminescence. *Justification for Duty-Free Entry:* No instruments of the same general category are being manufactured in the United States. *Application accepted by Commissioner of Customs:* July 18, 2011.

Docket Number: 11–049. *Applicant:* University of Missouri, Electron Microscopy Core Facility, Veterinary Medicine Building, 1600 East Rollins, Columbia, MO 65211. *Instrument:* Electron Microscope. *Manufacturer:* FEI Company, Czech Republic. *Intended Use:* The instrument will be used to study natural, synthetic and biological materials, to determine their atomic and crystalline structures, 3-dimensional organization at the nano level, elemental composition and organization. *Justification for Duty-Free Entry:* No instruments of the same general category are being manufactured in the United States. Application accepted by Commissioner of Customs: July 27, 2011.

Docket Number: 11–051. *Applicant:* DOD Uniformed Services University of the Health Sciences, 4301 Jones Bridge Road, Bethesda, MD 20814–4799. *Instrument:* Transmission Electron Microscope. *Manufacturer:* JEOL, Japan. *Intended Use:* The instrument will be used to obtain extremely high-magnification images of biological samples, such as cells, tissues, bacteria and protein complexes, to study the characterization of injury and wound response and the effects of pharmacological agents on control and diseased tissues. *Justification for Duty-Free Entry:* No instruments of the same general category are being manufactured in the United States. Application accepted by Commissioner of Customs: July 27, 2011.

Dated: August 3, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Office of Policy, Import Administration.

[FR Doc. 2011–20207 Filed 8–8–11; 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 August 29, 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: 11–030. *Applicant:* University of Chicago, Institute for Genomic Systems and Biology, 900 E 57th Street, Chicago, IL 60637. *Instrument:* Digital Scanned Laser Microscope. *Manufacturer:* Emblem GMBH, Germany. *Intended Use:* The instrument will be used to study the functions and properties of biological materials, such as biomedical specimens, through microscopy imaging and recording of fluorescently labeled, light-sensitive samples. *Justification for Duty-Free Entry:* No instruments of the same or similar general category, which could be used for the intended purposes, are being manufactured in the United States. The DSLM is a new prototype not available commercially. *Application accepted by Commissioner of Customs:* May 27, 2011.

Docket Number: 11–042. *Applicant:* Brandeis University, 415 South Street, Waltham, MA 02454. *Instrument:* Technai G2 F20 Twin Electron Microscope. *Manufacturer:* FEI Company, The Netherlands. *Intended Use:* The instrument will be used for NIH-funded basic biomedical research to study the chemical mechanisms of cellular proteins and molecules. *Justification for Duty-Free Entry:* No instruments of the same general category are being manufactured in the United States. *Application accepted by Commissioner of Customs:* July 1, 2011.

Docket Number: 11–045. *Applicant:* University of California Santa Barbara, Building 503, Room 1355, Santa Barbara, CA 93106–5050. *Instrument:* Ultrasonic Fatigue Testing Equipment.

Manufacturer: University of Natural Resources and Applied Life Sciences, Austria. *Intended Use:* The instrument is a highly specialized system for studying a wide range of materials used in very high cycle, high temperature applications, such as light metals, composite metal/ceramics, titanium alloys and superalloys. *Justification for Duty-Free Entry:* No instruments of the same general category are being manufactured in the United States. *Application accepted by Commissioner of Customs:* July 18, 2011.

August 3, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Office of Policy, Import Administration.

[FR Doc. 2011–20206 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. I.D. GF001]

Grants to Manufacturers of Certain Worsted Wool Fabrics

AGENCY: Department of Commerce, International Trade Administration.

ACTION: Notice Announcing the Availability of Grant Funds.

SUMMARY: The purpose of this notice is to inform potential applicants that the Department of Commerce is providing financial assistance in calendar year 2011 for U.S. manufacturers of certain worsted wool fabrics. Section 4002(c)(6)(A) of the Miscellaneous Trade and Technical Corrections Act of 2004 (Pub. L. 108–429, 118 Stat. 2603) (the ''Act''), as amended by the Emergency Economic Stabilization Act of 2008 (Pub. L. 110–343, 122 Stat. 3765), authorizes the Secretary of Commerce to provide grants to persons (including firms, corporations, or other legal entities) who were, during calendar years 1999, 2000, and 2001, manufacturers of two categories of worsted wool fabrics. The first category are manufacturers of worsted wool fabrics, containing 85 percent or more by weight of wool, with average fiber diameters greater than 18.5 micron (Harmonized Tariff Schedule of the United States (HTS) heading 9902.51.11); the total amount of available funds is $2,666,000, to be allocated among such manufacturers on the basis of the percentage of each manufacturers' production of worsted wool fabric included in HTS 9902.51.11. The second category are manufacturers of worsted wool fabrics, containing 85 percent or more by weight of wool, with average fiber diameters of 18.5 micron or less (HTS heading 9902.51.15, previously HTS heading 9902.51.12); the total amount of available funds is $2,666,000, to be allocated among such manufacturers on the basis of the percentage of each manufacturers' production of worsted wool fabric included in HTS 9902.51.15. Funding for the worsted wool fabrics grant program will be provided by the Department of the Treasury from amounts in the Wool Apparel Manufacturers Trust Fund (the ''Trust Fund''). The total amount of grants to manufacturers of worsted wool fabrics described in HTS 9902.51.11 shall be $2,666,000 in calendar year 2011. The total amount of grants to manufacturers of worsted wool fabrics described in HTS 9902.51.15 shall also be $2,666,000 in calendar year 2011.

DATES: Applications by eligible U.S. producers of certain worsted wool fabrics must be received and validated by Grants.gov, postmarked, or provided to a delivery service on or before 5 p.m. EDT, August 19, 2011. Validation or rejection of your application by Grants.gov may take up to 2 business days after submission. Applications received after the closing date and time will be rejected/returned to the sender without further consideration. Use of U.S. mail or another delivery service must be documented with a receipt. No facsimile or electronic mail applications will be accepted.

ADDRESSES: The standard application package is available at *http://www.grants.gov*. For applicants without internet access, an application package may be received by contacting Mr. Jim Bennett, Office of Textiles and Apparel—Rm. 3100, International Trade Administration, U.S. Department of Commerce, Washington DC 20230, phone (202) 482–4058, *e-mail*: *James.Bennett@trade.gov*.

FOR FURTHER INFORMATION CONTACT: Technical questions can be directed to Jim Bennett, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4058; *James.Bennett@trade.gov.* Grants related administration questions concerning this program should be addressed to Janet Russell, Department of Commerce Grants Officer, (301) 713–0942; *Janet.J.Russell@noaa.gov.* For assistance with using grants.gov, contact *support@grants.gov.*

SUPPLEMENTARY INFORMATION: The items listed below are required before an award can be made. Failure to submit items below by the application date will result in the application not being reviewed. Applicants must have produced in the United States, during calendar years 1999, 2000 and 2001, worsted wool fabrics of a kind described in HTS 9902.51.11 or 9902.51.15. Applicants must provide: (1) Company name, address, contact and phone number; (2) Federal tax identification number; (3) the name and address of each plant or location in the United States where worsted wool fabrics of the kind described in HTS 9902.51.11 or HTS 9902.51.15 was woven by the applicant in 1999, 2000 and 2001; (4) the name and address of each plant or location in the United States where the applicant is weaving worsted wool fabrics of the kind described in HTS 9902.51.11 or HTS 9902.51.15 as of the date of application; (5) the quantity, in linear yards, of worsted wool fabric production described in HTS 9902.51.11 or 9902.51.15, as appropriate, woven in the United States in each of calendar years 1999, 2000 and 2001; and (6) the value of worsted wool fabric production described in HTS 9902.51.11 or 9902.51.15, as appropriate, woven in the United States in each of calendar years 1999, 2000 and 2001.

This data must indicate actual production (not estimates) of worsted wool fabric of the kind described in HTS 9902.51.11 or 9902.51.15. At the conclusion of the application, the applicant must attest that ''all information contained in the application is complete and correct and no false claims, statements, or representations have been made.'' Applicants should be aware that, generally, pursuant to 31 U.S.C. 3729, persons providing a false or fraudulent claims, and, pursuant to 18 U.S.C. 1001, persons making materially false statements or representations, are subject to civil or criminal penalties, respectively. Information that is marked ''business confidential'' will be protected from disclosure to the full extent permitted by law.

Other Application Requirements: Complete applications must also include the following forms and documents: CD–346, Applicant for Funding Assistance; CD–511, Certification Regarding Lobbying; SF–424, Application for Federal Assistance; and SF–424B, Assurances—Non-Construction Programs.

Electronic Access: The federal funding opportunity announcement for this program can be accessed via the Grants.gov Web site at *http://www.grants.gov*. The announcement will also be available by contacting the program officials identified under the section labeled **FOR FURTHER INFORMATION CONTACT**. Applicants must

comply with all requirements contained in the full funding opportunity announcement.

Statutory Authority: Section 4002(c)(6)(A) of the Miscellaneous Trade and Technical Corrections Act of 2004 (Pub. L. 108–429, 118 Stat. 2603) (the ''Act''), as amended by Section 1633 of the Pension Protection Act of 2006 (Pub. L. 109–280); Division C, Title 111, Section 325 (b) of the Emergency Economic Stabilization Act of 2008 (Pub. L. 110–343) extends availability of grant funds through 2014.

Funding Availability: The Secretary of Commerce is authorized under Section 4002(c)(6)(A) of the Act, as amended (Pub. L. 110–343, 122 Stat. 3765), to provide grants to manufacturers of certain worsted wool fabrics. Funding for the worsted wool fabrics grant program will be provided by the Department of the Treasury from amounts in the Wool Apparel Manufacturers Trust Fund. The total amount of grants to manufacturers of worsted wool fabrics described in HTS 9902.51.11 shall be $2,666,000 in calendar year 2011. The total amount of grants to manufacturers of worsted wool fabrics described in HTS 9902.51.15 shall also be $2,666,000 in calendar year 2011.

Eligibility Criteria: The worsted wool fabrics grant program is open to persons (including firms, corporations, or other legal entities) who were, during calendar years 1999, 2000 and 2001, manufacturers of worsted wool fabrics in the United States of the kind described in HTS 9902.51.11 or 9902.51.15. Only manufacturers who weave worsted wool fabric in the United States as of the date of application shall be eligible for grant funds. Any manufacturer who becomes a successor-of-interest to a manufacturer of the worsted wool fabrics described in HTS 9902.51.11 or HTS 9902.51.15 during 1999, 2000 or 2001 because of reorganization or otherwise, shall be eligible to apply for such grants.

Cost Sharing Requirements: No cost sharing or matching requirements is required for the worsted wool fabric program.

Evaluation and Selection Procedures: The general evaluation criteria and selection factors that apply to full applications to this funding opportunity are summarized below. Further information about the evaluation criteria and selection factors can be found in the full funding opportunity announcement.

Evaluation Criteria For Projects: For the worsted wool fabrics grant program, the technical reviewers will use the following criteria to evaluate the applications: (1) Whether the applicant (including persons, firms, corporations, or other legal entities) produced in the United States worsted wool fabrics of the kind described in HTS 9902.51.11 or 9902.51.15 during calendar years 1999, 2000 and 2001; (2) Whether the applicant (including persons, firms, corporations, or other legal entities) is weaving in the United States worsted wool fabric of the kind described in HTS 9902.51.11 or HTS 9902.51.15 as of the date of application; (3) Whether the applicant (including persons, firms, corporations, or other legal entities) was a successor-of-interest to a manufacturer who produced in the United States worsted wool fabric of the kind described in HTS 9902.51.11 or HTS 9902.51.15 during calendar years 1999, 2000 or 2001 because of a reorganization or otherwise; and (4) the quantity, in linear yards, of worsted wool fabric production described in HTS 9902.51.11 woven in the United States in each of calendar years 1999, 2000 and 2001; or the quantity, in linear yards, of worsted wool fabric production described in HTS 9902.51.15 woven in the United States in each of calendar years 1999, 2000 and 2001.

Review and Selection Process: All applications received in response to this announcement will be reviewed to determine whether they are complete and responsive to the content and form of application submission requirements as published in this notice. Responsive applications will be reviewed by an independent, objective panel composed of at least three individuals who are knowledgeable about worsted wool fabric production. The panel will conduct a technical review of applications based on the evaluation criteria listed above. The worsted wool fabrics grant program Selecting Official in the Office of Textiles and Apparel will make the award selection.

Selection Factors For Projects: For each applicant, the quantity, in linear yards, of worsted wool fabric production described in HTS 9902.51.11 woven in the United States in each of calendar years 1999, 2000 and 2001; or the quantity, in linear yards, of worsted wool fabric production described in HTS 9902.51.15 woven in the United States in each of calendar years 1999, 2000 and 2001. The grants are to be allocated among eligible applicants on the basis of the percentage of each manufacturers' production of the fabric described in HTS 9902.51.11 or HTS 9902.51.15, as appropriate, for calendar years 1999, 2000, and 2001, compared to the production of such fabric by all manufacturers who qualify for such grants.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Programs''.

Limitation of Liability: In no event will International Trade Administration or the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige International Trade Administration to award any specific project or to obligate any available funds.

The Department Of Commerce Pre-Award Notification Requirements For Grants And Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696), are applicable to this solicitation.

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424B, and SF–LLL and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provision of law, no person is required 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 PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866: This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism): It has been determined that this notice does not contain policies with implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notices and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements for the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Dated: August 4, 2011.

Kim Glas,

Deputy Assistant Secretary for Textiles and Apparel.

[FR Doc. 2011–20301 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA625

Endangered Species; File No. 16194

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the National Marine Fisheries Service, Southeast Fisheries Science Center (SEFSC) [Bonnie Ponwith: Responsible Party], 75 Virginia Beach Drive, Miami, FL 33149, has applied in due form for a permit to take green (*Chelonia mydas*), hawksbill (*Eretmochelys imbricata*), loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempii*), olive ridley (*Lepidochelys olivacea*), leatherback (*Dermochelys coriacea*), and unidentified hardshell sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before September 8, 2011.

ADDRESSES: The application and related documents are available for review by selecting Records Open for Public Comment from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 16194 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division.

- by e-mail to *NMFS.Pr1Comments@noaa.gov* (include the File No. in the subject line of the e-mail),
- by facsimile to (301) 713–0376, or
- at the address listed above.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Colette Cairns or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The proposed research would allow the applicant to monitor the take of green, loggerhead, hawksbill, leatherback, Kemp's ridley, olive ridley, and unidentified hardshell sea turtles during SEFSC resource assessment cruises in the Gulf of Mexico, the Atlantic Ocean and the Caribbean Sea. Green, loggerhead, Kemp's ridley, hawksbill, leatherback, olive ridley and unidentified hardshell sea turtles captured under separate authority would be handled, photographed, measured, weighed, flipper and passive integrated transponder tagged, temporarily marked, skin biopsied, and released. These efforts would aid in the development and refinement of management efforts to recover these species. The sampling would be conducted year-round for five years from the date of issuance of the permit.

Dated: August 3, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–20190 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA621

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Whiting Advisory Panel, in August 2011, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Wednesday, August 24, 2011 at 10 a.m.

ADDRESSES: The meeting will be held at the Hotel Providence, 139 Mathewson Street, Providence, RI 02903; *telephone:* (401) 861–8000; *fax:* (401) 861–8002.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; *telephone:* (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Whiting Advisory Panel will develop and recommend potential management alternatives for Multispecies FMP Amendment 19 for the small mesh fishery. These alternatives will include Annual Catch Limit (ACL) measures (allocations, buffers for management uncertainty, landings limits), Accountability Measures (AM), and possibly other measures to regulate the fishery and prevent catches from exceeding the ACL. The Advisory Panel will begin the meeting with a closed door session to elect a chair and vice-chair.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: August 4, 2011.

William D. Chappell,

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

[FR Doc. 2011–20193 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA623

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Whiting Oversight in August, 2011 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Thursday, August 25, 2011 at 9:30 a.m.

ADDRESSES: The meeting will be held at the Hotel Providence, 139 Mathewson Street, Providence, RI 02903; *telephone:* (401) 861–8000; *fax:* (401) 861–8002.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; *telephone:* (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Oversight Committee will approve and recommend to the Council draft management alternatives to be included and analyzed in the Multispecies FMP Draft Amendment 19 document.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: August 4, 2011.

William D. Chappell,

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

[FR Doc. 2011–20192 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Public Key Infrastructure (PKI) Certificate Action Form

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before October 11, 2011.

ADDRESSES: You may submit comments by any of the following methods:

- *E-mail: InformationCollection@uspto.gov.* Include ''0651–0045 comment'' in the subject line of the message.
- *Mail*: Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.
- *Federal Rulemaking Portal: http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Rod Turk, Office of Organizational Policy and Governance, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–1975; or by e-mail to *Rod.Turk@uspto.gov.* Additional information about this collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

The United States Patent and Trademark Office (USPTO) uses Public Key Infrastructure (PKI) technology to support electronic commerce between the USPTO and its customers. PKI is a set of hardware, software, policies, and procedures that provide important security services for the electronic business activities of the USPTO, including protecting the confidentiality of unpublished patent applications in accordance with 35 U.S.C. 122 and 37 CFR 1.14, as well as protecting international patent applications in accordance with Article 30 of the Patent Cooperation Treaty.

In order to provide the necessary security for its electronic commerce systems, the USPTO uses PKI technology to protect the integrity and confidentiality of information submitted to the USPTO. PKI employs public and private encryption keys to authenticate the customer's identity and support secure electronic communication between the customer and the USPTO. Customers may submit a request to the USPTO for a digital certificate, which enables the customer to create the encryption keys necessary for electronic identity verification and secure transactions with the USPTO. This digital certificate is required in order to access secure online systems that are provided by the USPTO for transactions such as electronic filing of patent applications and viewing confidential information about unpublished patent applications.

This information collection includes the Certificate Action Form (PTO–2042), which is used by the public to request a new digital certificate, the revocation of a current certificate, or the recovery of a lost or corrupted certificate. Customers may also change the name listed on the certificate or associate the certificate with one or more Customer Numbers. A certificate request must include a notarized signature in order to verify the identity of the applicant. The Certificate Action Form has an accompanying subscriber agreement to ensure that customers understand their obligations regarding the use of the digital certificates and cryptographic software. When generating a new certificate, customers register to get a set of seven codes that will enable customers to recover a lost certificate online without having to contact USPTO support staff.

II. Method of Collection

The Certificate Action Form must be notarized and may be mailed or hand delivered to the USPTO.

III. Data

OMB Number: 0651–0045.

Form Number(s): PTO–2042.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households; businesses or other for-profits; and not-for-profit institutions.

Estimated Number of Respondents: 1,857 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.5 hours) to read the instructions and subscriber agreement, gather the necessary information, prepare the Certificate Action Form, and submit the completed request.

Estimated Total Annual Respondent Burden Hours: 929 hours.

Estimated Total Annual Respondent Cost Burden: $129,131. The USPTO expects that 70% of the submissions for this collection will be prepared by paraprofessionals, 15% by attorneys, and 15% by independent inventors. Using those proportions and the estimated rates of $122 per hour for paraprofessionals, $325 per hour for attorneys in private firms, and $30 per hour for independent inventors, the USPTO estimates that the average rate for those respondents will be approximately $139 per hour. Therefore, the estimated total respondent cost burden for this collection will be approximately $129,131 per year.

Item	Estimated time for response	Estimated annual responses	Estimated annual burden hours
Certificate Action Form (including Subscriber Agreement) (PTO–2042)	30 minutes	1,857	929
Totals		1,857	929

Estimated Total Annual Non-hour Respondent Cost Burden: $4,531. There are no capital start-up costs, maintenance costs, or fees associated with this information collection. However, this collection does have annual (non-hour) cost burden associated with the Certificate Action Form.

This collection has costs due to the notarization requirement for authenticating the signatures on the Certificate Action Form. The USPTO estimates that the average fee for having a signature notarized is $2 and that 1,857 responses for these forms will be submitted annually, for a total cost of $3,714 per year.

This collection also has postage costs for submitting the Certificate Action Form to the USPTO by mail. The form cannot be faxed or submitted electronically because it requires an original notarized signature. The USPTO estimates that the first class postage cost for these forms will be 44 cents and that it will receive 1,857 mailed responses annually, for a total postage cost of approximately $817 per year.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.,* the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: August 4, 2011.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2011–20097 Filed 8–8–11; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

The following notice of scheduled meetings is published pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, 5 U.S.C. 552b.

Agency Holding the Meetings

Commodity Futures Trading Commission.

Times and Dates

The Commission has scheduled meetings for the following dates:

October 4, 2011 at 9:30 a.m.

October 18, 2011 at 9:30 a.m.

November 1, 2011 at 9:30 a.m.

November 17, 2011 at 9:30 a.m.

Place

Three Lafayette Center, 1155 21st St., NW., Washington, DC. Lobby Level Hearing Room (Room 1000).

STATUS: Open.

Matters To Be Considered

The Commission has scheduled these meetings to consider various rulemaking matters, including the issuance of proposed rules and the approval of final rules. The Commission may also consider and vote on dates and times for future meetings. Agendas for each of the scheduled meetings will be made available to the public and posted on the Commission's Web site at *http://www.cftc.gov* at least seven (7) days prior to the meeting. In the event that the times or dates of the meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site.

CONTACT PERSON FOR MORE INFORMATION: David A. Stawick, Secretary of the Commission, 202–418–5071.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–20351 Filed 8–5–11; 4:15 pm]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 11–C0008]

Black & Decker (U.S.) Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published

below is a provisionally accepted Settlement Agreement with Black & Decker (U.S.) Inc., containing a civil penalty of $960,000.00.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by August 24, 2011.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to Comment 11–C0008, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814–4408.

FOR FURTHER INFORMATION CONTACT: William J. Moore, Jr., Trial Attorney, Division of Enforcement and Information, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7583.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: August 2, 2011.

Todd A. Stevenson,

Secretary.

Settlement Agreement

(1) In accordance with 16 CFR 1118.20, Black & Decker (U.S.) Inc., its responsible officials, and its foreign and domestic corporate parents, affiliates, agents and employees (collectively ''Black & Decker'' or ''the Firm'') and the staff (''Staff'') of the United States Consumer Product Safety Commission (''Commission'') hereby enter into this Settlement Agreement (''Agreement'') under the Consumer Product Safety Act (''CPSA''). The Agreement and the incorporated attached Order resolve the Staff's allegations set forth below.

The Parties

(2) The Staff is the staff of the Consumer Product Safety Commission, an independent federal regulatory agency established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. 2051–2089.

(3) Black & Decker is a corporation organized and existing under the laws of the State of Maryland, with its principal corporate office located at 701 East Joppa Road, Towson, Maryland.

Staff Allegations

(4) Between November 2005 and October 2006, Black & Decker imported and distributed approximately one hundred thirty-six thousand (136,000) newly designed electric, hand-held grass trimmer/edgers known as model GH1000 Grasshog XP (''Grasshog XP''). The Grasshog XPs were sold through retailers nationwide for approximately $70.00.

(5) The Grasshog XPs are ''consumer products'' and, at all times relevant hereto, Black & Decker was a ''manufacturer'' of these consumer products, which were ''distributed in commerce,'' as those terms are defined or used in sections 3(a)(5), (8) and (11) of the CPSA, 15 U.S.C. 2052(a)(5), (8) and (11).

(6) The Grasshog XPs contained several defects that presented four failure modes: (1) The cutting string spool covers and spools can be projected off the Grasshog XP at high speed in unpredictable directions, allowing these components to strike the user or bystanders; (2) the dual cutting lines were fed and cut off at high speed and at irregular intervals during use, allowing the line to strike the user; (3) the spool line feed guard can fall off during use, exposing the user to injury from overly long high speed cutting line; and (4) the spool housing may overheat, exposing users to risks of burn injuries.

(7) Black & Decker first learned of defects in its Grasshog XP spool cover in December 2005. It modified the defective spool cover manufacturing process and changed the spool cover to a different material (''the new spool cover'') for future production. In January 2006, the firm recalled 9,000 Grasshogs. In February 2006, Black & Decker informed the CPSC staff of what it termed a ''quality'' problem involving the original spool cover but did not file a report under 15 U.S.C. 2064(b) at that time.

A. Violation of 15 U.S.C. 2068(a)(3), Failure To Provide Information Requested by CPSC Staff

Paragraphs one through seven, above, are hereby incorporated herein by reference.

(8) Black & Decker received its first complaints involving Grasshog XP defects, including problems with the new replacement spool cover, in mid-March and April 2006. By the end of May 2006, the Firm had received 80 safety complaints, personal injury reports and hundreds of warranty claims involving the Grasshog XP. The subject of the complaints, reports and warranty claims were the defects set forth in Paragraph 6, *supra.*

(9) In a letter dated May 9, 2006, CPSC staff asked Black & Decker for full report information with regard to the Grasshog XP, including, but not limited to, the defective spool covers the Firm discovered in December 2005 and replaced in January 2006.

(10) Despite an awareness of the information set forth in Paragraphs six and eight, *supra,* and other information germane to written questions posed by the staff on May 9, 2006, Black & Decker did not comply with the staff written request to provide a full report concerning the Grasshog XP. In late May 2006, the firm provided limited, incomplete information regarding its January spool cover recall. Among other acts of omission, it failed to provide information about defects it discovered in the replacement spool cover system used in production from January 2006 forward. These new, defective spool covers had been intended as the remedy and were provided as replacement covers in the firm's January 2006 recall.

(11) Based upon the incomplete information provided by Black & Decker, on June 30, 2006, the staff sent Black & Decker a letter closing the case file that had been opened on May 9, 2006. The staff letter of June 30, 2006 reminded Black & Decker of its duty to immediately report information that the risk or hazard posed by the Grasshog XP was greater than or different from that indicated by the information that had been supplied by the firm to date.

(12) By June 2006, Black & Decker had received 216 Grasshog XP safety complaints and approximately 14 reports of injury. Despite the Commission staff letters of May 2 and June 30, 2006 requesting this information, Black & Decker silently acquiesced in the file closure without revealing this information.

(13) Black & Decker waited until October 2006 to provide information requested by the staff on May 9, 2006. By its acts and omissions, the Firm knowingly violated Section 19(a)(3) of the CPSA, 15 U.S.C. 2068(a)(3), as the term ''knowingly'' is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).

B. Violation of 15 U.S.C. 2068(a)(4) Failure To Furnish Information Required by Sections 15(b)(3) and (b)(4) of the CPSA

Paragraphs one through thirteen, above, are hereby incorporated herein by reference.

(14) From July through September 2006, Black & Decker continued to receive large numbers of safety complaints, injury reports and warranty claims involving defects in the Grasshog XP new spool cover, the spool line feeder, the spool line feed guard and the spool feed housing (as set forth in Paragraph 6 above.) Although Black & Decker had obtained sufficient information to reasonably support the

conclusion that the Grasshog XP contained defects which could create a substantial product hazard, or created an unreasonable risk of serious injury or death on or before May 1, 2006, Black & Decker failed to immediately inform the Commission of such defects or risks as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. 2064(b)(3) and (4). In failing to do so, Black & Decker knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4) as the term ''knowingly'' is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).

(15) Pursuant to section 20 of the CPSA, 15 U.S.C. 2069, Black & Decker is subject to civil penalties for its knowing failure to report as required under section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

Response of Black & Decker (U.S.) Inc.

(16) Black & Decker denies Staff's allegations that the Grasshog XP, contains defects which could create a substantial product hazard or create an unreasonable risk of serious injury or death, and denies that it knowingly violated Sections 19(a)(3) or 19(a)(4) of the CPSA. This payment is made in settlement of the staff allegations. Neither the payment nor the fact of entering into this Settlement Agreement, constitute evidence of or an admission of, any fault, liability or statutory or regulatory violation by Black & Decker or of the truth of any allegations made by the staff.

Agreement of the Parties

(17) Under the CPSA, the Commission has jurisdiction over this matter and over Black & Decker and the Grasshog XP.

(18) In settlement of the Staff's allegations stemming from the Firm's importation and distribution of the Grasshog XP and in reporting to the Commission, Black & Decker shall pay a civil penalty in the amount of nine hundred sixty thousand dollars ($960,000.00) within ten (10) calendar days of receiving service of the Commission's final Order accepting the Agreement. The payment shall be made electronically to the CPSC via *http://www.pay.gov* .

(19) The parties enter into this Agreement for settlement purposes only. The Agreement does not constitute an admission by Black & Decker or a determination by the Commission that Black & Decker knowingly violated Sections 19(a)(3) or 19(a)(4) of the CPSA.

(20) Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

(21) Upon the Commission's final acceptance of the Agreement and issuance of the final Order, Black & Decker knowingly, voluntarily and completely waives any rights it may have in this matter to the following: (i) An administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission as to whether Black & Decker failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

(22) The Commission may publicize the terms of the Agreement and the Order.

(23) The Agreement and the Order shall apply to and be binding upon Black & Decker and each of its parent corporation(s), successors and/or assigns.

(24) The Commission issues the Order under the provisions of the CPSA, and a violation of the Order may subject Black & Decker and each of its parent corporation(s), successors and/or assigns to appropriate legal action.

(25) The Agreement may be used in interpreting the Order. Understandings, agreements, representations or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. The Agreement shall not be waived, amended, modified or otherwise altered without written agreement thereto executed by the party against whom such waiver, amendment, modification or alteration is sought to be enforced.

(26) If any provision of the Agreement or the Order is held to be illegal, invalid or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Black & Decker agree that severing the provision materially affects the purpose of the Agreement and Order.

Black & Decker (U.S.) Inc.

Dated: 6/27/2011.

By: _____

James R. O'Brien, Esquire,
Vice President and Product Liability Counsel, Black & Decker (U.S.) Inc., 701 East Joppa Road, Towson, MD 21286.

Dated: 6/27/2011.

By: _____

Timothy L. Mullin, Jr.,
Miles & Stockbridge P.C., 10 Light Street, Baltimore, MD 21202, Counsel for Black & Decker (U.S.) Inc.

U.S. Consumer Product Safety,
Commission Staff.

Cheryl A. Falvey,
General Counsel.

Mary B. Murphy,
Assistant General Counsel.

Dated: 8/2/2011.

By: _____

William J. Moore, Jr.,
Trial Attorney, Division of Compliance, Office of the General Counsel.

Order

Upon consideration of the Settlement Agreement entered into between Black & Decker (U.S.) Inc., its responsible officials, and their foreign and domestic corporate parents, affiliates, agents and employees (collectively ''Black & Decker''), and the U.S. Consumer Product Safety Commission (''Commission'') staff, and the Commission having jurisdiction over the subject matter and over Black & Decker, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

Ordered that the Settlement Agreement be, and is, hereby, accepted; and it is

Further Ordered, that Black & Decker shall pay a civil penalty in the amount of nine hundred sixty thousand dollars ($960,000.00) within ten (10) days of service of the Commission's final Order accepting the Settlement Agreement upon counsel for Black & Decker identified in the Settlement Agreement. The payment shall be made electronically to the CPSC via *http://www.pay.gov.* Upon the failure of Black & Decker to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by Black & Decker at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b).

Provisionally accepted and provisional Order issued on the 2nd day of August, 2011.

By Order of the Commission.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2011–20086 Filed 8–8–11; 8:45 am]

BILLING CODE 6355–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Computer Matching and Privacy Protection Act of 1988

AGENCY: Corporation for National and Community Service.

ACTION: Notice of new computer matching program between the Corporation for National and Community Service and the Social Security Administration.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), OMB Final Guidance Interpreting the Provisions of the Computer Matching and Privacy Protection Act of 1988 (54 FR 25818, June 19, 1989), and OMB Circular No. A–130, ''Management of Federal Information Resources,'' the Corporation for National and Community Service (''CNCS'') is issuing a public notice of its new computer matching program with the Social Security Administration (''SSA'').

DATES: CNCS will file a report on the computer matching agreement with the Office of Management and Budget and Congress. The matching program will begin September 1, 2011, or 40 days after the date of CNCS's submissions to OMB and Congress, whichever is later. The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months thereafter, if the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

ADDRESSES: You may submit comments identified by the title of this notice, by any of the following methods.

(1) *By mail sent to:* Corporation for National and Community Service, Attention Amy Borgstrom, Associate Director for Policy, Room 9515, 1201 New York Avenue, NW., Washington, DC 20525.

(2) *By fax to:* (202) 606–3467.

(3) *By e-mail to: aborgstrom@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call (202) 606–3472 between 8:30 a.m. and 5 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, Associate Director for Policy, (202) 606–6930, or by e-mail at *aborgstrom@cns.gov*.

SUPPLEMENTARY INFORMATION:

A. General

The Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503), regulates the use of computer matching agreements by Federal agencies when records in a system of records are matched with other Federal, State, or local government records. Among other things, it requires Federal agencies involved in computer matching agreements to publish a notice in the **Federal Register** regarding the establishment of the matching program.

B. Participating Agencies

Participants in this computer matching program are the Social Security Administration (source agency) and the Corporation for National and Community Service (recipient agency).

C. Purpose of the Match

The computer match between CNCS and SSA will enable CNCS to verify the social security numbers (SSNs) of applicants for approved national service positions, and verify statements made by those applicants regarding their citizenship status.

D. Authority

SSA's authority for this matching program is section 1711 of the Serve America Act of 2009 (Pub. L. 111–13, April 21, 2009). The legal authority for the disclosure of SSA data under this agreement is section 1106 of the Social Security Act (42 U.S.C. 1306(b)), 5 U.S.C. 552a(b)(3) of the Privacy Act, and the regulations and guidance promulgated thereunder.

CNCS's legal authority to enter into this agreement is section 146(b)(3) of the National and Community Service Act (NCSA) (42 U.S.C. 12602(a)), concerning an individual's eligibility to receive a Segal AmeriCorps Education Award from the National Service Trust upon successful completion of a term of service in an approved national service position and section 1711 of the Serve America Act (Pub. L. 111–13), which directs CNCS to enter into a data matching agreement to verify statements made by an individual declaring that such individual is in compliance with section 146(b)(3) of the NCSA by comparing information provided by the individual with information relevant to such a declaration in the possession of another Federal agency.

E. Categories of Records and Individuals Covered

Each individual who applies to serve in an approved national service position, including positions in AmeriCorps State and National, AmeriCorps VISTA, AmeriCorps NCCC, and Serve America Fellows, must, at the time of application, certify that the individual meets the citizenship eligibility criteria to serve in the position, *i.e.,* is a citizen, national, or lawful permanent resident of the United States.

The Master Files of Social Security Number Holders and SSN Applications SSA/OEEAS 60–0058, last published at 74 FR 62866 (December 1, 2009) (Enumeration System) maintains records about each individual who has applied for and obtained an SSN. SSA uses information from the Enumeration System to assign SSNs. The information CNCS provides from the AmeriCorps Member Individual Account (Corporation 8) system of records will be matched against this system of records and verification results will be disclosed under the applicable routine use.

F. Inclusive Dates of the Matching Program

This agreement will be in effect for a period of 18 months, with a provision for a one-time extension for a period not to exceed 12 months. In order to renew this agreement, both CNCS and SSA must certify to their respective Data Integrity Boards that: (1) The matching program will be conducted without change; and (2) the matching program has been conducted in compliance with the original agreement.

G. Procedure

CNCS will provide SSA with a data file including each applicant's social security number, first and last names, date of birth, and sex. SSA will conduct a match on the identifying information. If the match does not return a result verifying the individual's citizenship status, CNCS will contact the individual or the grant recipient program that selected the individual to verify the results in accordance with the requirements of 5 U.S.C. 552a(p) and applicable OMB guidelines. The affected individual will have an opportunity to contest the accuracy of the information provided by SSA. The applicant will have at least 30 days from the date of the notice to provide clear and convincing evidence of the accuracy of the social security number, proof of U.S. citizenship, or both. The notice will advise the individual and the grant recipient program that selected the individual that failure to respond within 30 days will provide a valid basis for CNCS to assume that the information provided by SSA is correct.

H. Additional Notice

Applicants will be informed at the time of application that information provided on the application is subject to verification through a computer

matching program. The application package will contain a privacy certification notice that the applicant must sign authorizing CNCS to verify the information provided.

I. Other Information

CNCS will furnish a copy of this notice to both Houses of Congress and the Office of Management and Budget.

Dated: August 2, 2011.

Philip W. Clark,

Chief Information Officer.

[FR Doc. 2011–20019 Filed 8–8–11; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2011–OS–0084]

Privacy Act of 1974; System of Records

AGENCY: Office of the Inspector General, Department of Defense.

ACTION: Notice to add a system of records.

SUMMARY: The Office of the Inspector General proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on September 8, 2011 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Tanya Layne, Office of the Inspector General, 400 Army Navy Drive, Arlington, Virginia 22202–4704, or by phone at (703) 604–9779.

SUPPLEMENTARY INFORMATION: The Office of the Inspector General notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**. The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, were submitted on June 28, 2011 to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records about Individuals,'' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: August 2, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

CIG–26

SYSTEM NAME:

Case Control System—Investigative

SYSTEM LOCATION:

Department of Defense Office of the Inspector General (DoD OIG), Office of the Assistant Inspector General, Office of Professional Responsibility (OPR), 400 Army Navy Drive, Arlington, VA 22202–4704.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons and/or activities within the DoD community which is or has been the subject of an OIG OPR investigation.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's names, Social Security Number (SSN), address, case control number, records of investigations to include Reports of Investigation and Information Reports, which are being or have been conducted by the OIG OPR.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

DoD Directive 5106.1, Inspector General of the Department of Defense; Inspector General Act of 1978, (Pub. L. 452), as amended; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

Open and closed case listings used to manage investigations, to produce statistical reports, and to control various aspects of the investigative process.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

IN ADDITION TO THOSE DISCLOSURES GENERALLY PERMITTED UNDER 5 U.S.C. 552A(B) OF THE PRIVACY ACT OF 1974, THESE RECORDS CONTAINED THEREIN MAY SPECIFICALLY BE DISCLOSED OUTSIDE THE DOD AS A ROUTINE USE PURSUANT TO 5 U.S.C. 552A(B)(3) AS FOLLOWS:

To the U.S. Secret Service in conjunction with the protection of persons under its jurisdiction.

To other Federal, State, Tribal or local agencies having jurisdiction over the substance of the allegations or a related investigative interest in criminal law enforcement investigations, including statutory violations, counter-intelligence, counter-espionage and counter-terrorist activities and other security matters.

To other Federal Inspector General offices, the Council of the Inspectors General on Integrity and Efficiency (CIGIE), and/or other Federal law enforcement agencies for the purpose of coordinating and conducting administrative inquiries and civil and criminal investigations, or when responding to such offices, Council, and agencies in connection with the investigation of potential violations of law, rule, and/or regulation.

To other Federal Inspector General offices, the CIGIE, and/or the Department of Justice for purposes of conducting external reviews to ensure that adequate internal safeguards and management procedures continue to exist within the DoD OIG.

To State, Territorial, and District of Columbia, and Commonwealth Attorney Generals and their respective employees, for statistical purposes or evidentiary documentation in connection with their agency investigation(s).

To State, Territorial, Commonwealth, County, or City law enforcement officials and their respective employees, for statistical purposes or evidentiary documentation in connection with their agency investigation(s).

The DoD ''Blanket Routine Uses'' set forth at the beginning of the DoD OIG's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in file folders and on electronic storage media.

RETRIEVABILITY:

Records are retrieved by individual's name, Social Security Number (SSN), or case control number.

SAFEGUARDS:

Computerized records maintained in a controlled area are accessible only to authorized personnel. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Physical and electronic access is restricted to designated individuals having a need therefore in the performance of official duties and who are properly screened and cleared for need-to-know. Electronic data system is password and Common Access Card (CAC) protected.

RETENTION AND DISPOSAL:

Electronic records are retained indefinitely for statistical purposes. Paper copies of records are retained permanently and retired to the Washington National Records Center 3 years after case closure.

SYSTEM MANAGER(S) AND ADDRESS:

Office of the Inspector General of the Department of Defense, Office of the Assistant Inspector General, Office of Professional Responsibility, 400 Army Navy Drive, Arlington, VA 22202–4704.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Freedom of Information Act Requester Service Center/Privacy Act Office, Room 1021, 400 Army Navy Drive, Arlington, VA 22202–4704.

Written requests should contain the individual's full name (including former names and aliases), and Social Security Number (SSN), current home address, telephone number, and the request must be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Freedom of Information Act Requester Service Center/Privacy Act Office, Room 1021, 400 Army Navy Drive, Arlington, VA 22202–4704.

Written requests should contain the individual's full name (including former names and aliases), and SSN, current home address, telephone number, and the request must be signed.

CONTESTING RECORD PROCEDURES:

The DoD OIG's rules for accessing records and for contesting contents and appealing initial agency determinations are published in 32 CFR part 312 or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Office of Inspector General System Administrators.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principle function any activity pertaining to the enforcement of criminal laws.

An exemption rule for this record system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 312. For additional information contact the system manager.

[FR Doc. 2011–20080 Filed 8–8–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 11, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: August 4, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Revision.

Title of Collection: State Plan for Assistive Technology under the Assistive Technology Act of 1998, as Amended.

OMB Control Number: 1820–0664.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: Federal Government, Not-for-profit-institutions; State, Local or Tribal Government.

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 4,144.

Abstract: Section 4 of the Assistive Technology Act of 1998, as amended, requires states to submit an application in order to receive funds under the state grant for assistive technology program. This information collection will be used by states to meet their application requirements and annual data reports. The Rehabilitation Services Administration calls this application a State Plan for Assistive Technology.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4701. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically

mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–20198 Filed 8–8–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Postsecondary Education Center for Individuals Who Are Deaf

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information:

Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities (TA&D); Personnel Development to Improve Services and Results for Children with Disabilities (Personnel Development); and Technology and Media Services for Individuals with Disabilities (T&M Services) Programs—Postsecondary Education Center for Individuals who are Deaf

Notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.326D.

DATES:

Applications Available: August 9, 2011.

Deadline for Transmittal of Applications: September 8, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Programs: Funding from three programs—the TA&D, the Personnel Development, and the T&M Services Programs—supports this competition.

The purpose of the TA&D Program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

The Personnel Development Program: (1) Helps address State-identified needs for highly qualified personnel—in special education, related services, early intervention, and regular education—to work with children with disabilities and (2) ensures that those personnel have the skills and knowledge—derived from practices that have been determined through research and experience to be successful—that are needed to serve those children.

Finally, the T&M Services Program: (1) Improves results for children with disabilities by promoting the development, demonstration, and use of technology, (2) supports educational media services activities designed to be of educational value in the classroom setting to children with disabilities, and (3) provides support for captioning and video description that is appropriate for use in the classroom setting.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute or otherwise authorized in the statute (see sections 662(c)(2), 663(c)(8)(C), 674(b), and 681(d)of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1463 and 1481(d)).

Absolute Priority: For FY 2011 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Postsecondary Education Center for Individuals who are Deaf 84.326D

Background:

Individuals who are deaf or hard of hearing have unique communication and language barriers that require a range of accommodations for success in postsecondary education settings. Research, policy, and practice suggest that decisions about accommodations should be made on an individual basis (Marschark, 2001; U.S. Department of Education, 2005). For example, different accommodations are needed for a student who has hearing aids, a student who has a cochlear implant and uses oral-auditory strategies, a student with a cochlear implant who uses sign language in addition to oral-auditory strategies, and a student who uses sign language only (Marschark, 2001). It is important that postsecondary institutions be well-informed about the various accommodations that may be appropriate for students who are deaf or hard of hearing, such as oral transliteration services, cued language transliteration services, sign language transliteration, and interpreting and transcription services.

To address the needs of these students, section 682(d)(1)(B) of IDEA requires that the Secretary ensure that, for each fiscal year, not less than $4,000,000 is provided to address the postsecondary, vocational, technical, continuing, and adult education needs of individuals with deafness. Pursuant to this requirement, the Department's Office of Special Education Programs (OSEP) has previously funded four regional centers to assist postsecondary institutions in more effectively addressing the postsecondary, vocational, technical, continuing, and adult education needs of individuals who are deaf or hard of hearing. These centers have served collectively as the Postsecondary Education Programs Network (PEPNet). While PEPNet's project period is scheduled to end on September 30, 2011, institutions of higher education (IHEs) continue to need assistance to support this population. For more information about PEPNet, see *http://www.pepnet.org.*

In addition to the funding required under section 682(d)(1)(B) of IDEA, section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990, as amended (ADA) outline postsecondary institutions' obligations to ensure they do not discriminate on the basis of disability, including in their provision of academic adjustments and auxiliary aids and services for students with disabilities (34 CFR 104.44; 28 CFR 35.160–164; 28 CFR 36.303). Current statistics show that many individuals who are deaf or hard of hearing are enrolling in mainstream postsecondary institutions (Raue & Lewis, 2011). Given the numbers of students enrolling in mainstream postsecondary institutions, and considering the various types of accommodations that may be necessary to serve this low-incidence population, it is paramount that personnel at these postsecondary institutions have the knowledge and skills needed to provide fully accessible learning experiences for students who are deaf or hard of hearing (Lang, 2002). For example, personnel must be skilled at helping to determine the appropriate type of interpreting services for a particular student's needs. Personnel must also be knowledgeable about other services from which the student may benefit (*e.g.,* captioning or note-taking) and the availability of newer technology, such as live text-captioning technologies (*e.g.,* C–Print or Computer Assisted Realtime Translation) and assistive listening devices, that are effective accommodations for students who are deaf or hard of hearing (Cawthon, Nichols, & Collier, 2009). Given the fast pace of emerging technology, it is particularly important for personnel to

have access to the information needed to stay current in this area.

In addition, there are deaf or hard of hearing students who are not college-bound and who need to develop their basic skills to prepare to enter job training programs or matriculate to other postsecondary education programs. Researchers examined the transition strengths and needs of 53 middle and high school students who were deaf or hard of hearing and found substantial deficits in employment and independent living skills [1] (Luft and Huff, 2011). Individuals who are deaf or hard of hearing need access to a wide variety of institutions or programs that provide postsecondary educational opportunities to address these needs. These postsecondary educational opportunities may be provided by postsecondary institutions and other relevant organizations and public agencies such as secondary schools, vocational rehabilitation agencies, community service agencies, centers for independent living, and one stop centers funded under the Workforce Investment Act.

To help bring about significant improvement in the quality of services for students who are deaf or hard of hearing and to improve educational outcomes, a national agenda was developed by a coalition of parent, consumer, professional, and advocacy organizations involved in the education of children who are deaf or hard of hearing. This national agenda, called Moving Forward on Achieving Educational Equality for Deaf and Hard of Hearing Students (National Agenda),[2] is currently underway and its focus is on helping State educational agencies (SEAs), local educational agencies (LEAs), postsecondary institutions, and their partners identify and implement strategies to significantly improve the quality and nature of educational programs and services for students who are deaf or hard of hearing (Muller, 2005; National Agenda, 2005; NASDSE, 2006; National State Leaders' Summit, 2010). For the past several years, through this National Agenda, State teams comprised of parents and representatives from SEAs, LEAs, State (or other) special schools and programs for the deaf, postsecondary institutions, early childhood deaf education, and others have met annually for a National State Leaders Summit to learn about effective strategies and develop State plans for improving outcomes for children and youth who are deaf or hard of hearing. The National Agenda encourages State teams to focus on goals and practices that will help support postsecondary access and completion for deaf or hard of hearing students. These practices include establishing collaborative partnerships among diverse agencies to improve coordination of services, making technology available to support educational access, and preparing personnel to meet the needs of a diverse population of deaf or hard of hearing students. The Department intends to build on these efforts by providing TA to State teams, including representatives from postsecondary institutions, to address the postsecondary, vocational, technical, continuing, and adult education needs of individuals who are deaf or hard of hearing.

Consistent with the Department's priority to increase all students' postsecondary success, the Department seeks to support postsecondary institutions, working with other relevant organizations and public agencies, in increasing the number and proportion of students who are deaf or hard of hearing who attend, persist in, and complete college or other postsecondary education and training (U.S. Department of Education, 2010b).

Priority:

The purpose of this priority is to support a Postsecondary Education Center for Individuals who are Deaf (Center) that will support postsecondary institutions, working with other relevant organizations and public agencies, to more effectively address the postsecondary, vocational, technical, continuing, and adult education needs of individuals who are deaf or hard of hearing, including those who are deaf or hard of hearing with co-occurring disabilities such as learning and emotional disabilities, so that a greater number and proportion of these students persist in and complete college or other postsecondary education and training. The Center will: (1) Provide postsecondary institutions and other relevant organizations and public agencies with technical assistance on programs, practices, and activities that postsecondary institutions could use to improve the completion and persistence of students who are deaf or hard of hearing; (2) provide professional development opportunities through local, State, regional, and national in-person or online trainings to postsecondary educators and other individuals who provide educational services to postsecondary students who are deaf; and (3) provide training and information about how postsecondary institutions and other relevant organizations and public agencies can utilize technology to provide and promote access and accommodations for individuals who are deaf or hard of hearing.

To be considered eligible for funding under this absolute priority, applicants must meet the application requirements contained in this priority. Any project funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed Center. A logic model communicates how the Center will achieve its outcomes and provides a framework for both the formative and summative evaluations of the Center;

Note: The following Web sites provide more information on logic models: *http://www.researchutilization.org/matrix/logicmodel_resource3c.html* and *http://www.tadnet.org/model_and_performance.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services;

(d) A budget for a summative evaluation to be conducted by an independent third party;

(e) A budget for attendance at the following:

(1) A one and one half day kick-off meeting to be held in Washington, DC,

[1] In this study, employment skills included job-seeking skills, work adjustment skills (*e.g.,* work schedules and deadlines, job-related reading and math), and job-related social and interpersonal skills. Independent living skills included money management skills, health- and home-related skills, and community awareness (*e.g.,* use of public transportation, effective communication) (Luft and Huff, 2011).

[2] The National Agenda is an education initiative based on a set of priorities that are stated as goals and that are designed to bring about significant improvement in the quality and nature of educational services and programs for deaf and hard of hearing students. The National Agenda was developed by a coalition of parent, consumer, professional, and advocacy organizations involved in the education of children who are deaf and hard of hearing, and working to develop an effective, communication and language-driven educational delivery system for children. The following Web sites provide more information on the National Agenda: *http://www.ndepnow.org/agenda/agenda.htm* or *http://http://www.pepnet.org/2011Summit.asp*

within four weeks after receipt of the award, and an annual two-day planning meeting held in Washington, DC, with the OSEP Project Officer during each subsequent year of the project period.

(2) A three-day Project Directors' Conference in Washington, DC, during each year of the project period.

(3) A three-day Technical Assistance and Dissemination Conference in Washington, DC, during each year of the project period.

(4) A minimum of two two-day trips annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP.

(f) A line item in the proposed budget for an annual set-aside of 5 percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with OSEP.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

(g) A description of both the process and the selection criteria that the Center will use to identify the recipients of the needs assessments and subsequent TA described under sections (a) and (b) of each of the *Project Activities* sections of this notice (*TA&D Project Activities, Personnel Development Project Activities, T&M Services Project Activities*). The Center must obtain approval from OSEP before finalizing the selection criteria and making the final selection of the recipients.

Project Activities. To meet the requirements of this priority, the Center at a minimum, must conduct the following project activities: *TA&D Project Activities, Personnel Development Project Activities,* and *T&M Services Project Activities.*

TA&D Project Activities (Consistent with section 663(c)(8)(C) of IDEA).

(a) Conduct assessments, including examining student outcome data, to determine current TA needs of postsecondary institutions related to meeting the postsecondary, vocational, technical, continuing, and adult education needs of individuals who are deaf or hard of hearing. Such assessments must identify the needs of postsecondary institutions related to enrolling, retaining, and instructing students who are deaf or hard of hearing and addressing the varying communication needs of, and methods used by, individuals who are deaf or hard of hearing, such as oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services. In its application, an applicant must describe both the process and the selection criteria that the Center will use to identify the institutions that will receive the needs assessment and subsequent TA. The Center must obtain approval from OSEP before finalizing the selection criteria and making the final selection of institutions.

(b) Provide TA to postsecondary institutions to address the needs identified in assessments conducted under paragraph (a) of these *TA&D Project Activities.* This TA must—

(1) Be designed to enhance access to college or other postsecondary education and training by individuals who are deaf or hard of hearing;

(2) Address the needs of individuals who are deaf or hard of hearing to improve their persistence and completion in postsecondary education by implementing practices, strategies, or programs that improve student learning outcomes, reduce time to degree, reduce instructional costs, or other activities as appropriate;

(3) Provide information on how to use data to improve postsecondary student outcomes relating to enrollment, persistence, and completion, and leading to career success.

(c) Provide TA on request to other relevant organizations and public agencies working with postsecondary institutions to increase the number and proportion of individuals who are deaf or hard of hearing who enroll in, persist in, and complete postsecondary education. Other relevant organizations and public agencies may include SEAs, vocational rehabilitation agencies, community service agencies, centers for independent living, and one stop centers funded under the Workforce Investment Act. The TA provided under this paragraph (c) must focus on:

(1) Students who are deaf or hard of hearing, including those who are deaf or hard of hearing with co-occurring disabilities such as learning or emotional disabilities, who are transitioning from secondary to postsecondary, vocational, technical, continuing, adult education, the workforce, and the community.

(2) Assisting postsecondary institutions to meet their responsibilities under Federal laws, including Section 504 and the ADA, with respect to students who are deaf or hard of hearing.

(3) Developing and implementing effective procedures for providing postsecondary educational supports to students who are deaf or hard of hearing, including by encouraging the use of cooperative arrangements among postsecondary institutions and other service providers, such as public and private community service providers that may address the educational, remedial, support services, transitional, independent living, and employment needs of individuals who are deaf or hard of hearing. The Center may also address the transition of these students from postsecondary institutions to independent living and employment.

(4) Assisting teams of other relevant organizations and appropriate public agencies, including postsecondary institutions, working on State plans or other strategies to address the postsecondary, vocational, technical, continuing, and adult education needs of individuals who are deaf or hard of hearing.

(d) Make information available to individuals who are deaf or hard of hearing, parents of students who are deaf or hard of hearing, secondary schools, and postsecondary institutions on the availability of resources (*e.g.,* different kinds of accommodations, financial, support services) to support students who are deaf or hard of hearing in completing their postsecondary education.

(e) Incorporate the effective use of technology (*e.g.,* webinars, online instruction) in the delivery of TA to improve productivity and efficiency of these activities.

Personnel Development Project Activities (Consistent With section 662(c)(2) of IDEA)

(a) Conduct assessments, including examining student outcome data, of the personnel development training needs of postsecondary, vocational, and adult education professional and support staff who provide transitional or postsecondary educational services to students who are deaf or hard of hearing.

(b) Provide interdisciplinary training to postsecondary educators, guidance counselors, interpreters, speech pathologists, audiologists, social workers, rehabilitation counselors, and other staff that addresses the needs identified in the assessments conducted under paragraph (a) of these *Personnel Development Project Activities* and that will contribute to improvements in transitional and postsecondary educational results for students who are deaf or hard of hearing. This training must include information on—

(1) How to use data to improve practice and student outcomes; and

(2) Evidence-based practices that address the postsecondary, vocational, technical, continuing, and adult

education needs of individuals who are deaf or hard of hearing.

(c) Provide professional development opportunities through local, State, regional, and national in-person or online trainings on key topics (*e.g.,* orientation to deafness; deafness and English proficiency status; deafness and co-occurring disabilities; how to use data to improve instructional practices) to postsecondary educators and other individuals who provide postsecondary services to students who are deaf or hard of hearing.

(d) Incorporate the effective use of technology (*e.g.,* webinars, online instruction) in the delivery of training to improve the productivity and efficiency of the Center and to ensure that the Center supports a broad audience.

T&M Services Project Activities (Consistent with section 674(b) and (c) of IDEA).

(a) Conduct assessments, including examining student outcome data, to determine the accessible technology and media needs of postsecondary, vocational, and adult education programs related to—

(1) Enrolling, retaining, and instructing students who are deaf or hard of hearing; and

(2) Addressing the varying communication needs of and methods used by individuals who are deaf or hard of hearing.

(b) Provide TA to administrators, faculty, and support staff at postsecondary institutions to address the needs identified in assessments conducted under paragraph (a) of these *T&M Services Project Activities.* This TA must—

(1) Be designed to enhance access to, and completion of, college or other postsecondary education and training by individuals who are deaf;

(2) Provide information, technological support, and in-service training, as needed, to personnel at postsecondary institutions who provide services to students who are deaf or hard of hearing;

(3) Train personnel in the innovative uses and applications of technology, including universally designed technologies, assistive technology devices, and accessible media formats; and

(4) Train personnel on developing and implementing effective procedures for providing educational technology and media supports to postsecondary students who are deaf or hard of hearing.

(c) Provide information on how postsecondary institutions can use technology to meet their responsibilities under Federal laws, including the ADA and Section 504, to provide access to college or other postsecondary education and training, and to provide accommodations to individuals who are deaf or hard of hearing.

Leadership and Coordination Activities. In addition to the activities conducted under the *Project Activities* section of this priority, the Center must—

(a) Maintain a Web site that meets government or industry-recognized standards for accessibility and that links to the Web site operated by the Technical Assistance Coordination Center (TACC).

(b) Establish and maintain an advisory committee to review the activities and outcomes of the Center and provide programmatic support and advice throughout the project period. At a minimum, the advisory committee must meet on an annual basis in Washington, DC, and consist of representatives from SEAs, LEAs, school administrators, individuals who are deaf, educators, parents of individuals who are deaf, vocational rehabilitation agencies, community service agencies, centers for independent living, one stop centers funded under the Workforce Investment Act, postsecondary institutions, and service providers who work with transitioning youth and adults who are deaf. The Center must submit the names of proposed members of the advisory committee to OSEP for approval within eight weeks after receipt of the award.

(c) Prepare and disseminate reports, documents, and other materials on appropriate accommodations in postsecondary institutions, how to prepare students who are deaf or hard of hearing to be college and career ready, and related topics as requested by OSEP. The reports must identify effective evidence-based practices as well as areas that would benefit, through additional research, from improved levels of evidence for specific practices. In consultation with the OSEP Project Officer, the Center must make selected reports, documents, and other materials available for parents, educators, service providers, members of professional organizations and advocacy groups, researchers, and others, as appropriate.

(d) Communicate and collaborate, on an ongoing basis and as appropriate, with OSEP-funded projects, such as the Parent Training and Information Centers, the National Secondary Transition Technical Assistance Center, the National High School Center (jointly funded with the Office of Elementary and Secondary Education), the National Center on Deaf-Blindness, the Regional Resource Centers, the Center for Implementing Technology in Education, the Family Center on Technology and Disability, and OSEP-funded projects that focus on training personnel to serve students with low incidence disabilities. In addition, communicate and collaborate, on an ongoing basis and as appropriate, with related projects funded by the Rehabilitation Services Administration, the National Institute on Disability and Rehabilitation Research, the Institute of Education Sciences, and the Office of Vocational and Adult Education. This collaboration could include the joint development of products, the coordination of TA services, and the planning and carrying out of TA meetings and events.

(e) Host an annual National State Systems Change Summit with representatives from the SEAs, LEAs, State schools, parent organizations, postsecondary institutions, vocational rehabilitation agencies, community service agencies, centers for independent living, and one stop centers funded under the Workforce Investment Act, service providers who work with transitioning youth and adults who are deaf or hard of hearing, and other stakeholders. The National State Systems Change Summit may be held in conjunction with other national conferences such as the annual National State Leaders' Summit. The summit must—

(1) Provide, and enable the exchange of, information on establishing and implementing strategies to improve educational programs and services for postsecondary students who are deaf or hard of hearing, and to increase the number and proportion of these students who persist in and complete college or other postsecondary education and training.

(2) Facilitate collaborative planning and implementation among stakeholders to address identified needs of postsecondary institutions in the State related to enrolling, retaining, instructing, and graduating students who are deaf or hard of hearing.

(f) Participate in, organize, or facilitate communities of practice if they align with the needs of the Center's target audience. Communities of practice must align with the Center's objectives to support discussions and collaboration among key stakeholders.

Note: The following Web site provides more information on communities of *practice: http://www.tadnet.org/communities.*

(g) Prior to developing any new product, submit a proposal for the product to the TACC database for approval from the OSEP Project Officer.

The development of new products must be consistent with the product definition and guidelines posted on the TACC Web site (*http://www.tadnet.org*).

(h) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations and e-mail communication, as needed.

Extending the Project for a Fourth and Fifth Year

The Secretary may extend the project period of the Center for up to two additional years beyond its original project period of 36 months if the grantee is achieving the intended outcomes of the grant, shows improvement against baseline measures on performance indicators, and is making a positive contribution to practices and improved services that address the postsecondary, vocational, technical, continuing, and adult education needs of individuals who are deaf or hard of hearing, including those who are deaf or hard of hearing with co-occurring disabilities (*e.g.*, learning or emotional disabilities), so that a greater number of students with deafness will complete their postsecondary education.

References:

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Lang, H. G. (2002). Higher education for deaf students: Research priorities in the new millennium. Journal of Deaf Studies and Deaf Education, 7 (4), 267–280.

Luft, P., and Huff, K. (2011). How prepared are transition-age deaf and hard of hearing students for adult living? Results of the Transition Competence Battery. American Annals of the Deaf. 155 (5), 569–579.

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Raue, K., and Lewis, L. (2011). *Students with Disabilities at Degree-Granting Postsecondary Institutions* (NCES 2011–018). National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education. Washington, DC.

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U.S. Department of Education, National Center for Education Statistics (2010a), 2003–04 Beginning Postsecondary Students Longitudinal Study, Second Follow-up (BPS:04/09). Computation by NCES PowerStats Version 1.0 on 12/4/2010; revised on December 17, 2010.

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Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1462, 1463, 1474, 1481, and 1482.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: Three programs plan to make available a total of an estimated $4,000,000 for this competition: $1,300,000 from the TA&D Program; $1,700,000 from the Personnel Development Program; and $1,000,000 from the T&M Program.

Estimated Average Size of Award: $4,000,000.

Note: In each budget period of 12 months $1,300,000 must be budgeted for the activities described under *Technical Assistance and Dissemination Activities (Consistent with section 663(c)(8)(C) of IDEA);* $1,700,000 must be budgeted for the activities described under *Personnel Development Activities (Consistent with section 662(c)(2) of IDEA);* and $1,000,000 must be budgeted for the activities described under *T&M Services Activities (Consistent with section 674(b) of IDEA).* The Assistant Secretary for Special Education and Rehabilitative Services may change these maximum amounts through a notice published in the **Federal Register**.

Maximum Awards: We will reject any application that proposes a total budget exceeding $4,000,000 or the individual program budget amounts for the designated activities described in the note under the *Estimated Average Size of Award* section of this notice for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change any of these maximum amounts through a notice published in the **Federal Register**.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months with an optional additional 24 months based on performance. Applications must include plans for both the 36 month award and the 24 month extension.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs, including public charter schools that are considered LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

Note: Eligible applicants may form consortia that meet the requirements in 34 CFR 75.127 to 75.129 to apply under this competition. The Secretary views the formation of consortia as an effective and efficient strategy to address the requirements of this priority.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The project funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and the grant recipient funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, *toll free:* 1–877–433–7827. *Fax:* (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, *toll free:* 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.EDPubs.gov* or at its *e-mail address: edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.326D.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 70 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: August 9, 2011.

Deadline for Transmittal of Applications: September 8, 2011.

Applications for grants under this competition may be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via *Grants.gov,* you must (1) Be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *http://www.grants.gov/applicants/get_registered.jsp*).

7. *Other Submission Requirements:* Applications for grants under this competition may be submitted

electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We are participating as a partner in the Governmentwide *Grants.gov* Apply site. The Postsecondary Education Center for Individuals who are Deaf competition, CFDA number 84.326D, is included in this project. We request your participation in *Grants.gov.*

If you choose to submit your application electronically, you must use the Governmentwide *Grants.gov* Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Postsecondary Education Center for Individuals who are Deaf competition at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.326, not 84.326D).

Please note the following:

- Your participation in *Grants.gov* is voluntary.
- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov,* we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov.*
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- If you submit your application electronically, you must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. (This notification indicates receipt by *Grants.gov* only, not receipt by the Department.) The Department then will retrieve your application from *Grants.gov* and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov,* along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326D), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326D), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays. *Note for Mail or Hand Delivery of Paper Applications:* If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within the specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the TA&D program. These measures focus on the extent to which projects provide high-quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved

application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Louise Tripoli, U.S. Department of Education, 400 Maryland Avenue, SW., room 4077, Potomac Center Plaza (PCP), Washington, DC 20202–2550. *Telephone:* (202) 245–7554.

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. *Telephone:* (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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.

Dated: August 4, 2011.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2011–20180 Filed 8–8–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Technical Assistance and Dissemination To Improve Services and Results for Children With Disabilities—Transition to College and Careers Center

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information: Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities—Transition to College and Careers Center; Notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.326J.

Dates: Applications Available: August 9, 2011. Deadline for Transmittal of Applications: September 8, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute or otherwise authorized in the statute (see sections 663 and 681(d) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1463 and 1481(d)).

Absolute Priority: For FY 2011 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Technical Assistance and Dissemination To Improve Services and Results for Children With Disabilities—Transition to College and Careers Center

Background:

The Department is committed to the goal of ensuring that every child is on track to graduate from high school with the knowledge and skills needed for success in college and careers. Under Part B of IDEA, State educational agencies (SEAs) and local educational agencies (LEAs) must ensure that the individualized education programs (IEPs) of children with disabilities who turn 16, or younger if determined appropriate by the IEP Team,[1] include appropriate, measurable postsecondary goals in specified areas and the transition services[2] needed to assist the child in reaching those goals. The postsecondary goals and transition services components in the IEPs of eligible students with disabilities must be updated annually thereafter (20 U.S.C. 1414(d)(1)(A)(VIII)). The SEA must also have in effect policies and procedures related to interagency agreements or other mechanisms for interagency coordination to meet its obligation related to, and methods of, ensuring transition services for students with disabilities (20 U.S.C. 1412(a)(12)).

Effective transition services are directly linked to better post-school outcomes for students with disabilities (National Alliance for Secondary Education and Transition (NASET), 2005; Test, Fowler, Richter, White, Mazzotti, Walker, Kohler & Kortering, 2009; Test, Mazzotti, Mustian, Fowler, Kortering & Kohler, 2009). Researchers

[1] As used here, an IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 34 CFR 300.320 through 300.324 (34 CFR 300.320(a)). The term *IEP Team* means a group of individuals described in 34 CFR 300.321 that is responsible for developing, reviewing, or revising an IEP for a child with a disability (34 CFR 300.23). An IEP Team includes both parents and school officials. Additionally, if a purpose of an IEP Team meeting will be the consideration of the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals, the student must be invited to attend that meeting (34 CFR 300.321(b)(1)). Also, to the extent appropriate, with the consent of the parents or a student who has reached the age of majority, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services to an IEP Team meeting where postsecondary goals and transition services are considered (34 CFR 300.321(b)(3)).

[2] The term *transition services* means a coordinated set of activities for a child with a disability that—(A) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. (20 U.S.C. 1401(34)).

have identified evidence-based practices for transition services (*e.g.,* teaching employment skills using community-based instruction, encouraging and facilitating self-directed IEPs, teaching parents and families about transition, and structuring programs to extend services beyond secondary school) that help to improve student outcomes and better prepare students for college, other postsecondary education and training, and the workforce (Cobb & Alwell, 2009; NASET, 2005; Test, Fowler *et al.,* 2009; Test, Mazzotti *et al.,* 2009). Further, a review of research and practice indicates that LEAs and schools can implement and scale-up evidence-based practices with fidelity when proper supports, such as ongoing consultation and coaching for key staff, regular evaluation of staff performance, and data-based decision-making, are in place (Fixsen, Naoom, Blasé, Friedman, & Wallace, 2005). To improve postsecondary success for students with disabilities, LEAs and schools need more support in ensuring the delivery and implementation of effective transition services (Landmark, Ju, & Zhang, 2010).

President Obama has established a goal that by 2020, the United States will once again have the highest proportion of college graduates in the world. To accomplish this goal, we need to better prepare all high school students for postsecondary education and employment; students with disabilities will need more preparation for these post-school outcomes than most. Data suggest that many high school students are underprepared to enter postsecondary education and employment settings (Casner-Lotto & Barrington, 2006; U.S. Department of Education, 2004). The National Longitudinal Transition Study (NLTS–2) reports considerable gaps in achievement in the core academic subjects between students with disabilities and their non-disabled peers and suggests that students with disabilities are less likely to enroll in postsecondary education programs (Newman, Wagner, Cameto, & Knokey, 2009; Wagner, Newman, Cameto, & Levine, 2006). Students with disabilities are also less likely to enter post-school employment. The U.S. Department of Labor's Bureau of Labor Statistics (BLS) reported that in May of 2009, only 22.9 percent of individuals with disabilities—as compared to 71.1 percent of the general population—were in the workforce (BLS, 2009). Post-school outcomes are even more discouraging for particular subpopulations of individuals with disabilities, including individuals with emotional disturbance or intellectual disabilities and those from culturally and linguistically diverse backgrounds (Newman *et al.,* 2009).

To improve post-school outcomes for students with disabilities, LEAs and schools need support in (1) Accessing or establishing programs and initiatives designed to ensure college- and career-readiness, such as more challenging or alternative courses, as well as work-based learning experiences; [3] and (2) facilitating the participation and completion in those programs and initiatives of students with disabilities. Researchers and policymakers suggest that enrollment in more rigorous, academically intense programs (*e.g.,* Advanced Placement [AP] or dual high school and college enrollment) in high school can prepare students, including those with previously low achievement levels, to enroll and persist in postsecondary education at higher rates than similar students who pursue less challenging courses of study (Adelman, 2006; College Board, 2010; Karp, Calcagno, Hughes, Jeong, Bailey, 2007; Tierney, Bailey, Constantine, Finkelstein, & Hurd, 2009). In addition, the use of context-based approaches in which academic content and career and technical education curricula are integrated has resulted in improved student performance on standardized measures of math and literacy achievement (Pearson, Sawyer, Park, Santamaria, van der Mandele, Keene, Taylor, 2010; Stone, Alfeld, Pearson, Lewis, Jensen, 2006). Preparing students with disabilities for successful post-school outcomes also involves assisting them in improving their achievement of functional skills.[4] In a study of the functional achievement of students with disabilities, a substantial number of youth with disabilities were rated at the lowest performing level when compared to their non-disabled peers (Wagner *et al,* 2006). Researchers have identified evidence-based practices that improve functional skills in activities such as balancing a checkbook and purchasing groceries (Ayers, Langone, Boon, & Norman, 2006); and locating, carrying, and purchasing items in stores (Alberto, Cihak, & Gama, 2005; Bates, Cuvi, Miner & Korabek, 2001; Cihak, Alberto, Kessler, & Taber, 2004). Researchers have also identified evidence-based practices that support gains in social skills, work-related interpersonal skills, interviewing skills, job maintenance skills, and specific job-related skills (Izzo, Cartledge, Miller, Growick, & Rutkowski, 2000). Finally, work-based learning experiences—ranging from job shadowing to internships and apprenticeships—are essential for preparing students with disabilities with the knowledge and skills needed for success in the workforce (Lynn & Mack, 2008; Symonds, Schwartz & Ferguson, 2011).

In addition to funding research on improving post-school outcomes for students with disabilities, the Department's Office of Special Education Programs (OSEP) monitors States in certain priority areas,[5] using specific indicators. States are required to monitor their LEAs using most of those same indicators (20 U.S.C. 1416(a)(3)). States report data related to 20 indicators in their IDEA, Part B State Performance Plan/Annual Performance Report (SPP/APR). IDEA, Part B Indicator 13 (Indicator 13), which concerns IEP requirements related to postsecondary goals and transition services, is a compliance indicator, and States are required to meet a 100 percent target for this indicator.[6] In addition, States collect and use Indicator 13 data, in part, to assess their LEAs' implementation of these IEP requirements. In the past 5 years, OSEP has funded the National Secondary Transition Technical Assistance Center (NSTTAC) (*http://www.nsttac.org*) to support States to develop, implement, and improve transition services and to collect and use Indicator 13 data

[3] In the past, the Department helped to support a Youth to Work Coalition (YWC)—a group of Federal agencies, businesses, and foundations—to assist businesses in creating or enhancing internship and mentoring programs focused on engaging youth with disabilities and providing them with meaningful work-based learning experiences. Developing relationships between schools and community employers with regard to internship and mentoring programs is a key strategy for connecting students with disabilities to work-based learning experiences while still in high school (Carter, Trainor, Cakiroglu, Cole, Swedeen, Ditchman & Owens, 2009).

[4] As used here, functional skills refer to four cluster areas (motor skills, social interaction and communication, personal living skills, and community living skills) (Wagner *et al,* 2006).

[5] These priority areas are: provision of a free appropriate public education in the least restrictive environment; State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services as defined in section 602(34) and 637(a)(9) of IDEA; and disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification. (20 U.S.C. 1416(a)(3)).

[6] Indicator 13 has been revised, and States reported data on the revised Indicator 13 for the first time in the Federal Fiscal Year 2009 SPP/APR, (submitted February 1, 2011 for the period covering July 1, 2009 through June 30, 2010). The text of Indicator 13 can be found at *http://www2.ed.gov/policy/speced/guid/idea/bapr/2010/b2-1820-0624bmeastable111210.doc.*

(*http://www.nsttac.org*). According to an analysis conducted by NSTTAC (2009), States initially reported relatively low levels of compliance with Indicator 13. However, in the Federal Fiscal Year (FFY) 2009 SPP/APR, (submitted February 1, 2011 for the period covering July 1, 2009 through June 30, 2010), 60 percent of States reported Indicator 13 data that ranged between 80 percent and 100 percent compliance (NSTTAC, in press). All States are required to meet Indicator 13's 100 percent compliance target.

To further improve their compliance with Indicator 13, States indicated that they will need to provide LEAs and their stakeholders (*e.g.,* parents, vocational rehabilitation counselors, postsecondary education disability service providers) with: (1) Training or professional development; (2) TA; (3) information on how to improve data collection and reporting; (4) assistance with clarifying, examining, or developing policies and procedures; and (5) strategies for improving collaboration and coordination among transition services providers (NSTTAC, 2009). States continue to need TA in order to build their capacity to meet IDEA, Part B's postsecondary goals and transition services requirements and meet the 100 percent target for compliance with Indicator 13. States also continue to need TA to ensure that all students are well prepared for college (or other postsecondary education and training) and the workforce.

The Department proposes to support a Transition to College and Careers Center (Center) to assist States and LEAs with developing appropriate, measurable postsecondary goals and implementing transition services that result in improved academic and functional achievement of students with disabilities and a successful transition to college (or other postsecondary education and training) and the workforce. The Center's scope of work would include activities that are focused on supporting the implementation of evidence-based practices for transition services and facilitating and increasing the participation of students with disabilities in programs and initiatives to ensure college- and career-readiness (*e.g.,* AP courses, dual high school and college enrollment programs, career and technical education, and work-based learning experiences).

Priority:

The purpose of this priority is to fund a cooperative agreement to support the establishment and operation of a Transition to College and Careers Center that will provide TA and disseminate useful information to SEAs, LEAs, schools, and other stakeholders to improve the: (1) Implementation and scaling up [7] of evidence-based practices [8] to assist SEAs and LEAs in the development of appropriate measurable postsecondary goals and the implementation of the transition services (as defined in section 602(34) of IDEA) that will lead to improved academic and functional [9] achievement for students with disabilities and prepare them for college or other postsecondary education and training and the workforce; (2) implementation of SEA and LEA policies, procedures, and practices that facilitate and increase the participation of students with disabilities in programs and initiatives that are designed to ensure college- and career-readiness; and (3) achievement of compliance with the 100 percent target for IDEA, Part B Indicator 13 so that SEAs and LEAs can develop, implement, and annually update IEPs for eligible students with disabilities, generally age 16 and above, that contain appropriate measurable postsecondary goals and the transition services, as defined in section 602(34) of IDEA, needed to assist students in reaching those goals. These activities will support SEA and LEA efforts to ensure that all students with disabilities are prepared for college (or other postsecondary education and training) and the workforce.

To be considered for funding under this absolute priority, applicants must meet the application requirements contained in this priority. Any project funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both the formative and summative evaluations of the project;

Note: The following Web sites provide more information on logic models: *http://www.researchutilization.org/matrix/logicmodel_resource3c.html* and *http://www.tadnet.org/model_and_performance.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services;

(d) A budget for a summative evaluation to be conducted by an independent third party;

(e) A budget for attendance at the following:

(1) A one and one half day kick-off meeting to be held in Washington, DC, within four weeks after receipt of the award, and an annual planning meeting held in Washington, DC, with the OSEP Project Officer during each subsequent year of the project period.

(2) A three-day Project Directors' Conference in Washington, DC, during each year of the project period.

(3) A two-day Technical Assistance and Dissemination Conference in Washington, DC, during each year of the project period.

(4) A two-day OSEP Leadership Mega Conference in Washington, DC, during each year of the project period.

(5) One one-day trip annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP; and

(f) A line item in the proposed budget for an annual set-aside of five percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with OSEP.

[7] For the purposes of this priority, *scale-up* means to reach ''a tipping point at which at least 60 percent of the students who could benefit from an innovation are experiencing it in their educational setting. To scale-up innovations, a State must first scale-up implementation capacity in all districts in the State''. (State Implementation and Scaling-Up of Evidence-Based Practices Center (*http://www.scalingup.org*)).

[8] For the purposes of this priority, *evidence-based practices* means practices for which there is ''strong evidence'' or ''moderate evidence'' of effectiveness as defined in the Department's notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

[9] For the purposes of this priority, *functional* is used as described in the *Analysis of Comments and Changes* section of the preamble to the final regulations in 34 CFR parts 300 and 301, (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities), published in the **Federal Register** on August 14, 2006 (71 FR 46540, 46661). Although not defined in the regulations, the term is generally understood to refer to ''skills or activities that are not considered academic or related to a child's academic achievement, * * * [but] is often used in the context of routine activities of everyday living.''

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

Project Activities. To meet the requirements of this priority, the Center, at a minimum, must conduct the following activities:

Knowledge Development Activities.

(a) Conduct a comprehensive review of studies and related evidence and prepare papers that synthesize the research on policies and practices related to the transition of students with disabilities to postsecondary education or a workforce setting (secondary transition) and college- and career-readiness among students with disabilities. In conducting the review of studies and related evidence, the Center must use standards that are consistent with those used by the What Works Clearinghouse and the definitions of *strong evidence* and *moderate evidence* contained in the *Definitions* section of the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486). The papers must present the research in a format that is accessible to the Center's relevant audiences, including SEAs, LEAs, and schools, and clearly articulate the strength (*i.e.,* internal validity) and the breadth (*i.e.,* external validity) of the research supporting the policies or practices described, and provide useful recommendations based on the research that can be incorporated into the Center's TA activities. These papers must be subject to external peer review. Topics for these papers may include, but are not limited to SEA, LEA, and school policies and practices that—

(1) Support the effective implementation and scaling up of evidence-based practices (*e.g.,* teaching employment skills using community-based instruction, encouraging and facilitating self-directed IEPs, teaching parents and families about transition, and structuring programs to extend services beyond secondary school) at the local level in developing appropriate postsecondary goals and implementing transition services, including effective strategies for developing and sustaining interagency linkages and collaboration between secondary school systems and other systems such as: Institutions of higher education (*e.g.,* two- and four-year institutions), adult service agencies (*e.g.,* vocational rehabilitation and workforce development systems), career and technical education systems, and other postsecondary training programs (*e.g.,* Job Corps);

(2) Improve postsecondary outcomes for students with disabilities across disability categories and severity levels, including particular subpopulations that tend to have the poorest postsecondary outcomes, such as individuals with emotional disturbance or intellectual disabilities and those from culturally and linguistically diverse backgrounds; and

(3) Facilitate the participation and completion of students with disabilities in programs and initiatives designed to ensure college- and career-readiness (*e.g.,* AP courses, dual high school and college enrollment programs, career and technical education, and work-based learning experiences).

(b) Conduct an analysis of IDEA, Part B State APRs and other sources of information to determine the current status of the development of appropriate postsecondary goals and the implementation of transition services that support improved performance or create barriers to improved performance.

Technical Assistance and Dissemination Activities

(a) Provide a continuum of general TA and conduct dissemination activities (*e.g.,* managing Web sites, listservs, and communities of practice; and holding conferences and training institutes) on implementing—

(1) Evidence-based practices that help to improve the academic and functional achievement of students with disabilities, including particular subpopulations of students with disabilities that tend to have the poorest outcomes, and prepare them for college (or other postsecondary education and training) and the workforce; and

(2) Policies and practices that facilitate the participation of students with disabilities in programs and initiatives designed to ensure college- and career-readiness (*e.g.,* AP courses, dual high school and college enrollment programs, career and technical education, and work-based learning experiences).

(b) Maintain a Web site that meets government or industry-recognized standards for accessibility and that links to the Web site operated by the Technical Assistance Coordination Center (TACC).

(c) Prepare and disseminate reports, documents, and other materials, including publications in peer-reviewed journals, on developing appropriate postsecondary goals and implementing transition services and related topics as requested by OSEP for specific audiences including students, teachers, educators, rehabilitation counselors, families, administrators, policymakers, and researchers. In consultation with the OSEP Project Officer, make selected reports, documents, and other materials available in both English and Spanish.

(d) Develop materials and guidance for States and provide TA related to Indicator 13 on their APRs and SPPs, as requested by OSEP.

(e) Improve data collection and reporting systems at the State and local level related to the development of postsecondary goals and implementation of transition services.

(f) Host an annual national forum for researchers, policymakers, administrators, practitioners, and other appropriate stakeholders to exchange information on developing appropriate postsecondary goals and implementing transition services designed to prepare students with disabilities for college (or other postsecondary education and training) and the workforce.

(g) Identify, in each year of the project period, a minimum of five States to receive intensive TA[10] from the Center. The purpose of the intensive TA will be to assist these States in supporting effective implementation of evidence-based practices at the SEA, LEA, and school levels, and using effective methods to scale-up the use of evidence-based practices. The dissemination of the Center's work (as described in paragraph (c) in *Technical Assistance and Dissemination Activities*) will enhance the capacity of all States to support their LEAs and schools in implementing and scaling up the use of evidence-based practices.

In its application, an applicant must describe both the process and the selection criteria that the Center will use to identify the States that will receive the intensive TA. The Center must obtain approval from OSEP before finalizing the selection criteria and making the final selection of States that will receive intensive TA. Once a State is selected, the Center must work with that State for the entire project period. (The Center must identify a minimum of five States the first year of the project period and a minimum of five more States in each of the second and third years of the project period, so that by

[10] For the purposes of this priority, *intensive TA* means TA services that require a stable, on-going negotiated relationship between the TA Center staff and the TA recipient, and include a purposeful, planned series of activities designed to reach an outcome that is valued by the host organization. Intensive TA typically results in changes to policy, program, practice, or operations that support increased recipient capacity and/or improved outcomes at one or more systems levels (State Implementation and Scaling-Up of Evidence-Based Practices Center (Fixen, Blasé, Horner,& Sugai, 2009).

the end of the project period, it is working with at least 15 States in total). The Center must provide each of these States with intensive TA in the State's first year of working with the Center. In each subsequent year the Center will provide less intensive TA devoted to resolving any remaining TA needs of the State. The Center must perform a thorough analysis of the State's needs and engage in frequent communication with the State to determine how these needs can be met. The needs assessments must be designed to identify the barriers that students with disabilities face in accessing not only the programs and initiatives designed to ensure college- and career-readiness but also the supports that are needed for successful implementation and sustainability of evidence-based practices in developing appropriate postsecondary goals and implementing effective transition services. After providing the first year of TA to the State, the Center must analyze the State's Indicator 13 data (in conjunction with other relevant information) annually for the remaining project period to inform an assessment of the State's need for any additional TA and to evaluate the impact of previous TA interventions.

(h) Produce a summary of the results of the needs assessments conducted as a part of the intensive TA activities described in paragraph (g) of *Technical Assistance and Dissemination Activities.*

Leadership and Coordination Activities.

(a) Develop collaborative partnerships with business organizations that promote employment of individuals with disabilities, such as the U.S. Business Leadership Network and the National Business and Disability Council, to create and support the operation of a Youth to Work Coalition, which is a group of Federal agencies, businesses, and foundations that will conduct activities to expand work-based learning experiences for students with disabilities. The Center, through these partnerships, must—

(1) Establish and coordinate a network of experts to provide TA to employers on establishing internships or mentoring programs for students with disabilities; and

(2) Develop tools that are designed to assist employers and schools to support work-based learning experiences.

(b) Compile and share data, as directed by OSEP, on States' APRs and updated SPPs for Indicator 13 by—

(1) Reviewing relevant sections of each State's APR and updated SPP and summarizing the data on Indicator 13;

(2) Developing a summary report for Indicator 13 that includes information about States' progress in meeting targets for the indicator, as well as any revisions made to States' monitoring and data systems, measurement systems, or improvement strategies; and

(3) Providing this summary report to OSEP in a timely manner and participating in OSEP-requested teleconferences to discuss the findings of the summary report.

(c) Establish and maintain an advisory committee to review the activities and outcomes of the Center and provide programmatic support and advice throughout the project period. At a minimum the advisory committee must convene annually, whether in person, by phone, or another means, and must represent the perspectives of individuals with disabilities or family members of students with disabilities, students, school-level transition specialists, State transition administrators, general education teachers or administrators, vocational rehabilitation counselors or administrators, postsecondary education disability service providers, adult service agencies, and other appropriate stakeholders. The Center must submit the names of proposed members of the advisory committee to OSEP for approval within eight weeks after receipt of the award.

(d) Communicate and collaborate, on an ongoing basis, with other projects funded by the U.S. Department of Education, such as the National Dropout Prevention Center for Students with Disabilities, the National Post-school Outcomes Center, the National High School Center, the Regional Resource Centers, the IDEA Partnership Project, the Postsecondary Education Programs Network, the National Alliance Technical Assistance Center, the Technical Assistance on Transition and Rehabilitation Act Project, and the National Research Center for Career and Technical Education. This collaboration could include the joint development of products, the coordination of TA services, and the planning and carrying out of TA meetings and events.

(e) Participate in, organize, or facilitate communities of practice that align with the needs of the Center's target audience. Communities of practice should align with the Center's objectives to support discussions and collaboration among key stakeholders. The following Web site provides more information on communities of practice: *http://www.tadnet.org/communities.*

(f) Prior to developing any new product, submit a proposal for the product to the TACC database for approval from the OSEP Project Officer. The development of new products should be consistent with the product definition and guidelines posted on the TACC Web site (*http://www.tadnet.org*).

(g) Contribute, on an ongoing basis, updated information on the Center's approved and finalized products and services to the TACC database.

(h) Coordinate with the National Dissemination Center for Individuals with Disabilities (*http://www.nichcy.org*) to develop an efficient and high-quality dissemination strategy that reaches broad audiences. The Center must report to the OSEP Project Officer the outcomes of these coordination efforts.

(i) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations and e-mail communication.

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Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section

681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1463 and 1481.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $1,100,000.

Maximum Awards: We will reject any application that proposes a budget exceeding $1,100,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register.**

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs, including public charter schools that are considered LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and grant recipients funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet, from the Education Publications Center (ED Pubs), or from the program office.

To obtain a copy via the Internet, use the following address: *http://www.ed.gov/fund/grant/apply/grantapps/index.html.*

To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, *toll free:* 1–877–433–7827. *Fax:* (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, *toll free:* 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.EDPubs.gov* or at its *e-mail address: edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.326J.

To obtain a copy from the program office, contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 70 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: August 9, 2011.

Deadline for Transmittal of Applications: September 8, 2011.

Applications for grants under this competition may be submitted electronically using the *Grants.gov* Apply site, or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV.7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the

Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via *Grants.gov,* you must (1) Be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *http://www.Grants.gov/applicants/get_registered.jsp.*

7. Other Submission Requirements: Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We are participating as a partner in the Governmentwide *Grants.gov* Apply site. The Transition to College and Careers Center competition, CFDA number 84.326J, is included in this project. We request your participation in *Grants.gov.*

If you choose to submit your application electronically, you must use the Governmentwide *Grants.gov* Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Transition to College and Careers Center competition at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.326, not 84.326J).

Please note the following:

- Your participation in *Grants.gov* is voluntary.
- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov,* we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov.*
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.
- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- If you submit your application electronically, you must attach any narrative sections of your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. (This notification indicates receipt by *Grants.gov* only, not receipt by the Department.) The Department then will retrieve your application from *Grants.gov* and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date. *Application Deadline Date Extension in Case of Technical Issues With the Grants.gov System:* If you are experiencing problems submitting your application through *Grants.gov,* please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov,* along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326J), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326J), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays. *Note for Mail or Hand Delivery of Paper Applications:* If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under section 682(b) of the IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within the specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR

75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program. These measures focus on the extent to which projects provide high-quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Michael F. Slade, U.S. Department of Education, 400 Maryland Avenue, SW., room 4083, Potomac Center Plaza (PCP), Washington, DC 20202–2550. *Telephone:* (202) 245–7527.

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. *Telephone:* (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

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.

Dated: August 4, 2011.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2011–20184 Filed 8–8–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration panel decisions under the Randolph-Sheppard Act.

SUMMARY: The Department of Education (Department) gives notice that on May 3, 2010, and April 19, 2011, an arbitration panel rendered decisions in the matter of *Art Stevenson* v. *Oregon Commission for the Blind,* Case no. R–S/07–4. This panel was convened by the Department under 20 U.S.C. 107d–1(a), after the Department received a complaint filed by the petitioner, Art Stevenson.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the full text of the arbitration panel decisions from Suzette E. Haynes, U.S. Department of Education, 400 Maryland Avenue, SW., Room 5022, Potomac Center Plaza, Washington, DC 20202–2800. *Telephone:* (202) 245–7374. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: Under section 6(c) of the Randolph-Sheppard Act (Act), 20 U.S.C. 107d–2(c), the Secretary publishes in the **Federal Register** a synopsis of each arbitration panel decision affecting the administration of vending facilities on Federal and other property.

Background

Art Stevenson (Complainant) alleged that the Oregon Commission for the Blind, the State licensing agency (SLA), violated the Act and its implementing regulations in 34 CFR part 395. Specifically, Complainant alleged that the SLA improperly administered the transfer and promotion policies and procedures of the Oregon Randolph-Sheppard Vending Facility Program in violation of the Act, implementing regulations under the Act, and State rules and regulations in Complainant's bid to manage the Marion County vending route comprised of vending machines at the Oregon Department of Public Safety Standards and Training (DPSST).

On May 1, 2006, the SLA issued a vacancy announcement for the DPSST vending route. While the posting did not indicate that the DPSST campus would be closed, i.e., that trainees would not be permitted to return home on weekends, the SLA communicated this information at an early May meeting with the Blind Enterprise Consumer Committee, of which Complainant was a member. On May 20, 2006, the SLA informed Complainant that his bid had been accepted. On July 27, 2006, Complainant signed a vendor's operating agreement with the SLA to manage the DPSST vending route. Subsequently, on August 1, 2006, Complainant informed the SLA that he would continue to operate his current vending route in Multnomah County (Multnomah) until September 30, 2006.

On August 10, 2006, staff of the SLA informed Complainant that the Multnomah vending route was being put out to bid. On August 22, 2006, a vacancy announcement was sent to all eligible vendors. Another vendor submitted the only bid for the Multnomah vending route and he was awarded the Multnomah vending route contract on September 6, 2006.

On September 28, 2006, Complainant requested from the SLA a two-week extension on relinquishing the Multnomah vending route to the new vendor, citing low sales figures for the DPSST vending route. The SLA agreed to the extension of Complainant's request to delay turning over the Multnomah vending route to the new vendor.

At a meeting on October 3, 2006, a DPSST official informed the blind vendor and SLA for the first time that the DPSST had decided to operate the DPSST facility as an open campus in which trainees were allowed to go home on weekends. At the same time, the SLA learned that the DPSST cafeteria was selling items in competition with Complainant's vending machines.

On October 4, 2006, Complainant filed a grievance with the SLA requesting an administrative review indicating that ''there are several issues that must be addressed before I relinquish my current status as the Multnomah County vending route manager.'' Following Complainant's request for an administrative review, staff of the SLA met with him and suggested alternatives to supplement Complainant's income at DPSST. However, Complainant declined the offer and requested that he be permitted to continue operating the Multnomah vending route. The SLA denied Complainant's request. However, Complainant continued to operate the Multnomah vending route until mid-2008. On June 13, 2008, SLA staff directed Complainant to turn over keys to the Multnomah vending route to the new vendor and Complainant complied with the SLA's request.

Subsequently, Complainant filed for a State fair hearing. The SLA held a State hearing on this matter. The SLA adopted the hearing officer's decision to deny Complainant's request to continue operating the Multnomah vending route as final agency action. It is this decision on which Complainant sought review by a Federal arbitration panel.

Arbitration Panel Decisions

After hearing testimony and reviewing all of the evidence, the panel majority ruled on May 3, 2010, that Complainant did not have the right to rescind the August 1, 2006, notice of termination of his operating agreement with the SLA for the Multnomah vending route. The panel majority concluded that the change in circumstances in the DPSST vending route was the result of DPSST's unilateral decision to open the campus. It was undisputed that DPSST decided to open the campus after the bidding ended and that it did not inform the SLA of this change until after the vendor complained of unexpected low earnings soon after he began operating the vending machines.

Thus, according to the panel, the SLA was not responsible for the change simply because it occurred at the outset of the operation of the DPSST vending route instead of a month or a year into the operation. Moreover, based on information at the time of the bid, Complainant had no reasonable expectation that he would receive sufficient income from just servicing the DPSST vending route—especially since the vacancy announcement for DPSST informed bidders that additional vending would be a significant part of the DPSST vending route. Finally, when the SLA official became aware of the decision to open the campus, he immediately mitigated the impact by offering additional vending and also promptly objected upon learning that the cafeteria was selling similar items.

The panel majority also ruled that Complainant was not entitled to be restored as the manager of the Multnomah vending route. This was based upon the finding that significant inequities would have ensued had Complainant been allowed to rescind his decision to relinquish the Multnomah vending route. By the time the SLA learned of DPSST's change to an open campus, the new vendor at the Multnomah vending route had already incurred significant cost to prepare to service the Multnomah vending route. Therefore, allowing Complainant to retain the Multnomah vending route would have caused real economic harm to the new vendor.

Accordingly, the panel majority concluded that the SLA did not violate the Randolph-Sheppard Act. The panel majority denied Complainant's motion for summary judgment and granted the SLA's motion for summary judgment.

One panel member dissented from the panel majority's decision stating that Complainant had a right to rescind his agreement to operate the Multnomah vending route. This panel member concluded that, if the SLA had acted upon Complainant's rescission request promptly, no additional harm would have occurred to Complainant or the other vendor. As a remedy, this panel member would have awarded damages in an appropriate amount to Complainant for the SLA's failure to rescind his agreement in a timely manner.

On July 27, 2010, following the panel's submitting the final decision to the Department, Complainant submitted to the panel a Request for Reconsideration. However, the request did not identify any specific issues that remained to be addressed. After consultation, the panel requested by e-mail, dated August 2, 2010, that Complainant articulate the specific issues in his view that were within the panel's jurisdiction under the Randolph-Sheppard Act and identify remaining issues in light of the panel majority's ruling on May 3, 2010.

On August 17, 2010, Complainant responded to the panel with a list of eleven issues. After reviewing the list, the panel majority concluded on April 19, 2011, that Complainant had not presented issues warranting further hearing in this matter. Specifically, the panel determined that it did not have jurisdiction to consider three of the issues because they had not been addressed at the State level first. For the remainder of the issues, the panel determined that they had either already been resolved or were moot. Therefore, Complainant's Request for Reconsideration was denied.

One panel member dissented in part and concurred in part from the panel majority. This panel member dissented stating that Complainant had not waived his right to a hearing on the SLA's alleged inappropriate administration of the Randolph-Sheppard vending facility program regarding the DPSST vending route.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the Department.

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 this 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.

Dated: August 4, 2011.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2011–20231 Filed 8–8–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Certification Notice—221]

Notice of Filings of Self-Certifications of Coal Capability Under the Powerplant and Industrial Fuel Use Act

AGENCY: Office Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Filings.

SUMMARY: The owners of three new base load electric powerplants submitted coal capability self-certifications to the Department of Energy (DOE) pursuant to section 201(d) of the Powerplant and Industrial Fuel Use Act of 1978 (FUA), as amended, and DOE regulations in 10 CFR 501.60, 61. Section 201(d) of FUA requires DOE to publish a notice of receipt of self-certifications in the **Federal Register**.

ADDRESSES: Copies of coal capability self-certification filings are available for public inspection, upon request, in the Office of Electricity Delivery and Energy Reliability, Mail Code OE–20, Room 8G–024, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence at (202) 586–5260.

SUPPLEMENTARY INFORMATION: Title II of FUA, as amended (42 U.S.C. 8301 *et seq.*), provides that no new base load electric powerplant may be constructed or operated without the capability to use coal or another alternate fuel as a primary energy source.

Pursuant to FUA section 201(d), in order to meet the requirement of coal capability, the owner or operator of such a facility proposing to use natural gas or petroleum as its primary energy source shall certify to the Secretary of Energy (Secretary) prior to construction, or prior to operation as a base load electric powerplant, that such powerplant has the capability to use coal or another alternate fuel. Such certification establishes compliance with FUA section 201(a) as of the date it is filed with the Secretary. The Secretary is required to publish a notice in the **Federal Register** reciting that the certification has been filed.

The following owners of proposed new base load electric powerplants have filed self-certifications of coal-capability with DOE pursuant to FUA section 201(d) and in accordance with DOE regulations in 10 CFR 501.60, 61:

Owner: Los Esteros Critical Energy Facility, LLC.

Capacity: 307 megawatts (MW).

Plant Location: Santa Clara County, California.

In-Service Date: June 2013.

Owner: Russell City Energy Company, LLC.

Capacity: 620 megawatts (MW).

Plant Location: City of Hayward, California.

In-Service Date: June 2013.

Owner: El Segundo Energy Center LLC.

Capacity: 550 megawatts (MW).

Plant Location: City of El Segundo, Los Angeles County, California.

In-Service Date: June 2013.

Issued in Washington, DC on August 2, 2011.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2011–20123 Filed 8–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–519–000]

El Paso Natural Gas Company; Notice of Application

Take notice that on July 20, 2011, El Paso Natural Gas Company (El Paso), P.O. Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP11–519–000, a request for authority, pursuant to 18 CFR part 157 and section 7(b) of the Natural Gas Act, to abandon, in place, El Paso's El Paso-Douglas Line (Line No. 1004) in Dona Ana and Luna Counties, New Mexico. Specifically, El Paso proposes to abandon approximately 34.2 miles of 12.75-inch diameter pipeline Line No. 1004 and the related appurtenances between the Afton and Florida Compressor Stations. El Paso states that the abandonment of Line No. 1004 will have no impact on capacity and service, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this application should be directed to Susan C. Stires, Director, Regulatory Affairs Department, Colorado Interstate Gas Company, P.O. Box 1087, Colorado Springs, CO 80944, telephone no. (719) 667–7514, facsimile no. (719) 667–7534, and *e-mail: EPMGregulatoryaffairs@elpaso.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in

determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: August 23, 2011.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20058 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–521–000]

Michigan Consolidated Gas Company and Dawn Gateway Pipeline, LLC; Notice of Application

Take notice that on July 26, 2011, Michigan Consolidated Gas Company (MichCon), and Dawn Gateway Pipeline, LLC (Dawn Gateway), whose offices are co-located at One Energy Plaza, Detroit, Michigan 48226, filed in Docket No. CP11–521–000, a joint application pursuant to section 3 of the Natural Gas Act (NGA) requesting Commission authorization to (1) Permit MichCon to relinquish its existing NGA section 3 authorization and Presidential Permit that was issued to MichCon for the Belle River-St. Clair Pipeline on September 13, 1989; and (2) issue a new NGA section 3 authorization and Presidential Permit to Dawn Gateway to reflect its anticipated lease from MichCon of the Belle River-St. Clair Pipeline. Dawn Gateway states that incorporating MichCon's Belle River-St. Clair Pipeline into the new 21-mile long Dawn Gateway Pipeline system, which includes other pipeline segments in Canada, will improve the connections between Michigan and the Dawn Ontario market hub. MichCon and Dawn Gateway further have requested that the Commission grant these approvals to become effective on the date that the lease takes effect.

The application is on file with the Commission and open to public inspection. 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. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Mark Bering, Director, Marketing & Optimization, DTE Pipeline/Dawn Gateway LLC, One Energy Plaza, Detroit, MI 48226, phone (313) 235–6531 or e-mail *beringm@dteenergy.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's

environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: August 24, 2011.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20146 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13466–001]

City of Gresham; Notice of Application Accepted for Filing and Soliciting Comments, Motions to Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 13466–001.

c. *Date filed:* May 5, 2011, and supplemented on June 28, 2011, and July 26, 2011.

d. *Applicant:* City of Gresham.

e. *Name of Project:* City of Gresham Wastewater Treatment Plant Outfall Hydroelectric Project.

f. *Location:* The proposed City of Gresham Wastewater Treatment Plant Outfall Hydroelectric Project would be located at the outfall of the City of Gresham's Wastewater Treatment Plant, a wastewater treatment facility effluent outfall distribution system located in Multnomah County, Oregon. The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a—825r.

h. *Applicant Contact:* Mr. Michael Nacrelli, P.E., City of Gresham, Oregon, Department of Environmental Services, 1333 NW Eastern Parkway, Gresham, Oregon 97030; telephone (503) 661–3000.

i. *FERC Contact:* Kim Carter, telephone (202) 502–6486, and e-mail address *Kim.Carter@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* In light of the resource agencies' comments filed with the application, the 60-day timeframe specified in 18 CFR 4.43(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Project:* The proposed City of Gresham Wastewater Treatment Plant Outfall Hydroelectric Project would consist of: (1) A new intake and a new outlet pipeline (each approximately 20-feet long) that taps onto two sections of the City of Gresham's Wastewater Treatment Plant's existing 3,500-foot-long, 48-inch-diameter outfall pipe; (2) a new 16-foot-wide, 12-foot-long concrete powerhouse; (3) a new single turbine/generator unit with an installed capacity of 50 kW; (4) a new 10-foot-wide, 10-foot-long concrete building to house additional controls and equipment; and (5) appurtenant facilities. The project would have an estimated annual generation of 413,000 kilowatt-hours. The applicant plans to sell the generated energy to Portland General Electric under a power sales agreement.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street, NE., Washington, DC 20426. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, here P–13466, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. Development Application—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a competing development application. A notice of intent must be served on the applicant(s) named in this public notice.

p. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests 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 protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''COMMENTS'', ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (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, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. 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.

r. *Waiver of Pre-filing Consultation:* The applicant requested agencies to support the waiver of the Commission's consultation requirements under 18 CFR 4.38(c). In May 2010, the U.S. Environmental Protection Agency, Bureau of Reclamation, Oregon Department of Environmental Quality, Department of Public Works—City of Fairview, U.S. Fish and Wildlife Service, Naval Seafloor Cable Protection Office, U.S. Coast Guard and the Yakama Indian Nation had no concerns or issues and waived the requirement for a second and third stage consultation. Several state and federal resource agencies commented on the application but no other comments regarding the request for waiver were received. Therefore, we intend to accept the consultation that has occurred on this project during the pre-filing period and we intend to waive pre-filing consultation under section 4.38(c), which requires, among other things, conducting studies requested by resource agencies, and distributing and consulting on a draft exemption application.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20160 Filed 8–8–11; 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: RP11–1670–003.

Applicants: Eastern Shore Natural Gas Company.

Description: Eastern Shore Natural Gas Company submits tariff filing per 154.203: Revised Rates to Place in Effect to be effective 7/29/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5114.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–1670–004.

Applicants: Eastern Shore Natural Gas Company.

Description: Eastern Shore Natural Gas Company submits tariff filing per 154.203: Revised Rate Schedules to be effective 7/29/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5254.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–1936–001.

Applicants: Millennium Pipeline Company, LLC.

Description: Millennium Pipeline Company, LLC submits tariff filing per 154.203: Out-of-Cycle RAM 2011 to be effective 9/1/2011.

Filed Date: 08/01/2011.

Accession Number: 20110801–5160.

Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2180–001.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per: Correction to Volume No. 2 Table of Contents Compliance Filing to be effective N/A.

Filed Date: 08/01/2011.

Accession Number: 20110801–5122.

Comment Date: 5 p.m. Eastern Time on Monday, August 15, 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: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20064 Filed 8–8–11; 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: RP11–2302–000.

Applicants: Kinder Morgan Interstate Gas Transmission LLC.

Description: Kinder Morgan Interstate Gas Transmission LLC submits tariff filing per 154.204: Negotiated Rate 2011–07–27 Cima, Concord, Enserco to be effective 7/28/2011.

Filed Date: 07/27/2011.

Accession Number: 20110727–5072.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2303–000.

Applicants: Equitrans, L.P.

Description: Equitrans, L.P. submits tariff filing per 154.204: Equitrans' Negotiated Rate Service Agreement Filing to be effective 8/1/2011.

Filed Date: 07/27/2011.

Accession Number: 20110727–5097.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2304–000.

Applicants: Texas Eastern Transmission, LP.

Description: Texas Eastern Transmission, LP submits tariff filing per 154.203: TEMAX–TIME 3 Marietta

Extension—CP09–68 Compliance to be effective 8/26/2011.

Filed Date: 07/27/2011.

Accession Number: 20110727–5101.

Comment Date: 5 p.m. Eastern Time on Monday, August 08, 2011.

Docket Numbers: RP11–2305–000.

Applicants: Transcontinental Gas Pipe Line Company.

Description: Transcontinental Gas Pipe Line Company, LLC submits tariff filing per 154.403: S–2 Tracker Filing to be effective 8/1/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5023.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2306–000.

Applicants: Great Lakes Gas Transmission Limited Partnership.

Description: Great Lakes Gas Transmission Limited Partnership submits tariff filing per 154.203: Transporters Use Report Jan-June 2011 to be effective N/A.

Filed Date: 07/28/2011.

Accession Number: 20110728–5079.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2307–000.

Applicants: Ozark Gas Transmission, LLC.

Description: Ozark Gas Transmission, LLC submits tariff filing per 154.204: Negotiated Rate—Southwestern Energy—contract 820131 to be effective 8/1/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5093.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2308–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: Algonquin Gas Transmission, LLC submits tariff filing per 154.204: AGT Winter Operations Review to be effective 9/1/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5116.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2309–000.

Applicants: CenterPoint Energy Gas Transmission Company, LLC.

Description: CenterPoint Energy Gas Transmission Company, LLC submits tariff filing per 154.204: CEGT LLC—Negotiated Rate—August 2011—CEMI to be effective 8/1/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5140.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2310–000.

Applicants: Trailblazer Pipeline Company LLC.

Description: Penalty Revenue Crediting Report of Trailblazer Pipeline Company LLC.

Filed Date: 07/28/2011.

Accession Number: 20110728–5163.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2311–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: Algonquin Gas Transmission, LLC submits tariff filing per 154.204: ConEd 2011–08–01 Releases to be effective 8/1/2011.

Filed Date: 07/28/2011.

Accession Number: 20110728–5170.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 09, 2011.

Docket Numbers: RP11–2312–000.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corporation submits tariff filing per 154.204: 2011 August IG Rate to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5020.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2313–000.

Applicants: Dominion South Pipeline Company, LP.

Description: Dominion South Pipeline Company, LP submits tariff filing per 154.203: DSP—2011 Report of Penalty Revenues to be effective N/A.

Filed Date: 07/29/2011.

Accession Number: 20110729–5021.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2314–000.

Applicants: Trunkline Gas Company, LLC.

Description: Trunkline Gas Company, LLC submits tariff filing per 154.204: Negotiated Rates Filing—13 to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5029.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2315–000.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.204: Antero 2 to Tenaska 205 Capacity Release Negotiated Rate Agreement Filing to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5087.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2316–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: Enerquest 34686 to BP 38991 Capacity Release Negotiated Rate Agreement to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5090.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2317–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits tariff filing per 154.204: BHP Billiton Petroleum Negotiated Rate Agreement Filing to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5091.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2318–000.

Applicants: Big Sandy Pipeline, LLC.

Description: Big Sandy Pipeline, LLC submits tariff filing per 154.203: Big Sandy Fuel Filing effective 9–1–11 to be effective N/A.

Filed Date: 07/29/2011.

Accession Number: 20110729–5094.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2319–000.

Applicants: Natural Gas Pipeline Company of America LLC

Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Negotiated Rate Filing—Twin Eagle to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5126.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2320–000.

Applicants: Dauphin Island Gathering Partners.

Description: Dauphin Island Gathering Partners submits tariff filing per 154.204: Negotiated Rates 2011–07–29 to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5187.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2321–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC submits tariff filing per 154.204: Negotiated Rate 2011–07–29 BP, Johnstown to be effective 8/1/2011.

Filed Date: 07/29/2011.

Accession Number: 20110729–5188.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2322–000.

Applicants: Kinder Morgan Interstate Gas Transmission LLC.

Description: Kinder Morgan Interstate Gas Transmission LLC submits tariff filing per 154.204: Negotiated Rate 2011–07–29 Concord to be effective 8/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5191.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2323–000.
Applicants: Dominion Transmission, Inc.
Description: Dominion Transmission, Inc. submits tariff filing per 154.204: DTI—July 29, 2011 Negotiated Rate Agreement to be effective 8/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5204.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2324–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: Fayetteville Express Pipeline LLC submits tariff filing per 154.403(d)(2): FEP Semi-Annual Fuel Filing 001 to be effective 9/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5213.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2325–000.
Applicants: Columbia Gas Transmission, LLC.
Description: Columbia Gas Transmission, LLC submits tariff filing per 154.204: LNG EPCA Errata to be effective 8/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5215.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2326–000.
Applicants: Kinder Morgan Interstate Gas Transmission LLC.
Description: Kinder Morgan Interstate Gas Transmission LLC submits tariff filing per 154.204: Negotiated Rate 2011–07–29 Hastings to be effective 9/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5223.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2327–000.
Applicants: ETC Tiger Pipeline, LLC.
Description: ETC Tiger Pipeline, LLC submits tariff filing per 154.403(d)(2): Tiger Semi-Annual Fuel Filing 001 to be effective 9/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5236.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2328–000.
Applicants: Kern River Gas Transmission Company.
Description: Kern River Gas Transmission Company submits tariff filing per 154.204: 2011 Self-Contained Rate Schedules to be effective 9/1/2011.
Filed Date: 07/29/2011.
Accession Number: 20110729–5247.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2329–000.
Applicants: Cimarron River Pipeline, LLC.
Description: 2011 Annual Report of Cash Out Activity of Cimarron River Pipeline, LLC.
Filed Date: 07/29/2011.
Accession Number: 20110729–5269.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 10, 2011.

Docket Numbers: RP11–2330–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.204: Antero 3 to Tenaska 206 Capacity Release Negotiated Rate Agreement Filing to be effective 8/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5019.
Comment Date: 5 p.m. Eastern Time on Monday, August 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.

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Dated: August 1, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20051 Filed 8–8–11; 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: RP11–2331–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.402: Annual Charge Adjustment to be effective 10/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5029.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2332–000.
Applicants: Southern Natural Gas Company.
Description: Southern Natural Gas Company submits tariff filing per 154.204: SNG Name Change to be effective 8/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5040.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2333–000.
Applicants: Kinder Morgan Louisiana Pipeline LLC.
Description: Kinder Morgan Louisiana Pipeline LLC submits tariff filing per 154.402: Annual Charge Adjustment Filing to be effective 10/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5060.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2334–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: Trailblazer Pipeline Company LLC submits tariff filing per 154.402: Annual Charge Adjustment to be effective 10/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5068.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2335–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.204: BP K37–6 Amendment to Negotiated Rate Agreement Filing to be effective 8/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5091.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2336–000.
Applicants: Horizon Pipeline Company, L.L.C.
Description: Horizon Pipeline Company, L.L.C. submits tariff filing per 154.402: Annual Charge Adjustment Filing to be effective 10/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5106.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2337–000.
Applicants: Bobcat Gas Storage.
Description: Bobcat Gas Storage submits tariff filing per 154.204: Non-conforming Agreement Filing to be effective 9/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5112.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2338–000.
Applicants: Bobcat Gas Storage.
Description: Bobcat Gas Storage submits tariff filing per 154.204: Revision to FSS Form of Service Agreement to be effective 9/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5113.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2339–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.204: BP K37–7 Amendment to Negotiated Rate Agreement Filing to be effective 8/2/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5114.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2340–000.
Applicants: Discovery Gas Transmission LLC.
Description: Discovery Gas Transmission LLC submits tariff filing per 154.204: August 1, 2011 Clean-up Filing to be effective 9/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5117.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2341–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Negotiated Rate Filing—Secure Energy to be effective 8/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5121.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2342–000.
Applicants: Kinder Morgan Illinois Pipeline LLC.
Description: Kinder Morgan Illinois Pipeline LLC submits tariff filing per 154.402: Annual Charge Adjustment Filing to be effective 10/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5127.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2343–000.
Applicants: CenterPoint Energy Gas Transmission Company, LLC.
Description: CenterPoint Energy Gas Transmission Company, LLC submits tariff filing per 154.204: CEGT LLC—Negotiated Rate—August 2011—Macquarie to be effective 8/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5151.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2344–000.
Applicants: Midcontinent Express Pipeline LLC.
Description: Midcontinent Express Pipeline LLC submits tariff filing per 154.402: Annual Charge Adjustment Filing to be effective 10/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5154.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2345–000.
Applicants: Fayetteville Express Pipeline LLC.
Description: Fayetteville Express Pipeline LLC submits tariff filing per 154.204: FEP BHP NCA Filing to be effective 8/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5161.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2346–000.
Applicants: Wyoming Interstate Company, L.L.C.
Description: Wyoming Interstate Company, L.L.C. submits tariff filing per 154.403(d)(2): WIC FL&U Filing effective 9–1–11.
Filed Date: 08/01/2011.
Accession Number: 20110801–5162.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2347–000.
Applicants: Ozark Gas Transmission, L.L.C.
Description: Ozark Gas Transmission, L.L.C. submits tariff filing per 154.204: Receipt and Delivery Pressure Modification to be effective 9/1/2011.
Filed Date: 08/01/2011.
Accession Number: 20110801–5164.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2348–000.
Applicants: Wyoming Interstate Company, L.L.C.
Description: Wyoming Interstate Company, L.L.C. Request for Limited Waiver.
Filed Date: 08/01/2011.
Accession Number: 20110801–5221.
Comment Date: 5 p.m. Eastern Time on Monday, August 15, 2011.

Docket Numbers: RP11–2349–000.
Applicants: Ozark Gas Transmission, L.L.C.
Description: Ozark Gas Transmission, L.L.C. submits tariff filing per 154.204: Non-conforming Agreements to be effective 9/1/2011.
Filed Date: 08/02/2011.
Accession Number: 20110802–5037.
Comment Date: 5 p.m. Eastern Time on Monday, August 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.

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FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20065 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14136–000; 14139–000]

Lock+™ Hydro Friends Fund XXXV Riverbank Hydro No. 4, LLC; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On April 1, 2011, Lock+™ Hydro Friends Fund XXXV (Hydro Friends) and Riverbank Hydro No. 4, LLC (Riverbank Hydro) filed preliminary permit applications, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of a hydropower project at the U.S. Army Corps of Engineers' (Corps) Lock and Dam No. 5, located on the Mississippi River near Minnesota City, Minnesota, in Winona County, Minnesota, and Buffalo County, Wisconsin. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

Hydro Friends' proposed Project Oscar Project No. 14136–000 would consist of: (1) A 109-foot-wide, 40-foot-high lock frame module placed in a new gate constructed in the downstream portion of an inactive, incomplete auxiliary lock of the Lock and Dam No. 5; (2) a 109-foot-wide, 40-foot-high lock frame module placed east of the movable section of the Lock and Dam No. 5 in an existing levee of the east abutment; (3) a new switchyard and control room located on the eastern side of the dam; and (4) a new 3-mile-long, 115-kilovolt transmission line extending from the switchyard to a nearby distribution line which would feed the project power to the grid. Each lock frame module would consist of ten 7-foot-diameter hydropower turbines each rated at 650 kilowatts (kW) based on a design head of 9 feet with a total rated capacity per module of 6.5 megawatts (MW) resulting in a total project installed capacity of 13 MW. Each module would be equipped with fish/debris screens located upstream of each module and control door assemblies that can open and close off flow to the units when needed. The project's average annual generation would be 79,770 megawatt-hours (MWh), and the project would operate run-of-release.

Applicant Contact: Mr. Wayne F. Krouse, Managing Partner, Lock+™ Hydro Friends Fund XXXV, 5090 Richmond Avenue #390, Houston, TX 77056, phone (877) 556–6566, extension 709.

Riverbank Hydro's Mississippi 5 Hydroelectric Project No. 14139–000 would consist of: (1) A forebay and intake structure equipped with a trashrack constructed upstream of the powerhouse on the east section of the dam in the existing levee of the east abutment; (2) a reinforced concrete powerhouse containing five turbine-generators each with a rating of 4,000 kW for a total project installed capacity of 20 MW; (3) a tailrace directing river flows back into the Mississippi River; and (4) a 13.1-mile-long, 69-kV transmission line feeding the project power to an existing transmission line. The intake, powerhouse, and tailrace dimensions would be determined during the permit period. The project's average annual generation would be 87,000 MWh at a head range of 5.0 to 9.5 feet, and the project would operate run-of-release.

Applicant Contact: Kuo-Bao Tong, Riverbank Power Corporation, Royal Bank Plaza, South Tower, P.O. Box 166, 200 Bay Street, Suite 3230, Toronto, ON, Canada M5J 2J4, phone (416) 861–0092, extension 154.

FERC Contact: Sergiu Serban, *sergiu.serban@ferc.gov,* (202) 502–6211.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about each project, including a copy of the applications, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14136–000, or P–14139–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20155 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 739–000]

Appalachian Power Company; Notice of Authorization for Continued Project Operation

On June 29 2009, The Appalachian Power Company, licensee for the Claytor Hydroelectric Project, filed an

Application for a New License pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. The Claytor Hydroelectric Project is located on the New River in Pulaski County, Virginia.

The license for Project No. 739 was issued for a period ending June 30, 2011. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 739 is issued to the Appalachian Power Company for a period effective July 1, 2011 through June 30, 2012, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before June 30, 2012, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the Appalachian Power Company is authorized to continue operation of the Claytor Hydroelectric Project, until such time as the Commission acts on its application for a subsequent license.

Dated: July 29, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20048 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–3322–000]

PJM Interconnection, L.L.C.; Notice Establishing Post-Technical Comment Period

As indicated in the June 21, 2011 Notice in this docket, comments on the technical conference that was held on July 29, 2011, to discuss the performance measurement of demand response in PJM's capacity market, are due 15 days from the date of this conference, or Monday, August 15, 2011.

Dated: July 29, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20045 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC11–121–000]

Liberty Gas Storage, LLC; Notice of Filing

Take notice that on July 25, 2011, Liberty Gas Storage, LLC (Liberty) submitted a request for confirmation that it is not required to file FERC Form No. 2–A and will not be applicable until such time as the actual volume transactions on Liberty exceed 200,000 Dth for three consecutive calendar years. Liberty argues that given the low levels of total volume transactions on Liberty's pipeline system during the preceding three calendar years, Liberty does not meet the threshold for filing a Form 2–A. Liberty, in fact, has never met this threshold since it placed its initial facilities into service in 2007. Since the Form No. 3–Q filing requirement is applicable only when a natural gas company is obligated to file a Form 2–A, Liberty likewise believes that it is not required to file a Form No. 3–Q under present circumstances. Liberty requests the issuance of an order or other determination on this request for confirmation by September 1, 2011, which is the requested effective date for new, cost-based rates on Liberty's system.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: August 29, 2011.

Dated: July 29, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20043 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2595–134]

Wisconsin Public Service Corporation; 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:* Non-project use of project lands and waters.

b. *Project No:* 2595–134.

c. *Date Filed:* July 28, 2011.

d. *Applicant:* Wisconsin Public Service Corporation.

e. *Name of Project:* High Falls Project.

f. *Location:* Peshtigo River, Marinette County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* James Nuthals, Wisconsin Public Service Corporation, 700 North Adams Street, P.O. Box 19001, Green Bay, WI 54301–9001.

i. *FERC Contact:* Jon Cofrancesco, (202) 502–8951, *jon.cofrancesco@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* August 31, 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–2595–134) on any comments or motions filed.

k. *Description of Application:* Wisconsin Public Service Corporation requests Commission approval to authorize Mr. and Mrs. Mark Denis to construct a pathway across project lands to facilitate access between their residence, located outside the project boundary, and their existing private boat dock, located along the project reservoir shoreline. The pathway would cross through project lands classified as ''Natural Shoreline Area'' within the project's approved comprehensive land and wildlife management plan. Mr. and Mrs. Denis consulted with the U.S. Fish and Wildlife Service, National Park Service, Wisconsin Department of Natural Resources, Marinette County Land Information Committee, and adjacent landowners on the proposal.

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–2595) 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: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20059 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13005–001]

Oliver Hydro LLC; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 13005–001.

c. *Dated Filed:* May 20, 2011.

d. *Submitted by:* Symbiotics LLC, on behalf of Oliver Hydro LLC.

e. *Name of Project:* William Bacon Oliver Lock and Dam Hydroelectric Project.

f. *Location:* At the U.S. Army Corps of Engineers' (Corps) William Bacon Oliver Lock and Dam on the Black Warrior River, in Tuscaloosa County, Alabama. The project would occupy 26.9 acres of United States lands administered by the Corps' Mobile District.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Brent Smith, Symbiotics LLC, 371 Upper Terrace, Suite 2, Bend, OR 97702; (541) 330–8779; or e-mail *brent.smith@symbioticsenergy.com.*

i. *FERC Contact:* Rachel McNamara at (202) 502–8340; or e-mail at *rachel.mcnamara@ferc.gov.*

j. Symbiotics LLC, on behalf of Oliver Hydro LLC, filed its request to use the Traditional Licensing Process on May 20, 2011. Symbiotics LLC provided public notice of its request on May 23, 2011. In a letter dated July 20, 2011, the Director of the Division of Hydropower Licensing approved Symbiotics LLC's request to use the Traditional Licensing Process.

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, part 402 and (b) the Alabama State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. Symbiotics LLC, on behalf of Oliver Hydro LLC, filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

m. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov,* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

n. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: July 29, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20041 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. DI11–13–000]

Cottonwood Hydro, LLC; Notice of Petition for Declaratory Order and Soliciting Comments, Protests, and/or Motions To Intervene

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Petition for Declaratory Order.

b. *Docket No:* DI11–13–000.

c. *Date Filed:* July 22, 2011.

d. *Applicant:* Cottonwood Hydro, LLC.

e. *Name of Project:* Cottonwood Hydro Project.

f. *Location:* The existing Cottonwood Hydro Project is located on Little Cottonwood Creek, in Salt Lake County, Utah, affecting T. 35 S., R. 2 E., sec. 7, Salt Lake Meridian.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Susannah Williams, 5014 East Little Cottonwood Canyon Road, Sandy, UT 84092; *telephone:* (801) 440–9650; FAX: (801) 303–6896; *e-mail: http://www.susannah@cottonwoodhydro.com.*

i. *FERC Contact:* Any questions on this notice should be addressed to Henry Ecton, (202) 502–8768, or *e-mail address: henry.ecton@ferc.gov.*

j. *Deadline for filing comments, protests, and/or motions:* September 5, 2011.

All documents should 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 filed with: 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.* Please include the docket number (DI11–13–000) on any comments, protests, and/or motions filed.

k. *Description of Project:* The existing Cottonwood Hydro Project consists of an upper and a lower project:

The upper project consists of: (1) A fifty-foot-wide concrete weir, directing water into a 2,002-foot-long, 24–28-inch-diameter steel penstock; (2) a single-story reinforced concrete powerhouse, containing a 261-kW turbine/generator; (3) a tailrace releasing water into the intake for the lower powerhouse; (4) a 75-foot-long transmission line; and (5) appurtenant facilities.

The lower project consists of: (1) A fifty-foot-wide concrete weir, directing water into a 5,341-foot-long 24–28-inch-diameter steel penstock; (2) a two-story reinforced concrete and masonry powerhouse, containing an 850-kW turbine/generator; (3) a tailrace releasing water into Little Cottonwood Creek; (4) a 200-foot-long transmission line; and (5) appurtenant facilities.

When a Petition for Declaratory Order is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the proposed project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Locations of the Application:* Copies of this filing are on file with the Commission and are available for public inspection. This filing may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (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 filings must bear in all capital letters the title ''Comments'', ''Protests'', and/or ''Motions to Intervene'', as applicable, and the Docket Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

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: July 29, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20044 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12918–002]

FFP Project 29 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 29 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in West Feliciana and Pointe Coupee Parishes, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Sarah Bend hydrokinetic project would consist of the following: (1) Up to 2,000 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 80,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 175,200,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–12918–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20056 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12855–002]

FFP Project 11 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 11 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near Waggaman, in Jefferson and St. Charles Parishes, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Kenner Bend hydrokinetic project would consist of the following: (1) Up to 2,250 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 90,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 197,100,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–12855–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20062 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12862–002]

FFP Project 5 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 5 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near the town of Belle Chase, in Orleans and St. Bernard Parishes, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Twelve Mile Point hydrokinetic project would consist of the following: (1) Up to 5,000 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 200,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 438,000,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–12862–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20063 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12833–002]

Free Flow Power Corporation; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On March 1, 2011, Free Flow Power Corporation filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near New Orleans, in Jefferson and Orleans Parishes, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Carrollton Bend hydrokinetic project would consist of the following: (1) Up to 950 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 38,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 86,420,550 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12833–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20061 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12829–002]

Free Flow Power Corporation; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On March 1, 2011, Free Flow Power Corporation filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near New Orleans, in Jefferson and Orleans Parishes, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Greenville Bend hydrokinetic project would consist of the following: (1) Up to 1,450 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 58,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 131,905,050 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12829–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20060 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14018–000]

FFP Project 125 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 10, 2011, FFP Project 125 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near Natchez, in Adams County, Mississippi and near Vidalia, in Concordia Parish, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Vidal Island hydrokinetic project would consist of the following: (1) Up to 5,640 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 225,600 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 513,065,160 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14018–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20154 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12933–002]

FFP Project 49 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 49 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near the town of Hickman, in Fulton County Kentucky and Mississippi County, Missouri. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Hickman Bend hydrokinetic project would consist of the following: (1) Up to 2,850 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 114,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 249,660,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12933–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20153 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 47 LLC; Project No.12932–002]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 47 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in Mississippi County Arkansas and Tipton County, Tennessee. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Williams Point hydrokinetic project would consist of the following: (1) Up to 3,550 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 142,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 310,980,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12932–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20152 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 43 LLC; Project No. 12931–002]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 43 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in Mississippi County Arkansas and Tipton County, Tennessee. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Plum Point hydrokinetic project would consist of the following: (1) Up to 5,900 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 236,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 516,840,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12931–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20151 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 37 LLC; Project No.12928–002]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 37 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in Washington County Mississippi and Chicot County, Arkansas. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Anconia Point hydrokinetic project would consist of the following: (1) Up to 750 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 30,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 65,700,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 Days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12928–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20150 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 36 LLC; Project No. 12919–002]

Notice Of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 36 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in Issaquena County Mississippi and East Carroll Parish, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Cat Island hydrokinetic project would consist of the following: (1) Up to 2,800 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 112,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 245,280,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 Days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12919–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20149 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12936–002]

FFP Project 46 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 46 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near the town of Caruthersville, in Pemiscot County, Missouri and Lake County Tennessee. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Little Prairie Bend hydrokinetic project would consist of the following: (1) Up to 2,700 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 108,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 236,520,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12936–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20144 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 48 LLC; Project No.12934–002]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 48 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near the town of New Madrid, in New Madrid County, Missouri and Fulton County Kentucky. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed New Madrid Bend hydrokinetic project would consist of the following: (1) Up to 5,350 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 214,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 468,660,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12934–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20143 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 121 LLC; Project No. 14012–000]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 10, 2011, FFP Project 121 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near Vicksburg, in Warren County, Mississippi and near Tallulah in Madison Parish, Louisiana. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Vicksburg Bend hydrokinetic project would consist of the following: (1) Up to 8,340 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 333,600 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 758,681,460 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14012–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20142 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 44 LLC; Project No. 12942–002]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 44 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in Lauderdale County, Tennessee and in Mississippi County, Arkansas. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Bar Field Bend hydrokinetic project would consist of the following: (1) Up to 4,700 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 188,000 kilowatts; (3) flexible cables would convey each arrays power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 411,720,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12942–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20159 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12941–002]

FFP Project 50 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 50 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near Wickliffe, in Ballard County, Kentucky and in Mississippi County Missouri. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Wickliffe hydrokinetic project would consist of the following: (1) Up to 1,450 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 58,000 kilowatts; (3) flexible cables would convey each array's power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 127,020,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12941–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20158 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12938–002]

FFP Project 42 LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 42 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, near Memphis, in Shelby County, Tennessee and near West Memphis, in Crittenden County Arkansas. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Hope Field Point hydrokinetic project would consist of the following: (1) Up to 5,600 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 224,000 kilowatts; (3) flexible cables would convey each array's power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 490,560,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12938–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20157 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[FFP Project 45 LLC; Project No. 12937–002]

Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 1, 2011, FFP Project 45 LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of hydropower on the Mississippi River, in Mississippi County, Arkansas and Dyer County Tennessee. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Huffman Light hydrokinetic project would consist of the following: (1) Up to 1,900 SmarTurbine generating units installed in arrays on the bottom of the river; (2) the total capacity of the installation would be up to 76,000 kilowatts; (3) flexible cables would convey each array's power to a metering station; and (4) a transmission line would interconnect with the power grid. The proposed project would have an average annual generation of 166,440,000 kilowatt-hours (kWh), which would be sold to a local utility.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Boston, MA 02114; phone (978) 283–2822.

FERC Contact: Michael Spencer, (202) 502–6093.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–12937–002) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20156 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14202–000]

FFP Project 70, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On May 13, 2011, Free Flow Power Project 70, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Mississippi Lock and Dam #19 Water Power Project (Mississippi Lock and Dam #19 Project or project) to be located at the abandoned lock and dry dock area of the Army Corp of Engineer's (Corps) Mississippi Lock and Dam #19 on the Mississippi River, near Keokuk, Lee County, Iowa and Hancock County, Illinois. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The existing dam is composed of four sections: the dam, an existing hydro powerhouse, an abandoned navigational lock at which the project is proposed, and an operational navigational lock. The dam and powerhouse are owned and operated by Ameren UE, and the two lock structures are owned and operated by the Corps.

The proposed project would consist of the following: (1) A 370-foot-wide, 660-foot-long new approach channel; (2) a 500-foot-long new guide wall to separate barge traffic going into the existing operational lock and direct water flow into the powerhouse; (3) an undetermined length of new retaining wall constructed along the eastern edge of the approach channel; (4) a 200-foot-wide, 250-foot-long new reinforced concrete powerhouse containing three new turbine-generators, each rated at 17 megawatts; (5) a 520-foot-wide, 1,100 foot-long new tailrace channel; (6) a discharge retaining wall of undetermined length constructed along the existing operational lock to protect the lock foundation against scour and undermining; (7) a 60-foot-wide, 75-foot-long new substation containing a step-up transformer and high-side and low-side disconnects; (8) a 900-foot-long, 161-kilovolt (kV) transmission line connecting the substation to Ameren UE's existing infrastructure; and (9) appurtenant facilities. The estimated annual generation of the Mississippi Lock and Dam #19 Water Power Project would be 200 gigawatt-hours.

Applicant Contact: Ramya Swaminathan, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; *phone:* (978) 283–2822.

FERC Contact: Sergiu Serban; *phone:* (202) 502–6211.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14202–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: July 29, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–20042 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–517–000]

Natural Gas Pipeline Company of America LLC; Notice of Request Under Blanket Authorization

Take notice that on July 19, 2011, Natural Gas Pipeline Company of America LLC (Natural), 3250 Lacey Road, Suite 700, Downers Grove, Illinois 60515 filed a prior notice request pursuant to sections 157.205 and 157.216 of the Federal Energy Regulatory Commission's Regulations under the Natural Gas Act (NGA), as amended, for authorization to abandon by removal two 1,250 horsepower horizontal compressor units (Units 9 and 10) at Natural's Compressor Station No. 112 (CS 112) on Natural's Shamrock Lateral located near Stinnett in Moore County, Texas. Natural states that the estimated cost to replace the facilities is approximately $7.5 million. Additionally, Natural avers that Units 9 and 10 are operationally and functionally obsolete and no longer required for system operations. Natural's compressor Units 1 and 2 at CS 112 are sufficient to meet the level of service on Natural's Shamrock Lateral, all as more fully set forth in the application, which is open to the public for inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this prior notice should be directed to Bruce H. Newsome, Vice President, Regulatory Products and Services, Natural Gas Pipeline Company of America LLC, 3250 Lacey Road, 7th Floor, Downers Grove, Illinois 60515–7918, or telephone (630) 725–3070, or by e-mail *bruce_newsome@kindermorgan.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be

authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Dated: August 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20057 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–525–000]

Monroe Gas Storage Company, LLC; Notice of Request Under Blanket Authorization

Take notice that on July 29, 2011 Monroe Gas Storage Company, LLC (Monroe), Three Riverway, Suite 1350, Houston, Texas 77056, filed in the above docket, a request pursuant to section 157.213 of the Commission's Regulations under the Natural Gas Act for authorization to modify a previously approved natural gas storage injection and withdrawal well. Specifically, Monroe proposes to alter the authorized but not yet constructed Well MGS–6–W–D from a directional well to a horizontal well, changing its final bottomhole location, and rename it Well MGS–6–W–H. The filing may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this Application should be directed to J. Gordon Pennington, Attorney at Law, 2707 N. Kensington St., Arlington, VA 22207; phone 703–533–7638; e-mail: *Pennington5@verizon.net.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with he Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20148 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–522–000]

Williston Basin Interstate Pipeline Company; Notice of Request Under Blanket Authorization

Take notice that on July 26, 2011, Williston Basin Interstate Pipeline Company (Williston Basin), 1250 West Century Avenue, Bismarck, North Dakota 58503 filed a prior notice request in accordance with sections 157.210 and 157.216 of the Federal Energy Regulatory Commission's (Commission) Regulations under the Natural Gas Act and Williston Basin's blanket certificate issued in Docket Nos. CP82–487–000, *et al.,* to replace approximately 9.5 miles of 10-inch diameter pipeline with new 12-inch diameter pipeline located in Carbon County, Montana. Additionally, Williston Basin proposes to abandon in place the existing 9.5 miles of 10-inch diameter pipeline and remove all exposed pipe and the existing 12 Mile Valve. Williston Basin states that the replacement project will cost $4,722,550, all as more fully set forth in the application, which is open to the public for inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding the application should be directed to Keith A. Tiggelaar, Director of Regulatory Affairs, Williston Basin Interstate Pipeline Company, 1250 West Century Avenue, Bismarck, North Dakota 58503, or telephone (701) 530–1560, or by e-mail *keith.tiggelaar@wbip.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene

or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20147 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–518–000]

Questar Pipeline Company; Notice of Request Under Blanket Authorization

Take notice that on July 20, 2011, Questar Pipeline Company (Questar), 180 East 100 South, Salt Lake City, Utah 84111 filed a prior notice request pursuant to 18 CFR 157.205 and 157.214 for authority to increase the maximum certificated volume of natural gas to be stored at its Clay Basin storage reservoir and increase the maximum certificated shut-in pressure of Clay Basin located in Daggett County, Utah. The request was made pursuant to the blanket certificate authorization issued to Questar in Docket No. CP82–491–000, all as more fully set forth in the application, which is open to the public for inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

Any questions regarding this prior notice application should be directed to L. Bradley Burton, General Manager, Federal Regulatory Affairs, and Chief Compliance Officer, Questar Pipeline Company, 180 East 100 South, P.O. Box 45360, Salt Lake City, Utah 84145–0360, or telephone (801) 324–2459, or fax (801) 324–5834 by e-mail *brad.burton@questar.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the NGA (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Dated: August 3, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–20145 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–4141–000]

New York Independent System Operator, Inc.; Notice of Request for Waiver and Shortened Notice Period

On July 29, 2011, the New York Independent System Operator, Inc. (NYISO) filed a notification of its inability to timely complete price corrections, a request for a limited tariff waiver to permit ancillary service prices to be corrected with the corrected prices to be posted by the end of Monday, August 1, 2011, and a request for a shortened notice period and expedited Commission action. NYISO requests a shortened answer period to facilitate expedited Commission consideration. NYISO states that good cause exists for the Commission to act on an expedited basis because until the Commission acts on NYISO's waiver request, NYISO and market participants will not know if

certain posted real-time ancillary service prices are correct and final.

By this notice, the period for filing answers to NYISO's request for a tariff waiver is shortened to and including August 3, 2011.

Dated: July 29, 2011.

Nathaniel J. Davis, Sr.

Deputy Secretary.

[FR Doc. 2011–20047 Filed 8–8–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2011–0625, FRL–9449–6]

Agency Information Collection Activities; Proposed Collection; Comment Request; Identification, Listing and Rulemaking Petitions (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to the Office of Management and Budget (OMB) to renew an existing approved Information Collection Request (ICR) concerning the identification and listing of hazardous waste under RCRA. This ICR is scheduled to expire on January 31, 2012. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 11, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2011–0625, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, D.C. 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room 3334, Washington, DC 20460. 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–2011–0625. 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.*

FOR FURTHER INFORMATION CONTACT: Melissa Kaps, Office of Resource Conservation and Recovery (5304P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 703–308–6787; *fax number:* 703–308–0519; *e-mail address: kaps.melissa@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2011–0625, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What information collection activity or ICR does this apply to?

Affected entities: Entities potentially affected by this action are Business and other for-profit.

Title: Identification, Listing and Rulemaking Petitions (Renewal).

ICR numbers: EPA ICR No. 1189.24, OMB Control No. 2050–0053.

ICR status: This ICR is currently scheduled to expire on January 31, 2012. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Under the authority of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, Congress directed the U.S. Environmental Protection Agency (EPA) to implement a comprehensive program for the safe management of hazardous waste. In addition, Congress wrote that ''[a]ny person may petition the Administrator for the promulgation, amendment or repeal of any regulation'' under RCRA (section 7004(a)).

40 CFR parts 260 and 261 contain provisions that allow regulated entities to apply for petitions, variances, exclusions, and exemptions from various RCRA requirements.

Under 40 CFR 260.20(b), all rulemaking petitioners must submit basic information with their demonstrations, including name, address, and statement of interest in the proposed action. Under § 260.21, all petitioners for equivalent testing or analytical methods must include specific information in their petitions and demonstrate to the satisfaction of the Administrator that the proposed method is equal to, or superior to, the corresponding method in terms of its sensitivity, accuracy, and reproducibility. Under § 260.22, petitions to amend part 261 to exclude a waste produced at a particular facility (more simply, to delist a waste) must meet extensive informational requirements. When a petition is submitted, the Agency reviews materials, deliberates, publishes its tentative decision in the **Federal Register**, and requests public comment. EPA also may hold informal public hearings (if requested by an interested person or at the discretion of the Administrator) to hear oral comments on its tentative decision. After evaluating all comments, EPA publishes its final decision in the **Federal Register**.

Burden Statement: The annual public reporting burden for this ICR is estimated to average 27 hours per response, and the annual recordkeeping burden for this ICR is estimated to average 2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 2603.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 73,787 hours.

Estimated total annual costs: $11,917,574. This includes an estimated burden cost of $2,678,259 for labor and an estimated cost of $9,239,315 for capital investment or maintenance and operational costs.

What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another Federal Register notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 1, 2011.

Suzanne Rudzinski,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2011–20161 Filed 8–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2011–0624, FRL–9449–5]

Agency Information Collection Activities; Proposed Collection; Comment Request; Standardized Permit for RCRA Hazardous Waste Management Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request) to the Office of Management and Budget (OMB) to renew an existing approved Information Collection Request (ICR) concerning the standardized permit for RCRA hazardous waste management facilities. This ICR is scheduled to expire on January 31, 2012. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 11, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2011–0624, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room 3334, Washington, DC 20460. 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–2011–

0624. 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.*

FOR FURTHER INFORMATION CONTACT: Jeff Gaines, Office of Resource Conservation and Recovery, (5303P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–8655; fax number: 703–308–8617; e-mail address: *gaines.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2011–0624, which is available for online viewing at www.regulations.gov, or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does this Apply to?

Affected entities: Entities potentially affected by this action are Business or other for-profit.

Title: Standardized Permit for RCRA Hazardous Waste Management Facilities

ICR numbers: EPA ICR No. 1935.04, OMB Control No. 2050–0182.

ICR status: This ICR is currently scheduled to expire on January 31, 2012. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Under the authority of sections 3004, 3005, 3008 and 3010 of the Resource Conservation and Recovery Act (RCRA), as amended, the U.S. Environmental Protection Agency (EPA) is finalizing revisions to the RCRA hazardous waste permitting program to allow a ''standardized permit.'' The standardized permit is available to facilities that generate hazardous waste and routinely manage the waste on-site in non-thermal units such as tanks, containers, and containment buildings. This ICR presents a comprehensive description of the information collection requirements for owners and operators submitting applications for a standardized permit or a standardized permit modification.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 82 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the

existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 866.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 0.212.

Estimated total annual burden hours: 15,045 hours.

Estimated total annual costs: $1,203,688. This includes an estimated burden cost of $592,029 for labor and an estimated cost of $611,659 for capital investment or maintenance and operational costs.

What is the Next Step in the Process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 1, 2011.

Suzanne Rudzinski,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2011–20163 Filed 8–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2011–0626, FRL–9449–4]

Agency Information Collection Activities; Proposed Collection; Comment Request; Facility Ground-Water Monitoring Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit to the Office of Management and Budget (OMB) a request to renew an existing approved Information Collection Request (ICR) concerning groundwater monitoring reporting and recordkeeping requirements. This ICR is scheduled to expire on January 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 11, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2011–0626, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room 3334, Washington, DC 20460. 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–2011–0626. 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.*

FOR FURTHER INFORMATION CONTACT: William Schoenborn, Office of Resource Conservation and Recovery, (mail code 5303P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 703–308–8483; *fax number:* 703–308–8433; *e-mail address: schoenborn.william@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2011–0626, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What information collection activity or ICR does this apply to?

Affected entities: Entities potentially affected by this action are Business or other for-profit; and State, Local, or Tribal Governments.

Title: Facility Ground-Water Monitoring Requirements.

ICR numbers: EPA ICR No. 0959.14, OMB Control No. 2050–0033.

ICR status: This ICR is currently scheduled to expire on January 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR examines the ground-water monitoring standards for permitted and interim status facilities at 40 CFR Parts 264 and 265, as specified. The ground-water monitoring requirements for regulated units follow a tiered approach whereby releases of hazardous contaminants are first detected (detection monitoring), then confirmed (compliance monitoring), and if necessary, are required to be cleaned up (corrective action). Each of these tiers requires collection and analysis of ground-water samples. Owners or operators that conduct ground-water monitoring are required to report information to the oversight agencies on releases of contaminants and to maintain records of ground-water monitoring data at their facilities. The goal of the ground-water monitoring program is to prevent and quickly detect releases of hazardous contaminants to groundwater, and to establish a program whereby any contamination is expeditiously cleaned up as necessary to protect human health and environment. Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA) creates a comprehensive program for the safe management of hazardous waste. Section 3004 of RCRA requires owners and operators of facilities that treat, store, or dispose of hazardous waste to comply with standards established by EPA that are to protect the environment. Section 3005 provides for implementation of these standards under permits issued to owners and operators by EPA or authorized States. Section 3005 also allows owners and operators of facilities in existence when the regulations came into effect to comply with applicable notice requirements to operate until a permit is issued or denied. This statutory authorization to operate prior to permit determination is commonly known as ''interim status.'' Owners and operators of interim status facilities also must comply with standards set under Section 3004.

Burden Statement: EPA estimates that permitted facilities will incur an average reporting burden of about 10 hours per year, which includes time for developing and submitting notifications, reports, and demonstrations. They will also incur a recordkeeping burden of about 130 hours per year, which includes time for reading the regulations, implementing a ground-water monitoring system, performing and keeping records of ground-water monitoring, and maintaining records. These estimates represent the average reporting and recordkeeping burdens placed on permitted facilities for detection monitoring, compliance monitoring, or corrective action.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 989.

Frequency of response: Quarterly, semi-annually, and annually.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 121,577 hours.

Estimated total annual costs: $27,818,075. This includes an estimated burden cost of $4,628,246 and an estimated cost of $23,189,829 for capital investment or maintenance and operational costs.

What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 1, 2011.

Suzanne Rudzinski,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2011–20166 Filed 8–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OCS–EPA–R4005; FRL–9449–7]

Notice of Issuance of Final Outer Continental Shelf Air Permit for Anadarko Petroleum Corporation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: This notice is to announce that on June 15, 2011, EPA issued a final Outer Continental Shelf (OCS) air permit for Anadarko Petroleum Corporation (Anadarko). The permit authorizes Anadarko to mobilize the Transocean Discoverer Spirit drill ship and support vessels to drill a single exploration well in the Gulf of Mexico, at Lloyd Ridge Lease Block 410, to determine if natural gas reserves are present in this location. The drill site is located approximately 200 miles southwest of Panama City, Florida. The operation will last less than 92 days, and based on applicable permitting regulations, is a ''temporary source'' for permitting purposes.

DATES: *Effective Date:* This permit became effective on July 15, 2011.

ADDRESSES: The final permit, EPA's responses to the public comments and additional supporting information are available at *http://www.epa.gov/region4/air/permits/OCSPermits/AnadarkoOCS.html.* Copies of the final permit and EPA's responses to comments are also available upon request in writing. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Gregg Worley, Air Permits Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9141. Mr. Worley can also be reached via electronic mail at *worley.gregg@epa.gov.*

SUPPLEMENTARY INFORMATION: On March 25, 2011, the EPA Region 4 Office requested public comments on a proposal to issue an OCS air permit for Anadarko. During the public comment period, which ended on April 25, 2011, EPA received comments from Offshore Operators Committee and Anadarko Petroleum Corporation regarding the project. EPA carefully reviewed each of the comments submitted and, after consideration of the expressed view of all interested persons, the pertinent federal statutes and regulations, and additional material relevant to the application and contained in the administrative record, EPA made a decision in accordance with title 40 CFR 52.21 and 40 CFR part 55 to issue a final OCS permit.

40 CFR 124.19(f)(2) requires notice of any final Agency action regarding a prevention of significant deterioration (PSD) permit to be published in the **Federal Register**. Section 307(b)(1) of the Clean Air Act (CAA) provides for review of final Agency action that is locally or regionally applicable in the United States Court of Appeals for the appropriate circuit. Such a petition for review of final Agency action must be filed within 60 days from the date of notice of such action in the **Federal Register**. (However, 40 CFR 124.19(f)(1) provides that, for purposes of judicial review under the CAA, final Agency action occurs when a final PSD permit is issued or denied by EPA *and* agency review procedures are exhausted.) Any person who filed comments on the draft permit was provided the opportunity to petition the Environmental Appeals Board by July 15, 2011. No petitions were submitted, therefore the permit became effective on July 15, 2011.

Dated: July 29, 2011.

Beverly H. Banister,

Director, Air, Pesticides and Toxics Management Division, Region 4.

[FR Doc. 2011–20213 Filed 8–8–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 11–1221]

Emergency Access Advisory Committee; Announcement of Date of Next Meeting

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the date of the Emergency Access Advisory Committee's (Committee or EAAC) next meeting. The August meeting will continue deliberations to develop recommendations to the Commission as required in the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).

DATES: The Committee's next meeting will take place on Friday, August 12, 2011, 10:30 a.m. to 3:30 p.m. (EST), at the headquarters of the Federal Communications Commission (FCC).

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Commission Meeting Room, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Cheryl King, Consumer and Governmental Affairs Bureau, 202–418–2284 (voice) or 202–418–0416 (TTY), e-mail: *Cheryl.King@fcc.gov;* and/or Patrick Donovan, Public Safety and Homeland Security Bureau, 202–418–2413, e-mail: *Patrick.Donovan@fcc.gov.*

SUPPLEMENTARY INFORMATION: On December 7, 2010, in document DA 10–2318, Chairman Julius Genachowski announced the establishment, and appointment of members and Co-Chairpersons, of the EAAC, an advisory committee required by the CVAA, Pub. L. 111–260, which directs that an advisory committee be established for the purpose of achieving equal access to emergency services by individuals with disabilities as part of our nation's migration to a national Internet protocol-enabled emergency network, also known NG9–1–1.

The purpose of the EAAC is to determine the most effective and efficient technologies and methods by which to enable access to NG9–1–1 emergency services by individuals with disabilities. In order to fulfill this mission, the CVAA directs that within one year after the EAAC's members are appointed, the Committee shall conduct a national survey, with the input of groups represented by the Committee's membership, after which the Committee shall develop and submit to the Commission recommendations to implement such technologies and methods. The EAAC survey has been completed and the EAAC is now considering recommendations based on the survey results. The August meeting will continue deliberations to develop recommendations to the Commission as required in the CVAA.

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Federal Communications Commission.

Karen Peltz Strauss,

Deputy Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. 2011–20203 Filed 8–8–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

DATE: August 5, 2011.

TIME AND DATE: 11 a.m., Thursday, August 11, 2011.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Bill Simola, employed by United Taconite, LLC*, Docket No. LAKE 2010–128–M. (Issues include whether an agent of a limited liability company can be liable for a civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c).)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Emogene Johnson,

Administrative Assistant.

[FR Doc. 2011–20352 Filed 8–5–11; 4:15 pm]

BILLING CODE 6735–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 24, 22011.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Patriot Financial Partners, GP, L.P.; Patriot Financial Partners, L.P.; Patriot Financial Partners Parallel, L.P.; Patriot Financial Partners, GP, LLC; Patriot Financial Managers, L.P.; Patriot Financial Mangers, LLC; Ira M. Lubert; W. Kirk Wycoff; and James J. Lynch,* all of Philadelphia, Pennsylvania; to acquire voting shares of ECB Bancorp, Inc., and thereby indirectly acquire voting shares of The East Carolina Bank, both in Engelhard, North Carolina.

B. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *James Philip O'Jibway, Bellville, Texas, individually; James Phillip O'Jibway, Kay Holmes O'Jibway, Justin Glenn Brandt, and Jill O'Jibway Brandt, all of Bellville, Texas; Jeffrey Philip O'Jibway, Joseph Austin O'Jibway, and Toby Don O'Jibway, all of Austin, Texas; Jay William O'Jibway, Fort Worth, Texas; William Beckham Holmes Jr., and Glenda Gabbard Holmes both of Boulder, Colorado, (collectively known as the O'Jibway Family Group);* to retain control of Austin County Bancshares, Inc., and thereby indirectly retain control of Austin County State Bank, both in Bellville, Texas.

Board of Governors of the Federal Reserve System, August 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–20129 Filed 8–8–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 2, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Farmers and Merchants Bancshares, Inc.,* Crescent, Oklahoma; to acquire 100 percent of the voting shares of Farmers & Merchants Bank, Crescent, Oklahoma.

Board of Governors of the Federal Reserve System, August 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–20131 Filed 8–8–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y

(12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 24, 2011.

A. FEDERAL RESERVE BANK OF NEW YORK (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. *ES Bancshares Inc.*, Newburgh, New York; to engage *de novo* through its subsidiary, Empire Lockbox Settlements, Inc., Newburgh, New York, and thereby engage in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

B. FEDERAL RESERVE BANK OF ATLANTA (Chapelle Davis, Acting Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *First Bank of Miami Shares, Inc.,* Coral Gables, Florida; to retain FBM International Advisors, Inc., Coral Gables, Florida, and thereby engage in investment advisory activities, pursuant to section 228.28(b)(6)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, August 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–20130 Filed 8–8–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: 10 a.m. (EST). August 15, 2011.

PLACE: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the July 18, 2011 Board member meeting

2. Thrift Savings Plan activity report by the Executive Director

a. Monthly Participant Activity Report;

b. Monthly Investment Performance Review;

c. Legislative Report.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: August 4, 2011.

Thomas K. Emswiler,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2011–20232 Filed 8–5–11; 11:15 am]

BILLING CODE 6760–01–P

GENERAL SERVICES ADMINISTRATION

[GSA Bulletin FTR 11–08; Docket 2011—0002, Sequence 6]

Federal Travel Regulation (FTR); Relocation Allowances—Standard Mileage Rate for Moving Purposes

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

ACTION: Notice of a bulletin.

SUMMARY: The Internal Revenue Service (IRS) Standard Mileage Rate for moving purposes is the rate at which agencies will reimburse an employee for using a privately owned vehicle for relocation on a worldwide basis. On June 23, 2011, the IRS announced that as of July 1, 2011, the relocation mileage rate would increase to $0.235 until December 31, 2011. FTR Bulletin 11–08 and all other FTR Bulletins may be found at *http://www.gsa.gov/federaltravelregulation.*

DATES: *Effective Date:* This notice is effective August 9, 2011.

Applicability Date: This notice applies to relocations performed on or after July 1, 2011, until December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Ed Davis, Office of Governmentwide Policy (M), Office of Travel, Transportation and Asset Management (MT), General Services Administration at (202) 208–7638 or via e-mail at *ed.davis@gsa.gov.* Please cite FTR Bulletin 11–08.

Dated: July 21, 2011.

Craig J. Flynn,

Deputy Director, Office of Travel, Transportation and Asset Management, Office of Governmentwide Policy.

[FR Doc. 2011–20188 Filed 8–8–11; 8:45 am]

BILLING CODE 6860–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Renewal of Charter for the Presidential Advisory Council on HIV/AIDS

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health, Office of HIV/AIDS Policy.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services is hereby giving notice that the charter for the Presidential Advisory Council on HIV/AIDS (PACHA; the Council) has been renewed.

FOR FURTHER INFORMATION CONTACT: Mr. Melvin Joppy, Committee Manager, Presidential Advisory Council on HIV/AIDS, Department of Health and Human Services, 200 Independence Avenue, SW., Room 443H Humphrey Building, Washington, DC 20201; (202) 690–5560. More detailed information about PACHA can be obtained by accessing the Council's Web site, *http://www.pacha.gov.*

SUPPLEMENTARY INFORMATION: PACHA is a discretionary Federal advisory committee. The Council was established under Executive Order 12963, dated June 14, 1993, and amended under Executive Order 13009, dated June 14, 1995. The Council provides advice, information, and recommendations to the Secretary regarding programs and policies to promote effective prevention and cure of HIV disease and AIDS. The functions of the Council are solely advisory in nature.

To carry out its mission, PACHA provides advice, information, and recommendations to the Secretary regarding programs and policies to (a) reduce HIV incidence; (b) advance research on HIV/AIDS; (c) improve health outcomes and ensure people living with HIV have access to quality health care; (d) address HIV-related health disparities; and (e) provide global leadership in responding to the HIV pandemic and expand access to treatment, care, and prevention for people infected with and affected by HIV/AIDS around the world.

On July 27, 2011, the Secretary of Health and Human Services approved for the PACHA charter to be renewed. The new charter was effected and filed with the appropriate Congressional offices and Library of Congress on July 27, 2011. Renewal of the PACHA charter gives authorization for the Council to continue to operate until July 27, 2013.

A copy of the PACHA charter is available on the Council Web site at *http://www.pacha.gov.* A copy of the

charter also can be obtained by accessing the FACA database that is maintained by the Committee Management Secretariat under the General Services Administration. The Web site address for the FACA database is *http://www.fido.gov/facadatabase.*

Christopher H. Bates.

Executive Director, Presidential Advisory Council on HIV/AIDS.

[FR Doc. 2011–20230 Filed 8–8–11; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Meeting of the Presidential Commission for the Study of Bioethical Issues

AGENCY: Department of Health and Human Services, Office of the Assistant Secretary for Health, Presidential Commission for the Study of Bioethical Issues.

ACTION: Notice of meeting.

SUMMARY: The Presidential Commission for the Study of Bioethical Issues will conduct its sixth meeting in August. At this meeting, the Commission will discuss research into the U.S. Public Health Service STD inoculation and serological studies in Guatemala from 1946–1948, and the current Federal standards regarding human subjects protection in scientific studies.

DATES: The meeting will take place Monday and Tuesday, August 29 and 30, 2011.

ADDRESSES: The Ritz-Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037. Phone 202–835–0500.

FOR FURTHER INFORMATION CONTACT: Hillary Wicai Viers, Communications Director, Presidential Commission for the Study of Bioethical Issues, 1425 New York Avenue, NW., Suite C–100, Washington, DC 20005. *Telephone:* 202–233–3960. *E-mail: Hillary.Viers@bioethics.gov.* Additional information may be obtained at *http://www.bioethics.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act of 1972, Public Law 92–463, 5 U.S.C. app. 2, notice is hereby given of the sixth meeting of the Presidential Commission for the Study of Bioethical Issues (the Commission). The meeting will be held from 10 a.m. to approximately 4 p.m. on Monday, August 29, 2011, and from 9 a.m. to approximately 4 p.m. on Tuesday, August 30, 2011, in Washington, DC. The meeting will be open to the public with attendance limited to space available. The meeting will also be webcast at *http://www.bioethics.gov.*

Under authority of Executive Order 13521, dated November 24, 2009, the President established the Commission. The Commission is an advisory panel of the nation's leaders in medicine, science, ethics, religion, law, and engineering. The Commission advised the President on bioethical issues arising from advances in biomedicine and related areas of science and technology. The Commission seeks to identify and promote policies and practices that ensure scientific research, health care delivery, and technological innovation are conducted in a socially and ethically responsible manner.

The main agenda items for this sixth meeting are to review Public Health Service STD inoculation and serological studies in the 1940s in Guatemala as well as contemporary Federal standards for human subjects protections in scientific studies supported by the Federal government as requested by President Obama on November 24, 2010.

The draft meeting agenda and other information about PCSBI, including information about access to the webcast, will be available at *http://www.bioethics.gov.*

The Commission welcomes input from anyone wishing to provide public comment on any issue before it. Respectful debate of opposing views and active participants by citizens in public exchange of ideas can enhance decisions that are reached and the overall public understanding of them. The Commission is particularly interested in receiving oral comments during the meeting that are responsive to specific sessions. Written comments will be accepted at the registration desk and comment forms will be provided for members of the public to write down questions for the Commission as they arise. To accommodate as many speakers as possible the time for each individual to speak may be limited. If the number of individuals wishing to speak is greater than can reasonably be accommodated during the scheduled meeting, the Commission may randomly select comments.

Anyone planning to attend the meeting who needs special assistance, such as sign language interpretation or other reasonable accommodations, should notify Esther Yoo (contact information above) in advance of the meeting. The Commission will make every effort to accommodate persons who need special assistance.

Written comments will also be accepted and are especially welcome. Please address written comments by e-mail to *info@bioethics.gov,* or by mail to the following address: Public Commentary, Presidential Commission for the Study of Bioethical Issues, 1425 New York Ave., NW., Suite C–100, Washington, DC 20005. Comments will be publicly available, including any personally identifiable or confidential business information that they contain. Trade secrets should not be submitted.

Dated: July 29, 2011.

Valerie H. Bonham,

Executive Director, Presidential Commission for the Study of Bioethical Issues.

[FR Doc. 2011–20195 Filed 8–8–11; 8:45 am]

BILLING CODE 4154–06–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Re-charter of the Natonal Vaccine Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health, National Vaccine Program Office.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services is hereby giving notice that the National Vaccine Advisory Committee (NVAC) has been rechartered.

FOR FURTHER INFORMATION CONTACT: LCDR Guillermo Aviles-Mendoza, Public Health Advisor, National Vaccine Program Office, Department of Health and Human Services, Room 739G.4 Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. *Phone:* (202) 205–2982; *Fax:* (202) 690–4631; *e-mail: nvpo@hhs.gov.*

SUPPLEMENTARY INFORMATION: *NVAC is a non-discretionary Federal advisory committee. The establishment of NVAC was mandated under Section 2105 (42 U.S.C. Section 300aa-5) of the Public Health Service (PHS) Act, as amended. NVAC advises and makes recommendations to the Director, National Vaccine Program (NVP), on matters related to the Program's responsibilities. The Assistant Secretary for Health is appointed to serve as the Director, NVP.*

To carry out its mission, NVAC (1) studies and recommends ways to encourage the availability of an adequate supply of safe and effective vaccination products in the United States; (2) recommends research priorities and other measures the Director of the NVP should take to enhance the safety and efficacy of

vaccines; (3) advises the Director of the NVP in the implementation of Sections 2102 and 2103 of the PHS Act; and (4) identifies annually for the Director of the NVP the most important areas of governmental and non-governmental cooperation that should be considered in implementing Sections 2101 and 2103 of the PHS Act.

NVAC was established on July 30, 1987. As a Federal advisory committee, NVAC is governed by the provisions of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App.) To comply with the guidelines under FACA, NVAC has been re-chartered at the appropriate intervals since it was established. On July 27, 2011, the Assistant Secretary for Health approved for NVAC to be rechartered. The new charter was effected and filed with the appropriate Congressional offices and Library of Congress on July 30, 2011. The rechartering of NVAC gives authorization for the Committee to continue to operate until July 30, 2013.

A copy of the NVAC charter is available on the website for the National Vaccine Program Office at http://www.hhs.gov/nvpo/nvac. A copy of the charter also can be obtained by accessing the FACA database that is maintained by the Committee Management Secretariat under the General Services Administration. The website address for the FACA database is http://fido.gov/facadatabase.

Bruce Gellin,

Deputy Assistant Secretary for Health (Vaccines and Immunization), Director, National Vaccine Program Office.

[FR Doc. 2011–20197 Filed 8–8–11; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: The OCSE–157 Child Support Enforcement Annual Data Report.

OMB No.: 0970–0177.

Description: The information obtained from this form will be used to: (1) Report Child Support Enforcement activities to the Congress as required by law; (2) calculate incentive measures performance and performance indicators utilized in the program; and (3) assist the Office of Child Support Enforcement (OCSE) in monitoring and evaluating State Child Support programs. OCSE is proposing minor changes to the OCSE–157 report instructions for medical support line items that will provide states with the option to define medical support to include private health insurance as well as other health care coverage such as Medicaid, Children's Health Insurance Program (CHIP) and other state coverage plans, and cash medical support. Further legislative or regulatory changes may be necessary to update medical child support policy.

Respondents: State, Local or Tribal Government.

Annual Burden Estimates.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–157 Child Support Annual Data Report	54	1	7	378

Estimated Total Annual Burden Hours: 378.

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, E-mail: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis

Reports Clearance Officer.

[FR Doc. 2011–20105 Filed 8–8–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Tribal Consultation Meetings

AGENCY: Administration for Children and Families' Office of Head Start (OHS).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Improving Head Start for School Readiness Act of 2007, Public Law 110–134, notice is hereby given of one-day Tribal Consultation Sessions to be held between the Department of Health and Human Services, Administration for Children and Families, Office of Head Start leadership and the leadership of Tribal Governments operating Head Start (including Early Head Start) programs. The purpose of these Consultation Sessions is to discuss ways to better meet the needs of American Indian and Alaska Native children and their families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations [42 U.S.C. 9835, Section 640(l)(4)].

DATES: October 17 and 19, 2011.

ADDRESSES: 2011 Office of Head Start Tribal Consultation Sessions will be held at the following locations: Monday, October 17, 2011— Seattle, Washington—Westin Seattle,1900 5th Avenue, Seattle, WA 98101; Wednesday, October 19, 2011—Anchorage, Alaska—Sheraton Anchorage Hotel & Spa, 401 East 6th Avenue, Anchorage, AK 99501.

FOR FURTHER INFORMATION CONTACT: Camille Loya, Acting Regional Program Manager Region XI, e-mail *Camille.Loya@acf.hhs.gov* or phone (202) 401–5964. Additional information and online meeting registration is available at *http://www.headstartresourcecenter.org.*

SUPPLEMENTARY INFORMATION: The Department of Health and Human Services (HHS) announces Office of Head Start (OHS) Tribal Consultations

for leaders of Tribal Governments operating Head Start and Early Head Start programs in Region X and in Alaska. The Consultation Session for Region X will take place Monday, October 17, 2011, in Seattle, Washington. The Consultation Session for the State of Alaska will take place Wednesday, October 19, 2011, in Anchorage, Alaska, immediately preceding the annual Alaska Federation of Natives convention. We are convening the OHS Tribal Consultations in conjunction with other Tribal Leader events in order to minimize the financial and travel burden for participants.

The agendas for both scheduled OHS Tribal Consultations will be organized around the statutory purposes of Head Start Tribal Consultations related to meeting the needs of American Indian and Alaska Native children and families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations. In addition, OHS will share actions taken and in progress to address the issues and concerns raised in 2010 OHS Tribal Consultations.

Tribal leaders and designated representatives interested in submitting written testimony or proposing specific agenda topics for the Seattle or Anchorage Consultation Sessions should contact Camille Loya at *Camille.Loya@acf.hhs.gov* at least three days in advance of the Session. Proposals should include a brief description of the topic area along with the name and contact information of the suggested presenter.

The Consultation Sessions will be conducted with elected or appointed leaders of Tribal Governments and their designated representatives [42 U.S.C.9835, Section 640(l)(4)(A)]. Designees must have a letter from the Tribal Government authorizing them to represent the Tribe. The letter should be submitted at least three days in advance of the Consultation Session to Camille Loya at (202) 205–9721 (fax). Other representatives of Tribal organizations and Native nonprofit organizations are welcome to attend as observers.

A detailed report of each Consultation Session will be prepared and made available within 90 days of the Consultation Session to all Tribal Governments receiving funds for Head Start and Early Head Start programs. Tribes wishing to submit written testimony for the report should send testimony to Camille Loya at *Camille.Loya@acf.hhs.gov* either prior to the Consultation Session or within 30 days after the meeting.

Oral testimony and comments from the Consultation Session will be summarized in the report without attribution, along with topics of concern and recommendations. Hotel and logistical information for all Consultation Sessions has been sent to Tribal leaders via e-mail and posted on the Head Start Resource Center Web site at *http://www.headstartresourcecenter.org.*

Dated: August 1, 2011.

Yvette Sanchez Fuentes,

Director, Office of Head Start.

[FR Doc. 2011–20071 Filed 8–8–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0116]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Device Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by September 8, 2011.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0485. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Medical Device Labeling Regulations—(OMB Control Number 0910–0485)—(Extension)

Section 502 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 352), among other things, establishes requirements for the label or labeling of a medical device so that it is not misbranded and subject to a regulatory action. Certain provisions under section 502 require manufacturers, importers, and distributors of medical devices to disclose information about themselves or the devices, on the labels or labeling for the devices.

Section 502(b) of the FD&C Act requires that for packaged devices, the label must bear the name and place of business of the manufacturer, packer, or distributor as well as an accurate statement of the quantity of the contents. Section 502(f) of the FD&C Act requires that the labeling for a device must contain adequate directions for use. FDA may however, grant an exemption, if the Agency determines that the adequate directions for use labeling requirements are not necessary for the particular case, as it relates to protection of the public health.

FDA regulations under parts 800, 801, and 809 (21 CFR parts 800, 801, and 809) require disclosure of specific information by manufacturers, importers, and distributors of medical devices about themselves or the devices, on the label or labeling for the devices to health professionals and consumers. FDA issued these regulations under the authority of sections 201, 301, 502, and 701 of the FD&C Act (21 U.S.C. 321, 331, 352, and 371). Most of the regulations under parts 800, 801, and 809 are derived from requirements of section 502 of the FD&C Act, which provides in part, that a device shall be misbranded if among other things, its label or labeling fails to bear certain required information concerning the device, is false or misleading in any particular way, or fails to contain adequate directions for use.

Reporting Burden

Sections 800.10(a)(3) and 800.12(c) require that the label for contact lens cleaning solutions bear a prominent statement alerting consumers of the tamper-resistant feature. Further, § 800.12 requires that packaged contact lens cleaning solutions contain a tamper-resistant feature, to prevent malicious adulteration.

Section 800.10(b)(2) requires that the labeling for liquid ophthalmic preparations packed in multiple-dose containers provide information on the duration of use and the necessary warning information to afford adequate protection from contamination during use.

Section 801.1 requires that the label for a device in package form, contain the name and place of business of the manufacturer, packer, or distributor.

Section 801.5 requires that labeling for a device include information on intended use as defined under § 801.4 and provide adequate directions to assure safe use by the lay consumers.

Section 801.61 requires that the principal display panel of an over-the-counter (OTC) device in package form must bear a statement of the identity of the device. The statement of identity of the device must include the common name of the device followed by an accurate statement of the principal intended actions of the device.

Section 801.62 requires that the label for an OTC device in package form must bear a statement of declaration of the net quantity of contents. The label must express the net quantity in terms of weight, measure, numerical count, or a combination of numerical count and weight, measure, or size.

Section 801.109 establishes labeling requirements for prescription devices, in which the label for the device must describe the application or use of the device, and contain a cautionary statement restricting the device for sale by, or on the order of an appropriate professional.

For prescription by a licensed practitioner, § 801.110 establishes labeling requirements for a prescription device delivered to the ultimate purchaser or user. The device must be accompanied by labeling bearing the name and address of the licensed practitioner, directions for use, and cautionary statements if any, provided by the order.

Section 801.150(e) requires a written agreement between firms involved when a nonsterile device is assembled or packaged with labeling that identifies the final finished device as sterile, for which the device is ultimately introduced into interstate commerce to an establishment or contract manufacturer to be sterilized. When a written agreement complies with the requirements under § 801.150(e), FDA takes no regulatory action against the device as being misbranded or adulterated. In addition, § 801.150(e) requires that each pallet, carton, or other designated unit, be conspicuously marked to show its nonsterile nature when introduced into interstate commerce, and while being held prior to sterilization.

Section 801.405(b)(1) provides for labeling requirements for articles, including repair kits, re-liners, pads, and cushions, intended for use in temporary repairs and refitting of dentures for lay persons. Section 801.405(b)(1) also requires that the labeling contain the word ''emergency'' preceding and modifying each indication-for-use statement for denture repair kits and the word ''temporary'' preceding and modifying each indication-for-use statement for re-liners, pads, and cushions.

Section 801.405(c) provides for labeling requirements that contain essentially the same information described under § 801.405(b)(1). The information is intended to enable a lay person to understand the limitations of using OTC denture repair kits, and denture re-liners, pads, and cushions.

Section 801.420(c)(1) requires that manufacturers or distributors of hearing aids develop a user instructional brochure to be provided by the dispenser of the hearing aid to prospective users. The brochure must contain detailed information on the use and maintenance of the hearing aid.

Section 801.420(c)(4) establishes requirements that the user instructional brochure or separate labeling, provide for technical data elements useful for selecting, fitting, and checking the performance of a hearing aid. In addition, § 801.420(c)(4) provides for testing requirements to determine that the required data elements must be conducted in accordance with the American National Standards Institute's (ANSI) ''Specification of Hearing Aid Characteristics,'' ANSI S3.22–1996 (ASA 70–1996); (Revision of ANSI S3.22–1987), which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

Section 801.421(b) establishes requirements for the hearing aid dispenser to provide prospective users with a copy of the user instructional brochure along with an opportunity to review comments, either orally or by the predominant method of communication used during the sale.

Section 801.421(c) establishes requirements for the hearing aid dispenser to provide a copy of the user instructional brochure to the prospective purchaser of any hearing aid upon request or, if the brochure is unavailable, provide the name and address of the manufacturer or distributor from which it may be obtained.

Section 801.430(d) establishes labeling requirements for menstrual tampons to provide information on signs, risk factors, and ways to reduce the risk of Toxic Shock Syndrome (TSS).

Section 801.430(e)(2) requires menstrual tampon package labels to provide information on the absorbency term based on testing required under § 801.430(f) and an explanation of selecting absorbencies that reduce the risk of contracting TSS.

Section 801.430(f) establishes requirements that manufacturers of menstrual tampons devise and follow an ongoing sampling plan for measuring the absorbency of menstrual tampons. Further, manufacturers must use the method and testing parameters described under § 801.430(f).

Section 801.435(b), (c), and (h) establishes requirements for condom labeling to bear an expiration date that is supported by testing that demonstrates the integrity of three random lots of the product.

Section 809.10(a) and (b) establishes requirements that a label for an in vitro diagnostic device and the accompanying labeling (package insert), must contain information identifying its intended use, instructions for use and lot or control number, and source.

Section 809.10(d)(1) provides that the labeling requirements for general purpose laboratory reagents may be exempt from the requirements of § 809.10(a) and (b), if the labeling contains information identifying its intended use, instructions for use, lot or control number, and source.

Section 809.10(e) provides that the labeling for ''Analytic Specific Reagents'' (ASRs) must provide information identifying the quantity or proportion of each reagent ingredient, instructions for use, lot or control number, and source.

Section 809.10(f) provides that the labeling for OTC test sample collection systems for drugs of abuse must include information on the intended use, specimen collection instructions, identification system, and information about use of the test results. In addition, § 809.10(f) requires that this information be in language appropriate for the intended users.

Section 809.30(d) requires that advertising and promotional materials for ASRs include the identity and purity of the ASR and the identity of the analyte.

Section 1040.20(d) provides that manufacturers of sunlamp products and ultraviolet lamps are subject to the labeling regulations under part 801.

Recordkeeping Burden

Section 801.150(a)(2) establishes recordkeeping requirements for reprocessors, relabelers, or repackagers to retain a copy of the agreement containing the specifications for the processing, labeling, or repacking of the device for 2 years after the shipment or delivery of the device. Section 801.150(a)(2) also requires that the subject respondents make copies of this agreement available for inspection at any reasonable hour to any officer or employee of the Department of Health and Human Services (HHS), upon their request.

Section 801.421(d) establishes requirements for hearing aid dispensers to retain copies of all physician statements or any waivers of medical evaluation for 3 years after dispensing the hearing aid.

Section 801.410(e) requires copies of invoices, shipping documents, and records of sale or distribution of all impact resistant lenses, including finished eyeglasses and sunglasses, be maintained for 3 years by the retailer and made available upon request by any officer or employee of FDA or by any other officer or employee acting on behalf of the Secretary of HHS.

Section 801.410(f) requires that the results of impact tests and description of the test method and apparatus be retained for a period of 3 years.

Section 801.421(d) requires hearing aid dispensers to retain a copy of any written statement from a physician required under § 801.421(a)(1), or any written statement waiving medical evaluation required under § 801.421(a)(2)(iii) for 3 years after the dispensing of the hearing aid.

Section 801.435(g) requires latex condom manufacturers to document and provide, upon request, an appropriate justification for the application of the testing data from one product on any variation of that product to support expiration dating in the user labeling.

In the **Federal Register** of March 14, 2011 (76 FR 13623), FDA published a 60-day notice requesting public comment on the proposed collection of information. In response to that notice, one comment was received. The comment questioned the accuracy of FDA's estimate of the number of respondents reporting under 21 CFR 1040.20(d) regarding sunlamp labeling requirements. Specifically, the comment suggested that the Agency provided a low estimate, however the comment did not provide a basis by which FDA may make an alternative estimate. FDA based its estimate on the number of sunlamp manufacturers currently registered in FDA's Uniform Registration and Listing System (FURLS) database.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response (in hours)	Total hours
800.10(a)(3) and 800.12(c)	37	100	3,700	1	3,700
800.10(b)(2)	37	100	3,700	1	3,700
801.1	23,393	6	140,358	.1	140,036
801.5	5,000	3.5	17,500	22.35	391,125
801.61	5,000	3.5	17,500	1	17,500
801.62	1,000	5	5,000	1	5,000
801.109	18,000	3.5	63,000	17.77	1,119,510
801.110	10,000	50	500,000	0.25	125000
801.150(e)	90	20	1,800	4	7,200
801.405(b)(1)	99	1.7	168	4	673
801.405(c)	99	1.7	168	4	673
801.420(c)(1)	275	5	1,375	40	55,000
801.420(c)(4)	275	5	1,375	80	110,000
801.421(b)	10,000	160	1,600,000	0.30	480,000
801.421(c)	10,000	5	50,000	0.17	8,500
801.430(d)	45	2	90	2	180
801.430(e)(2)	45	2	90	2	180
801.430(f)	45	2	90	80	7,200
801.435(b), (c), and (h)	86	3.4	292	100	29,200
809.10(a) and (b)	1,700	6	10,200	80	816,000
809.10(d)(1)	300	2	600	40	24,000
809.10(e)	300	25	7,500	1	7,500
809.10(f)	20	1	20	100	2,000
809.30(d)	300	25	7,500	1	7,500
1040.20(d)	110	1	110	10	1,100
TOTAL					3,362,477

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED AVERAGE ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	No. of record-keepers	No. of records per record-keeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours
801.150(a)(2)	57	1	57	0.50	29
801.410(e) and (f)	1,136	924,100	27,723,000	0.0008	22,178
801.421(d)	10,000	160	1,600,000	0.25	400,000

TABLE 2—ESTIMATED AVERAGE ANNUAL RECORDKEEPING BURDEN [1]—Continued

21 CFR section	No. of record-keepers	No. of records per record-keeper	Total annual records	Average burden per recordkeeping (in hours)	Total hours
TOTAL					422,207

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The medical device labeling regulations also refer to currently approved collections of information found in FDA regulations. The collections of information under § 800.12(d) and 801.437(i) have been approved under OMB control number 0910–0183; the collections of information under § 800.12(e) have been approved under OMB control number 0910–0231; and the collections of information under § 801.435(g) have been approved under OMB control number 0910–0073.

Further, FDA concludes that labeling statements under §§ 801.63, 801.405(b)(2) and (b)(3), 801.420(c)(2) and (c)(3), 801.430(c) and (e)(1), 801.433, 801.437(d) through (g), and 809.30(d)(2), (d)(3), and (e) do not constitute a ''collection of information'' under the PRA. Rather, these labeling statements are ''public disclosure'' of information originally supplied by the Federal Government to the recipient for the purpose of ''disclosure to the public'' (5 CFR 1320.3(c)(2)).

Reporting

These estimates are based on FDA's registration and listing database for medical device establishments and FDA's knowledge of and experience with device labeling.

Recordkeeping

These estimates are based on FDA's registration and listing database for medical device establishments, Agency communications with industry, and FDA's knowledge of and experience with device labeling.

The medical device labeling regulations also refer to previously approved collections of information. The collections of information under § 800.12(d) and 801.437(i) have been approved under OMB control number 0910–0183; and the collections of information under § 800.12(e) have been approved under OMB control number 0910–0231.

The information collection requirements under § 801.63, 801.405(b)(2) and (b)(3), 801.420(c)(2) and (c)(3), 801.430(c) and (e)(1), 801.433, 801.437(d) through (g), and 809.30(d)(2), (d)(3), and (e) are not considered information collection because the public information is originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public (5 CFR 1320.3(c)(2)).

Dated: August 3, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–20098 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0064]

Ray Nathan; Denial of Hearing; Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is denying Ray Nathan's request for a hearing and is issuing an order under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) permanently debarring Nathan from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Nathan was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product. Nathan has failed to file with the Agency information and analysis sufficient to create a basis for a hearing concerning this action.

DATES: This order is effective August 9, 2011.

ADDRESSES: Submit applications for termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: G. Matthew Warren, Office of Scientific Integrity, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4210, Silver Spring, MD 20993, 301–796–4613.

SUPPLEMENTARY INFORMATION:

I. Background

On May 3, 2007, the U.S. District Court for the District of Massachusetts entered a criminal judgment against Nathan pursuant to his guilty plea for wire fraud under 18 U.S.C. 1343 and 1342. The basis for this conviction was Nathan's scheme to obtain from Lyne Laboratories (Lyne) a copy of a certificate of analysis for the drug PhosLo to determine how to manufacture a generic version of the drug. Nathan, a founder of a startup drug company named Argus Therapeutics (Argus), admitted that he created a fake email account for a senior employee at Nabi Biopharmaceuticals (Nabi), a Florida company. In an effort to obtain the certificate of analysis, he then sent an email from that account to an employee at Lyne, which manufactured PhosLo as a subcontractor for Nabi. When the Lyne employee requested a physical address to which the certificate should be sent, Nathan provided the address of another principal at Argus via email. Nathan subsequently sent a third email from the fraudulent email account to inquire about the status of his request.

Nathan is subject to debarment based on a finding, under section 306(a)(2)(A) of the FD&C Act (21 U.S.C. 335a(a)(2)(A)), that he was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product. By a letter dated March 2, 2010, FDA served Nathan a notice proposing to permanently debar him from providing services in any capacity to a person having an approved or pending drug product application. In a letter dated April 6, 2010, Nathan requested a hearing on the proposal, and he submitted materials in support of that request on May 10, 2010. In his request for a hearing, Nathan acknowledges his conviction for wire fraud under Federal law, as alleged by FDA. However, he argues that the conduct underlying the conviction does not relate to the development or approval, including the

process for development or approval, of any drug product or otherwise relate to the regulation of drugs under the FD&C Act.

We reviewed Nathan's request for a hearing, as well as the materials submitted in support of that request, and find that Nathan has not created a basis for a hearing because hearings will be granted only if there is a genuine and substantial issue of fact. Hearings will not be granted on issues of policy or law, on mere allegations, denials, or general descriptions of positions and contentions, or on data and information insufficient to justify the factual determination urged (see 21 CFR 12.24(b)).

The Chief Scientist and Deputy Commissioner for Science and Public Health has considered Nathan's arguments and concludes that they are unpersuasive and fail to raise a genuine and substantial issue of fact requiring a hearing.

II. Argument

In support of his hearing request, Nathan argues that the conduct underlying his conviction for wire fraud does not relate to the development or approval of a drug product or otherwise relate to the regulation of drugs under the FD&C Act. We need not address whether the conduct relates to the regulation of drugs under the FD&C Act because it clearly relates to the development of a drug product. Nathan argues that the ''development or approval'' of a drug product subject to FDA's premarket review begins with preclinical testing in animals and ends with postmarket studies. He contends that his actions in attempting to obtain a certificate of analysis for PhosLo do not relate to that process but instead relate to ''pre-development'' market research. Nathan maintains that he and Argus were attempting to evaluate production costs for a generic version of PhosLo and that Argus did not possess the funding necessary to pursue the steps that he asserts are associated with the actual development or approval of a drug product.

Nathan's narrow reading of section 306(a)(2)(A) is not convincing. In analyzing the scope of a statute, the first step is to ''determine whether the language at issue has a plain and unambiguous meaning.'' (*Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 340 (1997)) Statutory interpretation turns on ''the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'' (*id.* at 341). Here, as FDA has held in denying a hearing in a debarment proceeding in the past, ''[t]he statutory language, 'relating to the development or approval * * *,' by definition encompasses all things that are logically connected to the development or approval of a drug product.'' (59 FR 62399, December 5, 1994) As defined by ''Merriam-Webster's Collegiate Dictionary,'' ''develop'' means, inter alia, ''to explore the possibilities of'' and ''to make suitable for commercial * * * purposes.'' (see ''Merriam-Webster's Collegiate Dictionary,'' 10th Edition (2002)). Although Nathan argues that researching manufacturing techniques and the commercial viability of those techniques is not part of the drug development process, it is clearly a necessary step in that process. At the very least, such research relates to that development process for a drug product. Indeed, the information that Nathan attempted to obtain through his illegal conduct would have enabled Argus to begin compiling the chemistry, manufacturing, and controls section for an abbreviated new drug application (see 21 CFR 314.94(a)(9), 314.50(d)(1)). Debarring individuals who have been convicted of a felony for attempting to obtain such key information through fraudulent means is consistent with the clear remedial goals of section 306 of the FD&C Act.

III. Findings And Order

Therefore, the Chief Scientist and Deputy Commissioner for Science and Public Health, under section 306(a)(2)(A) of the FD&C Act and under authority delegated to him, finds that Nathan has been convicted a of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of a drug product.

As a result of the foregoing findings, Nathan is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective August 9, 2011 (21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(ii) and 21 U.S.C. 321(dd)). Any person with an approved or pending drug product application who knowingly uses the services of Nathan, in any capacity during his period of debarment, will be subject to civil money penalties. If Nathan, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties. In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Nathan during his period of debarment.

Any application by Nathan for termination of debarment under section 306(d) of the FD&C Act (21 U.S.C. 335a(d)) should be identified with Docket No. FDA–2010–N–0064 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j). Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: *July 7, 2011.*

Jesse L. Goodman,

Chief Scientist and Deputy Commissioner for Science and Public Health.

[FR Doc. 2011–20181 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0428]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays.'' This guidance document describes a means by which the herpes simplex virus types 1 and 2 serological assay device type may comply with the requirement of special controls for class II devices.

DATES: Submit either electronic or written comments on this guidance at any time. General comments on Agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays'' to the Division of Small Manufacturers, International and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–

0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Haja Sittana El Mubarak, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5519, Silver Spring, MD 20993–0002, 301–796–6193.

SUPPLEMENTARY INFORMATION:

I. Background

This guidance document provides recommendations on the types of information and data that FDA believes needs to be included in a 510(k) for herpes simplex virus (HSV) types 1 and 2 serological assays. HSV serological assays are devices that consist of antigens and antisera used in various serological tests to identify antibodies to HSV in serum. Additionally, some of the assays consist of HSV antisera conjugated with a fluorescent dye (immunofluorescent assays) used to identify HSV directly from clinical specimens or tissue culture isolates derived from clinical specimens. The identification aids in the diagnosis of diseases caused by HSVs and provides epidemiological information on these diseases. Herpes simplex viral infections range from common and mild lesions of the skin and mucous membranes to a severe form of encephalitis (inflammation of the brain). Neonatal herpes virus infections range from a mild infection to a severe generalized disease with a fatal outcome. We revised the existing guidance by rewriting the method comparison section and the sample selection inclusion and exclusion criteria section. The revisions define and differentiate the required studies and the study populations for the assessment of the safety and effectiveness of the different types of HSV types 1 and 2 serological assays. Additionally, the revisions include several corrections and clarifications throughout the document to ensure accuracy, consistency, and ease of reading. The draft of this guidance issued on September 28, 2010 (75 FR 59726) and the comment period closed on December 27, 2010. We received no comments on the draft guidance. Elsewhere in this issue of the **Federal Register**, FDA is finalizing the amendment of the special controls guidance document and designating this guidance as the class II special control for HSV types 1 and 2 serological assays. Following the effective date in the final rule finalizing the amendment of the special controls guidance document, this revised guidance document will serve as the special control for this device and supersedes the guidance with the same name that issued on April 3, 2007 (72 FR 15888).

II. Significance of Special Controls Guidance Document

FDA believes that adherence to the recommendations described in this guidance document, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the HSV types 1 and 2 serological assays classified under 21 CFR 866.3305. In order to be classified as a class II device, HSV types 1 and 2 serological assays must comply with the requirements of special controls; manufacturers must address the issues requiring special controls as identified in the guidance document, either by following the recommendations in the guidance document or by some other means that provides equivalent assurances of safety and effectiveness.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* To receive ''Class II Special Controls Guidance Document: Herpes Simplex Virus Types 1 and 2 Serological Assays,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1713 to identify the guidance you are requesting.

IV. Paperwork Reduction Act

This guidance refers to previously approved collections of information found in FDA regulations and guidance documents. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; and the collections of information in 21 CFR part 801 and 21 CFR 809.10 have been approved under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 3, 2011.

Nancy K. Stade,

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

[FR Doc. 2011–20117 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Immunology Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Immunology Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on October 14, 2011, from 8 a.m. to 6 p.m.

Location: Hilton Washington DC North/Gaithersburg, salons A, B, and C, 620 Perry Pkwy., Gaithersburg, MD.

Contact Person: Shanika Craig, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–6639, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and

follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On October 14, 2011, the committee will discuss, make recommendations, and vote on a premarket approval application for the Progensa PCA3 assay sponsored by Gen-Probe, Inc. The Progensa PCA3 assay is indicated for use in conjunction with other patient information to aid in the decision for repeat biopsy in men 50 years of age or older who have had one or more previous negative prostate biopsies and for whom a repeat biopsy would be recommended based on current standard of care, before consideration of PCA3 assay results. A lower PCA3 score is associated with a decreased likelihood of a positive biopsy.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before September 30, 2011. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m., immediately following lunch. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before September 22, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by September 23, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact AnnMarie Williams at 301–796–5966 at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 3, 2011.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2011–20118 Filed 8–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; The Hispanic Community Health Study (HCHS)/Study of Latinos (SOL)

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Heart, Lung, and Blood Institute (NHLBI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Hispanic Community Health Study (HCHS)/Study of Latinos (SOL). *Type of Information Collection Request:* Revision of currently approved collection. (OMB# 0925–0584). *Need and Use of Information Collection:* A baseline examination was conducted from March 3, 2008 to June 30, 2011. HCHS will follow-up new participants enrolled in the past year by telephone for dietary data, and continue to conduct annual follow-up of all participants by telephone to ascertain morbidity and mortality. Physicians/health care providers will be contacted to verify reported events for outcomes ascertainment. The Hispanic Community Health Study (HCHS)/Study of Latinos (SOL) will identify risk factors for cardiovascular and lung disease in Hispanic populations and determine the role of acculturation in the prevalence and development of these diseases. *Frequency of Response:* The participants will be contacted annually. *Affected Public:* Individuals or households; Businesses or other for profit; Small businesses or organizations. *Type of Respondents:* Individuals or households; physicians/health care providers. The annual reporting burden is as follows: Estimated Number of Respondents: 17,284; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response: 0.3072;* and *Estimated Total Annual Burden Hours Requested: 5,309.* The annualized cost to respondents is estimated at $104,718, assuming respondents time at the rate of $15 per hour and physician time at the rate of $55 per hour. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

ESTIMATE OF ANNUAL HOUR BURDEN

Type of response	Number of respondents	Frequency of responses	Average hours per response	Annual hour burden
Participant telephone Interviews:				
a. Follow-up call, Year 1	1,333	1	0.75	1,000
b. Follow-up call, Year 2	5,333	1	0.25	1,333
c. Follow-up call, Year 3,4,5,6	9,334	1	0.25	2,334
Non Participant Components:				
Physician, medical examiner, next of kin or other contact follow-up [1]	1,284	1	0.50	642
Total unique respondents	17,284			5,309

[1] Annual burden is placed on doctors and respondent relatives/informants through requests for information which will help in the compilation of the number and nature of new fatal and nonfatal events.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) 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.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Dr. Larissa Aviles-Santa, Project Officer, NIH, NHLBI, 6701 Rockledge Drive, MSC 7936, Bethesda, MD 20892–7936, or call non-toll-free number 301–435–0450 or e-mail your request, including your address to: *AvilessantaL@NHLBI.NIH.GOV.*

DATES: *Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: August 1, 2011.

Michael S. Lauer,

Director, Division of Cardiovascular Sciences, National Heart, Lung, and Blood Institute, NIH.

Lynn Susulske,

NHLBI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2011–20174 Filed 8–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine Notice of Meetings

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Board of Scientific Counselors, Lister Hill Center for Biomedical Communications.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL LIBRARY OF MEDICINE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, Lister Hill Center for Biomedical Communications.

Date: September 26–27, 2011.

Open: September 26, 2011, 9 a.m. to 11:30 a.m.

Agenda: Review of research and development programs and preparation of reports of the Lister Hill Center for Biomedical Communications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Closed: September 26, 2011, 11:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Open: September 27, 2011, 10 a.m. to 11:15 a.m.

Agenda: Review of research and development programs and preparation of reports of the Lister Hill Center for Biomedical Communications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Karen Steely, Program Assistant, Lister Hill Center for Biomedical Communications, National Library of Medicine, Building 38A, Room 7S709, Bethesda, MD 20892, 301–435–3137, *ksteely@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: August 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–20178 Filed 8–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, AD Mutation.

Date: August 30, 2011.

Time: 1 p.m. to 1:45 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PhD, DSC, Scientific Review Branch, National Institute On Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Registry For AD.

Date: August 30, 2011.

Time: 1:45 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PHD, DSC, Scientific Review Branch, National Institute On Aging, 7201 Wisconsin Avenue, Suite 2C212,

Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–20176 Filed 8–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute Of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, Review of RFA–DE–12–002; National Dental Practice-based Research, Network Limited Competition (U19).

Date: September 13, 2011.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

Contact Person: Jonathan Horsford, PhD., Scientific Review Officer, Natl Inst of Dental and Craniofacial Research, National Insitutes of Health, 6701 Democracy Blvd, Room 664, Bethesda, MD 20892, 301–594–4859, *horsforj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: August 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–20175 Filed 8–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meetings; Correction

The Substance Abuse and Mental Health Services Administration published a document in the **Federal Register** of August 2, 2011, concerning a combined meeting on August 16, 2011, of the Substance Abuse and Mental Health Services Administration's (SAMHSA) four National Advisory Councils (the SAMHSA National Advisory Council (NAC), the Center for Mental Health Services NAC, the Center for Substance Abuse Prevention NAC, the Center for Substance Abuse Treatment NAC), and the two SAMHSA Advisory Committees (Advisory Committee for Women's Services, and the Tribal Technical Advisory Committee). The document contained an incorrect date.

FOR FURTHER INFORMATION CONTACT: Cynthia A. Graham, 240–276–1692.

Correction

In the **Federal Register** of August 2, 2011, in FR Doc. 2011–19478, on page 46312, in the second column, correct the ''DATE/TIME/TYPE'' caption to read:

DATE/TIME/TYPE: Monday, August 15, 2011, from 9 a.m.–5 p.m. (Open).

Dated: August 3, 2011.

Janine Denis Cook,

Chemist, Division of Workplace Programs, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2011–20026 Filed 8–8–11; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Form G–884, Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form G–884, Request for the Return of Original Document(s).

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 17, 2011, at 76 FR 28444, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until September 8, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: Sunday Aigbe, Chief, Regulatory Products Division, USCIS, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *USCISFRComment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0100 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the 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 collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Request for the Return of Original Document(s).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–884. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The information provided will be used by the USCIS to determine whether a person is eligible to obtain original document(s) contained in an alien file.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 7,500 responses at 30 minutes (0.50) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,750 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: *August 4, 2011.*

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–20199 Filed 8–8–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Crewman's Landing Permit

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Crewman's Landing Permit (CBP Form I–95). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (76 FR 31353) on May 31, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before September 8, 2011.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

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; 44 U.S.C. 3505(c)(2)). 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: Alien Crewman Landing Permit.

OMB Number: 1651–0114.

Form Number: Form I–95.

Abstract: CBP Form I–95, *Crewman's Landing Permit,* is prepared and presented to CBP by the master or agent of vessels and aircraft arriving in the United States for alien crewmen applying for landing privileges. This form is provided for by 8 CFR 251.1(c) which states that, with certain exceptions, the master, captain, or agent shall present this form to CBP for each nonimmigrant alien crewman on board. In addition, pursuant to 8 CFR 252.1(e), CBP Form I–95 serves as the physical evidence that an alien crewmember has been granted a conditional permit to land temporarily, and it is also a prescribed registration form under 8 CFR 264.1 for crewmen arriving by vessel or air. CBP Form I–95 is authorized by Section 252 of the Immigration and Nationality Act (8 U.S.C. 1282) and is accessible at *http://forms.cbp.gov/pdf/CBP_Form_I95.pdf.*

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to this collection of information.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 433,000.

Total Number of Estimated Annual Responses: 433,000.

Estimated time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 35,939.

Dated: August 3, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–20122 Filed 8–8–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2011–0025]

Receipt of Petition To Reconcile Inconsistent Customs and Border Protection Decisions Concerning the Tariff Classification of CN–9 Solution

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of receipt of petition to reconcile inconsistent Customs and

Border Protection classification decisions; solicitation of comments.

SUMMARY: Customs and Border Protection (''CBP'') has received a petition, dated June 6, 2010, submitted by an importer (''petitioner'') under 19 CFR 177.13, requesting the reconciliation of inconsistent classification decisions under the Harmonized Tariff Schedule of the United States (''HTSUS'') of a certain CN–9 solution that has been liquidated under subheading 2842.90.90, HTSUS, at the Port of Baltimore on June 3, 2010, and under subheading 3102.60.00, HTSUS, at the Port of Long Beach on October 13, 2009. The petitioner contends that the proper classification for the CN–9 Solution is in subheading 3102.60.00, HTSUS, as ''Mineral or chemical fertilizers, nitrogenous: Double salts and mixtures of calcium nitrate and ammonium nitrate.'' This document invites comments with regard to the correctness of each classification.

DATES: Comments must be received on or before August 24, 2011.

ADDRESSES: You may submit comments, identified by *docket number,* by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2011–0025.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 799 9th Street, NW., (Mint Annex), Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and docket number for this petition to reconcile inconsistent decisions concerning the tariff classification of CN–9 Solution. 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 any comments received go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark, Trade and Commercial Regulations Branch, at (202) 325–0118. Please note that any submitted comments that CBP receives by mail will be posted on the above-referenced docket for the public's convenience.

FOR FURTHER INFORMATION CONTACT: Tamar Anolic, Tariff Classification and Marking Branch, Regulations and Rulings, Office of International Trade at (202) 325–0036.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 177.13, CBP regulations (19 CFR 177.13), on behalf of Yara North America, Inc. (''Yara''). Yara is a subset of Yara International ASA, a global firm specializing in agricultural products and environmental protection agents. It is a supplier of mineral fertilizers. As an importer of these products, Yara has received inconsistent classification decisions on its merchandise at different ports. As such, Yara meets the requirements as an interested party set forth in 19 CFR 177.13(a)(2) and 19 U.S.C. 1514(c) and meets the requirements regarding the types of decisions subject to petition set forth in 19 CFR 177.13(a)(1) and 19 U.S.C. 1514(a). Furthermore, having filed this petition within 90 days of the latest decision it received from a port, Yara meets the timeliness requirements of 19 CFR 177.13(a)(3). Lastly, Yara also meets the requirements of 19 CFR 177.13(b)(2), and specifically 19 CFR 177.13(b)(2)(i) in that their petition contains a complete description of the inconsistent decisions of which they complain. Their petition includes enough information to demonstrate the inconsistency of the decisions at the Ports. Furthermore, the company has submitted a sample that has been tested at Customs and Border Protection (''CBP'') laboratories. Yara is requesting that CBP classify the imported merchandise in subheading 3102.60.00, Harmonized Tariff Schedule of the United States (HTSUS).

This transaction in particular concerns Yara's importation of CN–9 Solution, a hydrated ammonium calcium nitrate double salt that is primarily used as a fertilizer but is also used for waste water treatment. Yara entered the subject merchandise at the Port of Long Beach between January 24, 2009 and September 8, 2009, and the Port of Baltimore on April 20, 2010, under subheading 3102.60.00, HTSUS, as ''Mineral or chemical fertilizers, nitrogenous: Double salts and mixtures of calcium nitrate and ammonium nitrate.'' Citing Legal Note 2(a)(v) to Chapter 31, HTSUS, the Port of Long Beach liquidated the subject merchandise as entered.

Citing Legal Note 5 to Chapter 28, HTSUS, the Port of Baltimore liquidated the subject merchandise under subheading 2842.90.90, HTSUS, as ''Other salts of inorganic acids or peroxoacids (including aluminosilicates whether or not chemically defined), other than azides: Other: Other.''

Comments

Pursuant to section 177.13(c), CBP regulations (19 CFR 177.13(c)), before making a determination on this matter, CBP invites written comments on this petition to resolve inconsistent CBP decisions.

The comments received in response to this notice, will be available for public inspection on the docket at *http://www.regulations.gov.* Please note that any submitted comments that CBP receives by mail will be posted on the above-referenced docket for the public's convenience.

Authority: This notice is published in accordance with section 177.13(c), CBP Regulations (19 CFR 177.13(c)).

Dated: August 3, 2011.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

[FR Doc. 2011–20119 Filed 8–8–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–FA–34]

Announcement of Funding Awards for the Self-Help Homeownership Opportunity Program (SHOP) for Fiscal Year 2010

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Fiscal Year 2010 (FY 2010) Notice of Funding Availability (NOFA) for the Self-Help Homeownership Opportunity Program (SHOP). This announcement contains the consolidated names and addresses of this year's award recipients under SHOP.

FOR FURTHER INFORMATION CONTACT: For questions concerning SHOP Program awards, contact Ginger Macomber, SHOP Program Manager, Office of Affordable Housing Programs, U.S.

Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–4500, telephone (202) 402–4605. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The SHOP program provides grants to national and regional nonprofit organizations and consortia that have experience in providing self-help housing. Grant funds are used to purchase land and install or improve infrastructure, which together may not exceed an average investment of $15,000 per dwelling unit. Low-income homebuyers contribute a minimum of 100 hours of sweat equity on the construction of their homes and/or the homes of other homebuyers participating in the local self-help housing program. Sweat equity can include, but is not limited to, assisting in the painting, carpentry, trim work, drywall, roofing and siding for the housing. Persons with disabilities can substitute administrative tasks. Donated volunteer labor is also required.

The SHOP funds together with the sweat equity and volunteer labor contributions significantly reduce the cost of the housing for the low-income homebuyers. The FY 2010 awards announced in this Notice were selected for funding in the NOFA competition posted on February 1, 2011, on the grants.gov website. Applications were scored and selected for funding based on the selection criteria in the General Section and the SHOP program NOFA.

The amount appropriated in FY 2010 to fund the SHOP grants was $26,730,000. The allocations for SHOP grantees are as follows:

Tierra del Sol Housing Corporation, 880 Anthony Drive, Anthony, NM 88021	$866,898
Community Frameworks, 409 Pacific Avenue, Bremerton, WA 98337	7,361,863
Housing Assistance Council, 1025 Vermont Avenue, Washington, DC 20005	3,131,489
Habitat for Humanity International, 121 Habitat Street, Americus, GA 31709	15,369,750
Total	26,730,000

These non-profit organizations propose to distribute SHOP funds to several hundred local affiliates that will acquire and prepare the land for construction, select homebuyers, coordinate the homebuyer sweat equity and volunteer efforts, and assist in the arrangement of interim and permanent financing for the homebuyers.

Dated: August 4, 2011.

Mercedes Márquez,

Assistant Secretary for Community Planning and Development.

[FR Doc. 2011–20186 Filed 8–8–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2011–N100; 1265–0000–10137–S3]

Kootenai National Wildlife Refuge, Boundary County, ID; Draft Comprehensive Conservation Plan and Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of our draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for the Kootenai National Wildlife Refuge (NWR, refuge) for public review and comment. The Draft CCP/EA describes our proposal for managing the refuge for the next 15 years.

DATES: To ensure consideration, we need to receive your written comments by September 12, 2011.

ADDRESSES: You may submit comments, requests for more information, or requests for copies by any of the following methods. You may request a hard copy or a CD–ROM of the documents.

E-mail: FW1PlanningComments@fws.gov. Include ''Kootenai NWR CCP'' in the subject line.

Fax: Attn: Dianna Ellis, Refuge Manager, (208) 267–3888.

U.S. Mail: Dianna Ellis, Refuge Manager, Kootenai National Wildlife Refuge, 287 Westside Road, Bonners Ferry, ID 83805.

Web site: http://www.fws.gov/kootenai/refuge_planning.html; select ''Contact Us.''

In-Person Drop-off, Viewing, or Pickup: Call (208) 267–3888 to make an appointment (necessary for viewing/pickup only) during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dianna Ellis, Refuge Manager, (208) 267–3888.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Kootenai National Wildlife Refuge. We started this process through a notice in the **Federal Register** (74 FR 8102; February 23, 2009).

Kootenai NWR encompasses 2,774 acres along the lower Kootenai River in Boundary County, ID. Habitat types on the refuge include seasonal, semipermanent, and permanent wetlands; floodplain forests; coniferous forests; managed pastures; and croplands. The refuge was established ''for use as an inviolate sanctuary, or for any other management purpose, for migratory birds.'' The refuge provides important habitat for waterbirds, migratory landbirds, and raptors; a variety of mammals including white-tailed deer, elk, and moose; and bull trout, which is listed as a threatened species under the Federal Endangered Species Act.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify compatible wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Refuge Administration Act.

Public Outreach

We began public outreach by distributing Planning Update 1 to our mailing list and public outlets in January 2009. On January 23, 2009, we held two public scoping meetings in Bonners Ferry, Idaho, to meet the public and obtain comments. The meetings were announced through local media outlets, on the refuge's Web site, and in Planning Update 1. We published a Notice of Intent in the **Federal Register** announcing our intent to prepare a CCP/

EA and inviting public comments. The public scoping period ended on March 25, 2009, and all comments were considered and evaluated. In June 2009, we distributed Planning Update 2, which included a summary of the comments we received, a planning schedule, and a description of the CCP's scope. In July 2010, we distributed Planning Update 3; in it we summarized our preliminary draft alternatives and requested public comments.

CCP Alternatives We Are Considering

During the public scoping process, we, along with other governmental partners, Tribes, and the public raised several issues which our Draft CCP addresses. A full description of each CCP alternative will be in the EA. To address these issues, we developed and evaluated the following alternatives, summarized below:

Alternative 1 (No-Action)

Under Alternative 1, the refuge would continue to manage wetlands, croplands, and grasslands for migratory waterfowl, shorebirds, deer, and elk. Two hundred acres of grain crops would be grown annually. Riparian and forest habitat would be maintained. Minimal management of instream habitat would occur. Waterfowl hunting would continue on the 740-acre hunt area, 4 days per week, in accordance with the State's season. A 200-yard no-shooting area (91 acres) would continue along the auto tour route to provide for safety. Big game and upland game (grouse) hunting would be allowed on the 295 acres of timber on the west side of Lions Den and Westside Roads. Fishing would be allowed from the banks of Myrtle Creek only. The 4.5-mile auto tour route would remain open year round to vehicles, walking, bicycling, jogging, dog walking (on leash only), cross-country skiing, and snowshoeing as weather and road conditions permit. Slightly over 5 miles of trails would be open to walking, jogging, and dog walking (on leash only) year round, except for Island Pond Trail, which would be closed on hunt days during the waterfowl hunting season. The Environmental Education Center would be available for teacher-led, and occasionally staff-led, programs. This alternative is considered the base from which to compare the action alternatives.

Alternative 2 (Preferred Alternative)

Under Alternative 2, our preferred alternative, wetland, cropland, and grassland management for migratory waterfowl, shorebirds, deer, and elk would continue. Repairs and improvements to the existing water management infrastructure would take place to increase the refuge's ability to manage wetlands. Increased emphasis would be placed on moist soil management. Crop acreage could decrease to 125 acres with an increase in acreage of moist soil wetlands. Existing riparian habitat would be maintained and increased restoration of native riparian and grassland habitats would occur. White-tailed deer and elk populations would be managed, in consultation with the Idaho Department of Fish and Game (IDFG), through special permit hunts in order to protect restored riparian habitat. Wildfires would still be suppressed and forests would be thinned to maintain an open understory and reduce ladder fuels that would allow fire to carry from the forest understory into the canopy. The refuge would work with partners to examine the feasibility of restoring degraded stream habitats for the benefit of native fish. The refuge would initiate a land protection plan study to analyze alternatives for possible refuge boundary expansion to include 120 acres of floodplain owned by the Idaho Department of Lands.

Waterfowl hunting would be permitted 4 days per week, in accordance with the State's season. The waterfowl hunt area would be reduced to 605 acres due to increasing the size of the 200-yard non-shooting area to include the area along the Deep Creek Trail (225 acres) to provide for safety. An additional ADA-accessible blind would be constructed on the north hunt unit. South Pond would be open to hunting from the ADA blind only. The location of fixed blinds and free roam hunt areas would be adjusted as necessary based on habitat quality, waterfowl use of wetlands, and data from hunter surveys. Overall, waterfowl hunting opportunities will be the same as under current management. Big game, upland game (grouse only), and turkey hunting would be allowed west of Lions Den Road (173 acres). Big game and upland game hunting would be discontinued west of Westside Road (122 acres). A special permit hunt for white-tailed deer and elk would be developed, in consultation with IDFG, to reduce damage to riparian vegetation on the refuge flats. Overall, opportunities for big game and upland game hunting would increase compared to current management. Fishing would be allowed from the banks of Myrtle Creek only.

The 4.5-mile auto tour route would remain open year round to vehicles, walking, bicycling, jogging, dog walking (on leash only), cross-country skiing, and snowshoeing as weather and road conditions permit. Wildlife observation, photography, walking, cross-country skiing, and snowshoeing would be allowed on four trails (3.7 miles total) year round, weather permitting. The Island Pond Trail would be closed to reduce disturbance to waterfowl. Environmental education programs would increase.

Alternative 3

Under Alternative 3, actions to protect, maintain, and restore habitat for priority species are the same as under Alternative 2, except that fewer areas would be planted to crops since more acres are managed as moist soil wetlands. The acreage in crops and moist soil would be intermediate between Alternatives 1 and 2.

Waterfowl, big game, upland game, and turkey hunting would be the same as in Alternative 2. As in Alternative 2, special permit hunts for white-tailed deer and elk on the refuge flats would be developed to reduce damage to riparian vegetation. Catch-and-release fishing would be allowed from the banks of Myrtle Creek using single, barbless, non-baited hooks only.

The 4.5-mile auto tour route would remain open year-round to vehicles, walking, bicycling, jogging, dog walking (on leash only), cross-country skiing, and snowshoeing as weather and road conditions permit. Wildlife observation, photography, walking, cross-country skiing, and snowshoeing would be allowed on five trails (4.8 miles total) year round, weather permitting. The Island Pond Trail would be closed, but the 1.1-mile Kootenai River Trail would be reopened. Environmental education programs would increase.

Public Availability of Documents

In addition to the information in **ADDRESSES**, you can view copies of the Draft CCP/EA on the Internet at *http://www.fws.gov/kootenai/refuge_planning.html*, and printed copies will be available for review at the following libraries: Boundary County Library, 6370 Kootenai St., Bonners Ferry, ID 83805; Sandpoint Library, 1407 Cedar St., Sandpoint, ID 83864; and Coeur d'Alene Public Library, 702 E. Front Ave., Coeur d'Alene, ID 83814.

Next Steps

After this comment period ends, we will analyze the comments and address them in the final CCP and decision document.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other

personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your identifying information from the public, we cannot guarantee that we will be able to do so.

Dated: June 23, 2011.

Robyn Thorson,

Regional Director, Region 1, Portland, Oregon.

[FR Doc. 2011–19837 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2011–N151; 40120–1112–0000–F2]

Draft Environmental Impact Statement for Alabama Beach Mouse General Conservation Plan for Incidental Take on the Fort Morgan Peninsula, Baldwin County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Under the Endangered Species Act of 1973, as amended (Act), we, the U.S. Fish and Wildlife Service, announce the availability of a draft general conservation plan (GCP) and accompanying draft environmental impact statement (dEIS). If approved, the GCP would facilitate review of future incidental take applications. The take would affect the federally endangered Alabama beach mouse (*Peromyscus polionotus ammobates*) in Baldwin County, Alabama. The GCP analyzes the potential take incidental to construction, occupation, and maintenance of an estimated 500 single-family residences. We invite public comments on these documents.

DATES: We must receive any written comments on the GCP and dEIS at our Regional Office (see **ADDRESSES**) and on or before November 7, 2011.

ADDRESSES: Documents will be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345, or at the Fish and Wildlife Service Field Office, 1208–B Main Street, Daphne, AL 36526. For how to comment, see Public Comments under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional HCP Coordinator (see **ADDRESSES**), telephone: 404/679–4144, or Mr. Darren LeBlanc, Field Office Project Manager, at the Alabama Field Office (see **ADDRESSES**), telephone: 251/441–5868.

SUPPLEMENTARY INFORMATION: We announce the availability of the proposed GCP and the dEIS. These documents analyze the take of the Alabama beach mouse incidental to construction of up to 500 single-family developments potentially affecting an estimated total of 75 acres of Alabama beach mouse habitat. Individual land owners who would need incidental take permits (ITP) for single-family developments, and whose development proposal fits within limits evaluated in the GCP, could apply for ITPs using the GCP provisions instead of producing their own habitat conservation plans. The GCP evaluates issuance of ITPs with up to 50-year terms under section 10(a)(1)(B) of the Act (16 U.S.C. 1531 *et seq.*). The GCP describes the mitigation and minimization measures proposed to address the effects on the species.

We specifically request information, views, and opinions from the public via this notice on our proposed Federal action, including identification of any other aspects of the human environment not already identified in the dEIS pursuant to National Environmental Policy Act (NEPA) regulations in the Code of Federal Regulations (CFR) at 40 CFR 1506.6. Further, we specifically solicit information regarding the adequacy of the GCP per 50 CFR parts 13 and 17.

The dEIS analyzes the preferred alternative, as well as a range of reasonable alternatives and the associated impacts of each. Alternative 3 (Preferred Alternative) is implementation of the GCP. Rejection of the GCP would not necessarily halt single-family lot development in the study area. One of the alternatives considered would be to continue individual permitting as is done currently.

Public Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

If you wish to comment, you may submit comments by any one of several methods. Please reference ''Alabama beach mouse GCP'' in such comments. You may mail comments to our Regional Office or the Alabama Field Office (see **ADDRESSES**). You may also comment via the Internet to *david_dell@fws.gov* or *darren_leblanc@fws.gov.* Please include your name and return mailing address in your e-mail message. If you do not receive a confirmation from us that we have received your e-mail, contact us directly at either telephone number listed (see **FOR FURTHER INFORMATION CONTACT**). Finally, you may hand-deliver comments to either of our offices listed under **ADDRESSES**.

Covered Area

The GCP coverage area extends along the Gulf of Mexico for about 17 miles, encompassing approximately 2,400 acres of open beach and associated nearshore coastal dune environments on the Fort Morgan Peninsula, Baldwin County, Alabama. The coverage area begins at Little Lagoon Pass, on State Highway 182 in Gulf Shores, and extends westward to the tip of the Fort Morgan State Historic site at the western terminus of the Fort Morgan Peninsula. The area is defined biologically as that area where an Alabama beach mouse population or subpopulation could be affected by residential single-family development.

Next Steps

We will evaluate the GCP and its potential use by ITP applicants, as well as any comments we receive, to determine whether the GCP, when used by ITP applicants, would meet the requirements of section 10(a)(1)(B) of the Act. We will also evaluate whether issuance of section 10(a)(1)(B) ITPs under the GCP would comply with section 7 of the Act by conducting an intra-Service section 7 consultation on anticipated ITP actions. We will consider the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to make the GCP available to ITP applicants and issue ITPs under the GCP. If we determine that the requirements are met, we will issue ITPs for the incidental take of the Alabama beach mouse to those applicants who meet the criteria established in the GCP.

Authority We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: July 8, 2011.

Mark J. Musaus,

Acting Regional Director, Southeast Region.

[FR Doc. 2011–20140 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2011–N159; 96300–1671–0000–P5]

Endangered Species; Marine Mammals; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species, marine mammals, or both. With some exceptions, the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) prohibit activities with listed species unless a Federal permit is issued that allows such activities. Both laws require that we invite public comment before issuing these permits.

DATES: We must receive comments or requests for documents on or before September 8, 2011. We must receive requests for marine mammal permit public hearings, in writing, at the address shown in the **ADDRESSES** section by September 8, 2011.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or e-mail *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an e-mail or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, and the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR 18, require that we invite public comment before final action on these permit applications. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

III. Permit Applications

A. Endangered Species

Applicant: GTWT, LLC. dba Bang 57 Ranch, Okeechobee, FL; PRT–48053A

The applicant requests a permit to authorize interstate and foreign commerce, export, and cull of excess barashingh (*Rucervus duvauceli*) from the captive herd maintained at their facility for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: University of Michigan, Museum of Zoology, Ann Arbor, MI; PRT–46480A

The applicant requests a permit to import biological samples from howler monkeys (*Alouatta palliata mexicana, Alouatta pigra,* and *Alouatta palliata* x *Alouatta pigra* hybrids), collected in the wild in Mexico, for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Dennis Campbell, Dora, AL; PRT–48113A

Applicant: Harry Sanders, Fairfield, PA; PRT–48527A

Applicant: Stephen Pasquan, Belvedere, CA; PRT–45900A

Applicant: James Kelly, Fort Smith, AR; PRT–47165A

B. Endangered Marine Mammals and Marine Mammals

Applicant: Sea to Shore Alliance, Sarasota, FL; PRT–37808A

The applicant requests a permit to take, import, and export manatee specimens from West Indian manatees (*Trichechus manatus*) and West African manatees (Trichechus senegalensis) for the purpose of scientific research. Up to 50 *T. manatus* would be tagged and sampled and up to 2,000 animals would be subjected to harassment each year; samples from up to 50 live *T. senegalensis* and an unlimited number of samples from dead animals would be imported each year. This notification

covers activities to be conducted by the applicant over a 5-year period.

Applicant: Red Rock Films, Chevy Chase, MD; PRT–48293A

The applicant requests a permit to photograph polar bears (*Ursus maritimus*) on North Slope, Alaska, for commercial and educational purposes. This notification covers activities to be conducted by the applicant over a 1-year period.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2011–20233 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2011–N130; 40120–1113–0000–C2]

Recovery Plan for the Endangered Pyne's Ground-plum (*Astragalus bibullatus*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of the final recovery plan for Pyne's ground-plum (*Astragalus bibullatus*), a species endemic to the Central Basin in Tennessee. The recovery plan includes specific recovery objectives and criteria to be met in order to reclassify this species to threatened status and delist it under the Endangered Species Act of 1973, as amended (Act).

ADDRESSES: You may obtain a copy of the recovery plan by contacting the Tennessee Field Office, U.S. Fish and Wildlife Service, 446 Neal Street, Cookeville, TN 38501 (telephone 931–528–6481), or by visiting our recovery plan Web site at *http://www.fws.gov/endangered/species/recovery-plans.html.*

FOR FURTHER INFORMATION CONTACT: Mr. Geoff Call at the above address, or telephone: (931) 528–6481, ext. 213.

SUPPLEMENTARY INFORMATION:

Background

We listed Pyne's ground-plum as an endangered species under the Act (16 U.S.C. 1531 *et seq.*), on September 26, 1991 (56 FR 48748). This species is a rare perennial member of the pea family (Fabaceae) endemic to the limestone cedar glades in the Central Basin Section of the Interior Low Plateau (Tennessee). It is currently known from only eight extant occurrences (specific locations or sites) located within 90 square miles in Rutherford County, Tennessee, within a short distance of the rapidly growing city of Murfreesboro.

Factors contributing to its endangered status are an extremely limited range and loss of habitat. The primary threat is the loss of habitat from residential, commercial, or industrial development; livestock grazing; woody encroachment; and recreational uses such as all-terrain vehicles.

The Act requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide a public notice and an opportunity for public review and comment during recovery plan development. We made the draft recovery plan available for public comment from April 1 through June 1, 2010 (75 FR 16499). We considered information we received during this public comment period and information from peer reviewers in our preparation of this final recovery plan. We will forward comments to other Federal agencies so each agency can consider these comments in implementing approved recovery plans.

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the endangered species program. To help guide the recovery effort, we are preparing recovery plans for most listed species. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting, and estimate time and cost for implementing recovery measures.

The objective of this plan is to provide a framework for the recovery of this species so that protection under the Act is no longer necessary. *Astragalus bibullatus* will be considered for reclassification to threatened status when there are 11 viable protected occurrences distributed throughout the cedar glade ecosystem of the Stones River Basin which is located within Davidson, Rutherford, and Wilson Counties. Viability of each occurrence should be determined using a population viability analysis framework. Populations considered viable for recovery purposes should exhibit either stable or increasing population growth trends and have been shown through at least 10 consecutive monitoring events to possess suitable population structure for maintaining observed population growth into the foreseeable future. In order for an *A. bibullatus* occurrence to be considered protected, it should be located:

- On lands owned and managed by a public agency, with a written plan committing to conserve *A. bibullatus* and the cedar glade ecosystem on that site; the plan must include necessary resources, management recommendations, etc. for the site; or
- On private lands protected by a permanent conservation easement, State Natural Area registry, or other legally binding agreement, with a written plan committing to conserve *A. bibullatus* and the cedar glade ecosystem on that site; the plan must include necessary resources, management recommendations, etc. for the site.

Astragalus bibullatus will be considered for delisting when there are 16 viable protected occurrences that are distributed throughout the cedar glade ecosystem of the Stones River Basin within Davidson, Rutherford, and Wilson Counties.

The reclassification and recovery criteria were made more protective in the final recovery plan than they were in the draft recovery plan for this plant based on: (1) Comments from peer reviewers that the plan should provide additional redundancy on the landscape to help protect this plant against threats like drought, (2) new scientific information showing that this plant exhibits density-dependent regulation of population growth, and (3) recognition that more information was needed about the role of this plant's seed bank in maintaining population viability.

As reclassification and recovery criteria are met, the status of the species will be reviewed and the species will be considered for reclassification or removal from the Federal List of Endangered and Threatened Plants.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: June 15, 2011.

Mark J. Musaus,

Acting Regional Director.

[FR Doc. 2011–20137 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[USGS—GX.11.LH00.COM00.00]

Agency Information Collections Activities; Comment Request for Uranium Concentrations in Private Wells in South-East New Hampshire

AGENCY: United States Geological Survey (USGS), Interior.

ACTION: Notice; request for comments for a new proposed information collection.

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the new information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. The objectives of this information collection are to obtain information on water quality issues that affect private well owners. Please note that we 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.

DATES: To ensure that we are able to consider your comments to this IC, we must receive them on or before October 11, 2011.

ADDRESSES: Please submit a copy of your written comments to the USGS Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 807, Reston, VA 20192 (mail); 703–648–7197 (phone); 703–648–6853 (fax); or *cbartlett@usgs.gov* (e-mail). Please reference Information Collection 1028–NEW, Uranium concentrations in private wells in south-east New Hampshire, in the subject line.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, please contact the U.S. Geological Survey, Rudy Schuster, 2150–C Centre Avenue, Fort Collins, CO 80526 (mail); by telephone (970) 226–9165; or *schusterr@usgs.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

I. Abstract

Uranium concentrations in groundwater that is used for private domestic drinking water are not well characterized in south-east New Hampshire. These water sources do not fall under any jurisdiction for testing and therefore private well owners generally do not know if uranium is present in their water supply. For example, concentrations 10 times greater than the drinking water standard that applies to public wells have been found in some private wells. The benefits associated with knowing if a well has high uranium in the water or if specific areas of the region have elevated levels is a value to the citizens that inhabit those areas. In most scenarios, approximately 40 percent of the population that utilize private wells in the study area have no option but to connect to public supply. The objectives of this survey are to obtain information on water quality issues that affect private well owners. The survey will gather information concerning: water uranium concentrations, use of wells that may contain uranium, and any systems in place to remove uranium, if present.

II. Data

OMB Control Number: 1028–NEW.

Title: Uranium concentrations in private wells in south-east New Hampshire.

Type of Request: This is a new collection.

Affected Public: Individuals who are using private wells for water supply. In conducting this research project; potential respondents will include: a random sampling of private well owners in south-east New Hampshire.

Respondent's Obligation: Voluntary.

Frequency of Collection: One time.

Estimated Annual Number of Respondents: 350.

Estimated Total Annual Responses: 350.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 58 hours.

III. Request for Comments

We invite comments concerning this IC on: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) ways to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note comments that you submit in response to this notice are a matter of public record. 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 publically available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that will be done.

Dated July 27, 2011.

Keith Robinson,

Director NH–VT Water Science Center, U.S. Geological Survey.

[FR Doc. 2011–20108 Filed 8–8–11; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES956000–L14200000–BJ0000–LXSITRST0000]

Eastern States: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice Of Filing Of Plat Of Survey; Wisconsin.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM–Eastern States office in Springfield, Virginia, 30 calendar days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management—Eastern States, 7450 Boston Boulevard, Springfield, Virginia 22153. *Attn:* Cadastral Survey. 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 survey was requested by the Bureau of Indian Affairs.

The land surveyed is:

Fourth Principal Meridian, Wisconsin
T. 40 N., R. 5 E.

The plat of survey represents the dependent resurvey of a portion of the subdivisional lines of Section 8, and the dependent resurvey of Lots 2, 3, and 4 of Block 49, and Lot 4 of Block 50 of the modified Townsite of Lac Du Flambeau, in Section 8, in Township 40 North, Range 5 East, in the State of Wisconsin, and was accepted June 23, 2011.

We will place a copy of the plat we described in the open files. It will be

available to the public as a matter of information.

If BLM receives a protest against the survey, as shown on the plat, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals.

Dated: August 2, 2011.

Dominica Van Koten,

Chief Cadastral Surveyor.

[FR Doc. 2011–20139 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDI00000.LF31010WU. PN0000.LFHFPJ020000]

Notice of Public Meeting, Idaho Falls District Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Idaho Falls District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The Idaho Falls District RAC will meet in Challis, Idaho, September 27–28, 2011 for a two-day meeting at the Challis Field Office, 1151 Blue Mountain Road, Challis, Idaho 83226. The first day will begin at 10:30 a.m. and adjourn at 5 p.m. The second day will begin at 8:30 a.m. and adjourn at 2:30 p.m. Members of the public are invited to attend. A comment period will be held following the introductions at 10:30 a.m. All meetings are open to the public.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in the BLM Idaho Falls District (IFD), which covers eastern Idaho.

Items on the agenda will include an overview of the current issues affecting the District and Field Offices, review and approval of past meeting minutes, public comment period and discussion of the Wild Horse and Burro program in Challis, and other issues pertinent to the Challis Field Office. Following the morning part of the meeting, a tour of the Wild Horse and Burro facilities and herd management area will be conducted. On the second day, RAC members will meet to discuss the increased monitoring requirements related to threatened and endangered species and the impacts this is having on the local field office. A tour will be conducted at one of the monitoring sites to provide the RAC with a greater understanding of implementation.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below.

FOR FURTHER INFORMATION CONTACT: Sarah Wheeler, RAC Coordinator, Idaho Falls District, 1405 Hollipark Dr., Idaho Falls, ID 83401. *Telephone:* (208) 524–7550. *E-mail: Sarah_Wheeler@blm.gov.*

Dated: July 18, 2011.

Joe Kraayenbrink,

Idaho Falls District Manager.

[FR Doc. 2011–20128 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDC00000.L11500000.MO0000.241A.0; 4500022635]

Notice of Public Meeting, Coeur d'Alene District Resource Advisory Council Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council (RAC) will meet as indicated below.

DATES: September 13, 2011. The meeting will begin at 8:30 a.m. and end no later than 2:30 p.m. The public comment period will be held from 10 a.m. to 10:30 a.m. The meeting will be held at the Blue Creek Bay Recreation Site located six miles east of Coeur d'Alene, Idaho off of Interstate 90 exit 22.

FOR FURTHER INFORMATION CONTACT: Suzanne Endsley, RAC Coordinator, BLM Coeur d'Alene District, 3815 Schreiber Way, Coeur d'Alene, Idaho 83815 or telephone at (208) 769–5004.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda will include a site visit to the developed recreation site at Blue Creek Bay and the historic Mullan Trail Road. The meeting will also include discussion about vegetation treatment projects in the Coeur d'Alene District. Additional agenda topics or changes to the agenda will be announced in local press releases. More information is available at *http://www.blm.gov/id/st/en/res/resource_advisory.html.*

All meetings are open to the public. The public may present written comments to the RAC in advance of or at the meeting. Each formal RAC meeting will also have time allocated for receiving public comments. Depending upon the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the BLM as provided above.

Dated: July 29, 2011.

Gary D. Cooper,

District Manager.

[FR Doc. 2011–20125 Filed 8–8–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; PXI Systems Alliance, Inc.

Notice is hereby given that, on June 29, 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''), PXI Systems Alliance, 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, C & H Technologies, Round Rock, TX; BAE Systems, San Diego, CA; and Conduant Corporation, Longmont, CO, 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 PXI Systems Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems Alliance, 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 March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on February 24, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 25, 2011 (76 FR 16820).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–19962 Filed 8–8–11; 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—Institute of Electrical and Electronics Engineers

Notice is hereby given that, on July 1, 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''), Institute of Electrical and Electronics Engineers (''IEEE'') 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, 55 new standards have been initiated and 33 existing standards are being revised.

More detail regarding these changes can be found at *http://standards.ieee.org/about/sba/feb2011.html, http://standards.ieee.org/about/sba/may2011.html, http://standards.ieee.org/about/sba/mar2011.html* and *http://standards.ieee.org/about/sba/jun2011.html.*

On September 17, 2004, IEEE 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 3, 2004 (69 FR 64105).

The last notification was filed with the Department on January 3, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 2, 2011 (76 FR 5826).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–19964 Filed 8–8–11; 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—ODVA, Inc.

Notice is hereby given that, on June 24, 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''), ODVA, Inc. (''ODVA'') 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, Taiyo Cable (Dongguan) Co., Ltd., Gyeonggi-Do, REPUBLIC OF KOREA; Dukane Corporation, St. Charles, IL; UNIPULSE Corporation, Tokyo, JAPAN; Renesas Electronics, Tokyo, JAPAN; Jacobs Automation LLC, Hebron, KY; Welding Technology Corp., Carol Stream, IL; Micro Motion, Inc., Boulder, CO; Hitachi Cable Manchester, Inc., Manchester, NH; and Global Engineering Solutions Co., Ltd., Gyeonggi-do, REPUBLIC OF KOREA, have been added as parties to this venture.

Also, Applied Robotics, Inc., Glenville, NY; WIT, St.-Laurent-Du-Var, FRANCE; Caron Engineering, Inc., Wells, ME; and OPTO 22, Temecula, CA, 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 ODVA intends to file additional written notifications disclosing all changes in membership.

On June 21, 1995, ODVA 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 15, 1996 (61 FR 6039).

The last notification was filed with the Department on April 1, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 2, 2011 (76 FR 24523).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–19963 Filed 8–8–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Stacey J. Webb, M.D.; Denial of Application

On February 24, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order To Show Cause to Stacey J. Webb, M.D. (Respondent), of Chesapeake, Virginia. The Show Cause Order proposed the denial of Respondent's pending application for a DEA Certificate of Registration as a practitioner, on the ground that she had committed acts which render her registration ''inconsistent with the public interest.'' Order at 1 (citing 21 U.S.C. 823(f)).

The Show Cause Order specifically alleged that Respondent, while holding a DEA registration (which expired by its terms on May 31, 2009), had ''prescribed controlled substances to individuals in Virginia and Alabama via the Internet based on online questionnaires, submissions of unverified medical records, and/or telephone consultations without a medical examination.'' *Id.* The Order further alleged that ''[t]he prescriptions * * * were issued for other than a legitimate medical purpose or outside the usual course of professional practice.'' *Id.* (citing 21 CFR 1306.04(a)). Specifically, the Order alleged that Respondent ''failed to establish a valid physician-patient relationship'' as required by the laws of Virginia and Alabama. *Id.; see* Va. Code Ann. §§ 54.1–3303, 54.1–2915; Ala. Code § 34–24–360; Ala. Admin. Code 540–X–9–.11. Finally, the Show Cause Order alleged that Respondent holds a medical license in Virginia, but prescribed controlled substances via the internet to individuals in Alabama without possessing a controlled substance certificate as required by state law. *Id.*

at 1–2; *see* Ala. Code § 20–2–51; Ala. Admin. Code 540–X–.01.

Following service of the Show Cause Order, Respondent initially requested a hearing on the allegations and the matter was placed on the docket of the Agency's Administrative Law Judges. However, the day before the hearing was to convene, Respondent withdrew her request for a hearing and submitted a letter in lieu of a hearing. Order Terminating Proceedings, at 1; Ltr. of Respondent to Hearing Clerk (May 24, 2010) (hereinafter, Resp.'s Ltr.) Respondent did, however, respond to the allegations of the Show Cause Order. *See id.* Thereafter, the Investigative Record was forwarded to me for Final Agency Action.

Based on Respondent's letter, I find that she has waived her right to a hearing. *See* 21 CFR 1301.43(c). However, in accordance with 21 CFR 1301.43(c), Respondent's letter has been made a part of the record and will ''be considered in light of the lack of opportunity for cross-examination in determining the weight to be attached to matters of fact asserted therein.'' *Id.* Having considered the entire record, I issue this Decision and Final Order. I make the following findings.

Findings

On July 14, 2009, Respondent [1] applied for a DEA Certificate of Registration as a practitioner, which, if granted, would authorize her to prescribe controlled substances in schedules II through V; Respondent listed an address in Chesapeake, Virginia as her registered location. GX 1. Respondent previously held a practitioner's registration, DEA number BJ4518114, which expired by its terms on May 31, 2009. Order Terminating Proceedings, at 1 n.1.

On August 1, 2006, the Virginia Board of Medicine issued Respondent a license (number 0101–240458) to practice medicine and surgery in the Commonwealth of Virginia. *In re Stacey Johnson Webb, M.D.*, Consent Order, at 1 (Va. Bd. Med., Sept. 2, 2009) (hereinafter, Va. Consent Order). Respondent did not hold a registration as required by Alabama law to prescribe controlled substances in that State. Alabama State Board of Medical Examiners, Physician/PA Search; *see also* Ikner Decl., at 9.

From approximately January 2007 through August 2008, Respondent was employed by one or more Internet pharmacy ventures known as Telemed Ventures and/or Secure Telemedicine (hereinafter, Telemed). Va. Consent Order, at 1–2.; Ikner Decl. at 2; *see also* Resp.'s Ltr.[2] While working for Telemed, Respondent issued prescriptions for controlled substances to customers who placed orders through the company's Web site. Ikner Decl. at 2.

During interviews conducted by Drug Enforcement Administration (DEA) Special Agents and Diversion Investigators with Telemed customers, Respondent's customers described learning about Telemed through an internet source. Fitzgerald Decl. at 11, Aug. 17, 2010. Once connected with the Telemed Web site, customers completed an online questionnaire, which included general health questions and Telemed disclaimer questions. *Id.*; Terpening Decl. at 14, Aug. 2, 2010. After completing the online questionnaire and paying the consultation fee, a doctor assigned to the customer by Telemed contacted the customer. Fitzgerald Decl. at 11. The customers then submitted their medical records by fax or e-mail and the doctor would call the customer again for a telephone consultation. *Id.; see also* Ikner Decl. at 2.

Following the telephone consultation with the customer, in most instances, an order for a controlled substance was issued and forwarded to a pharmacy to dispense the drugs to the customer. Ikner Decl. at 2. Respondent's customers ''could choose the type of drug and dosage desired.'' Fitzgerald Decl. at 11. One customer reported that he was ''able to receive the drug he selected every time he visited the [Telemed web]site.'' Terpening Decl. at 15.

During an interview with a DEA Investigator, Respondent admitted that she never physically examined the Telemed customers before authorizing a prescription, but stated that she spoke with them by telephone every other month. Tribble Decl. at 12, Aug. 2, 2010. Respondent also admitted that she did not have any medical records for the customers, but only ''prescription originals.'' *Id.* She also had not previously treated the Telemed customers. Ikner Decl. at 8. According to those customers who were interviewed, while they may have had a primary physician, they sought prescriptions from Telemed for pain medications, such as hydrocodone, because their treating physicians would no longer prescribe the drug to them. Fitzgerald Decl. at 11. Moreover, the customers' primary physicians did not refer them to Telemed. *Id.*

Each of the customers who were interviewed provided a description of their interaction with Telemed, and all of them stated that they received prescriptions from Respondent; their prescriptions are contained in the investigative file. *Id.;* Terpening Decl., at 14–15. For example, in just over two months, Respondent authorized four prescriptions for 90 hydrocodone/apap (acetaminophen) (10/325 mg) tablets [3] to Customer T.F., who lived approximately 145 miles from Respondent's practice. *See* GX 3 (Rxs dated Sept. 6 and 26, Oct. 22, and Nov. 14, 2007). In addition, in less than a year's time, Respondent authorized ten prescriptions for 90 hydrocodone/apap (10/500 mg) tablets to Customer D.H., who resided approximately 180 miles from Respondent's practice. *See* GX 9 (Rxs dated Oct. 15, Nov. 16, Dec. 10, 2007, Jan. 7 and 31, April 18, May 16, June 11, July 18, and Sept. 9, 2008). The record also contains prescriptions for hydrocodone and Ambien [4] which Respondent authorized for six additional customers who were interviewed by the Investigators; none of the customers lived closer than 140 miles from Respondent's practice.[5]

While she was employed by Telemed, Respondent based her practice in and around Norfolk, Virginia. *See e.g., id.* During this time, Respondent stated that she wrote prescriptions for patients in Virginia and Georgia.[6] Tribble Decl. at 12. The record further contains spreadsheets purporting to indicate that she authorized prescriptions to patients in Alabama.[7] Ikner Decl. at 8.

[1] Respondent is referred to throughout investigative file by the names Stacey Johnson Webb, Stacey J. Webb, and Stacey Johnson. When using any of the three names, Respondent consistently listed Virginia Board of Medicine license number 0101–240458. Accordingly, I find that all three names refer to the same person.

[2] Respondent's own letter uses the names—Telemed Ventures and Secure Telemedicine—interchangeably, suggesting that they are one and the same.

[3] This formulation of hydrocodone is a schedule III controlled substance. 21 CFR 1308.13(e)(iv).

[4] Ambien (zolpidem) is a schedule IV controlled substance. 21 CFR 1308.14(c)(51).

[5] *See* GX 4 (Rxs issued to L.D. for hydrocodone/apap 10/325 mg on Oct. 10 and Nov. 2, 2007); GX 5 (Rxs issued to R.M. for hydrocodone/apap 10/325 mg on Aug. 13, Oct. 29, Dec. 31, 2007, and Jan. 30, 2008); GX 6 (Rxs issued to N.N. for hydrocodone/apap 10/325 mg on July 30, Aug. 21, Sept. 24, Oct. 29, Dec. 24, 2007, and Jan. 17, 2008); GX 7 (Rxs issued to R.D. for zolpidem on Dec. 19, 2007, Jan. 18, Feb. 12, Mar. 10, and April 7, 2008); GX 8 (Rxs issued to N.C. for hydrocodone/apap 10/325 mg on Jan. 18 and Feb. 13, 2008); GX 10 (Rxs issued to K.H. for hydrocodone/apap 10/500 mg on Oct. 2 and 29, Dec. 13, 2007, Jan. 7, Feb. 4, Mar. 3, April 24, May 20, June 20, July 11, and Sept. 4, 2008).

[6] The Order To Show Cause did not, however, allege that Respondent issued prescriptions to customers in Georgia.

[7] The only evidence of Respondent's having issued prescriptions to customers in Alabama is a

Continued

On September 2, 2009, the Virginia Board of Medicine found that Respondent violated Va. Code §§ 54.1–2915.A(13), (17) and 54.1–3303(A), by prescribing controlled substances over the Internet. Consent Order, at 1. More specifically, the Board found that from July 2007 through October 2008, Respondent prescribed controlled substances, including opioids (schedule III hydrocodone), outside of a bona fide practitioner-patient relationship to numerous persons who ''sought medical services'' on the Web site TopLineRx.com; the patients were assigned to Respondent by her employer, Secure Telemedicine, LLC, which also owned the Web site. *Id.* at (1) The Board concluded that Respondent issued prescriptions to these individuals without having contact beyond a telephone conversation, seeing the individuals in person, or performing a physical examination of them (either in person or through the use of instrumentation and diagnostic equipment). *Id.* at 1–2.

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied upon a determination ''that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination in the case of a practitioner, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The Respondent's experience in dispensing * * * controlled substances.

(3) The Respondent's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. *Id.*

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie*, 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether * * * to deny an application. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005) (citing *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005)).

With respect to a practitioner's registration, the Government bears the burden of proving by a preponderance of the evidence that granting the application would be inconsistent with the public interest. 21 CFR 1301.44(d). However, where the Government has made out a *prima facie* case, the burden shifts to the applicant to ''present[] sufficient mitigating evidence'' to show why she can be entrusted with a new registration. *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))), *aff'd, Medicine Shoppe-Jonesborough* v. *DEA,* 2008 WL 4899525 (6th Cir. 2008).

''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387. *See also Jayam Krishna-Iyer,* 74 FR 459, 464 (2009) (''[E]ven where the Agency's proof establishes that a practitioner has committed only a few acts of diversion, this Agency will not grant or continue a practitioner's registration unless he accepts responsibility for his misconduct.''); *Hoxie,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor'' in the public interest determination); *Cuong Trong Tran,* 63 FR 64280, 62483 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995).

In this matter, while I have considered all of the factors, I conclude that it is not necessary to make findings with respect to factors one (the recommendation of the state licensing board), three (Respondent's conviction record), and five (such other conduct which may threaten public health and safety). I find that the Government's evidence with respect to Respondent's experience in dispensing controlled substances (factor two) and her compliance with applicable Federal and State laws related to the distribution and dispensing of controlled substances (factor four) makes out a *prima facie* case that Respondent has committed acts which render her registration ''inconsistent with the public interest.'' 21 U.S.C. 823(f), 824(a)(4). I further find that Respondent has not rebutted the Government's *prima facie* case and will therefore deny her application.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of [her] professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' *Id.; see also* Va. Code Ann. § 54.1–3303 (''A prescription not issued in the usual course of treatment * * * is not a valid prescription.'').

As the U.S. Supreme Court has explained, ''the [CSA's] prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Under the CSA, it is fundamental that a practitioner must establish and maintain a bona fide doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Laurence T. McKinney,* 73 FR 43260, 43265 n.22 (2008); *see also Moore,* 423 U.S. at 142–43 (noting that evidence established that physician ''exceeded the bounds of 'professional practice,''' when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against * * * misuse and diversion''). At the time of the events at issue here, the CSA generally looked to state law to determine whether a doctor and patient have established a bona fide doctor-patient relationship. *See Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007); *but see* 21 U.S.C. 829(e)(2)(B) (providing federal standard for prescribing over the Internet as of October 15, 2008).

spreadsheet, which purports to list prescriptions Respondent issued to customers in Alabama. However, the Investigative Record does not explain how and when this document was obtained. In the absence of a foundation for this evidence, I conclude that the record lacks substantial evidence proving the allegation that Respondent issued prescriptions to customers in Alabama.

Under Virginia law, a ''prescription * * * may be issued only to persons * * * with whom the practitioner has a bona fide practitioner-patient relationship.'' Va. Code Ann. § 54.1–3303(A). The statute defines the term ''bona fide practitioner-patient-pharmacist relationship'' as ''one in which a practitioner prescribes, and a pharmacist dispenses, controlled substances in good faith to his patient for a medicinal or therapeutic purpose within the course of his professional practice.'' *Id.* To establish a ''bona fide practitioner-patient relationship,'' the ''practitioner shall'' meet the following criteria:

(i) [E]nsure that a medical or drug history is obtained;

(ii) [P]rovide information to the patient about the benefits and risks of the drug being prescribed;

(iii) [P]erform or have performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically; except for medical emergencies, the examination of the patient shall have been performed by the practitioner himself, within the group in which he practices, or by a consulting practitioner prior to issuing a prescription; and

(iv) [I]nitiate additional interventions and follow-up care, if necessary, especially if a prescribed drug may have serious side effects. *Id.*

Respondent violated the CSA's prescription requirement because she did not establish a bona fide doctor-patient relationship with the Telemed customers. While Respondent was a resident of Virginia, her practice was located a substantial distance from the majority of the Virginia residents she prescribed to through Telemed. Most significantly, Respondent admitted to Investigators that she prescribed on the basis of telephonic consultations and did not conduct a physical examination of the customers; she also admitted that she did not maintain medical records for them.

In her letter responding to the allegations, Respondent maintained that her ''actions met [Virginia's] definition of a practitioner-patient relationship.'' Resp.'s Ltr. at 1. First, Respondent maintained that patients submitted their medical records, that Telemed scrutinized the documents for legitimacy, and that she reviewed records and called the customer's primary care physician and/or consultant. *Id.* Second, Respondent stated that she provided information to her customers regarding the risks and benefits of each medication and that this information was documented in the Telemed medical record. *Id.* Third, Respondent maintained that she only continued a treatment plan initiated by the primary care provider or specialist, and that she did not ''make a new diagnosis or initiate a new medication.'' *Id.* Finally, Respondent wrote that the Telemed customers were ''required to see their primary care physician or consultant at least every three months to update their condition, diagnosis and/or treatment plan.'' *Id.*

In her letter, Respondent maintained that based on her ''literal reading of the Virginia code,'' her actions met the definition of a practitioner-patient relationship. *Id.* Respondent also argued that under ''case law and other sources,'' a physician patient ''relationship is established when a patient seeks medical care and/or advice from a practitioner, and the practitioner knowingly provides medical care and/or advice to the patient.'' *Id.* at 2.

That may be as a matter of tort liability, but that does not mean that the relationship complies with accepted standards of medical practice necessary to properly diagnose a patient and issue treatment recommendations, including prescribing a controlled substance. Indeed, the Virginia Board found Respondent's position unavailing, concluding that she ''issu[ed] prescriptions to [customers of the website] despite the fact that her contact with the individuals was solely by telephone and despite the fact that she never saw these individuals in person, and did not perform any examination of them either physically or by the use of instrumentation and diagnostic equipment.'' Consent Order at 1–2. The Board further concluded that Respondent ''prescribed controlled substances including opioids * * * to numerous individuals outside of a bona fide practitioner-patient relationship.'' *Id.* at 1.

In numerous other cases involving practitioners who prescribed controlled substances over the internet and telephone to persons they had never physically examined and with whom they did not establish a bona-fide doctor-patient relationship, DEA has denied pending applications and revoked registrations pursuant to its authority under 21 U.S.C. 824(a)(4). *See Ladapo O. Shyngle, M.D.,* 74 FR 6056 (2009) (denying application for DEA registration after Respondent issued prescriptions outside bona fide doctor-patient relationship with customers of a website); *see also Ronald Lynch, M.D.,* 75 FR 78745 (2010); *George Mathew, M.D.,* 75 FR 66138 (2010); *Patrick W. Stodola, M.D.,* 74 FR 20727 (2009); *Dale L. Taylor, M.D.,* 72 FR 30855 (2007); *Andre DeSonia, M.D.,* 72 FR 54293 (2007). Likewise, several Federal courts have held that such prescribing constitutes a criminal violation of the CSA. *United States* v. *Nelson,* 383 F.3d 1227, 1231–32 (10th Cir. 2004); *cf. United States v. Smith,* 573 F.3d 639, 657–58 (8th Cir. 2009); *United States* v. *Fuchs,* 467 F.3d 889 (5th Cir. 2006).

I therefore conclude that because Respondent failed to establish a legitimate physician-patient relationship with various persons found above, she lacked a legitimate medical purpose and acted outside of the usual course of professional practice in prescribing controlled substances to them and thus violated Federal law. *See* 21 CFR 1306.04(a); 21 U.S.C. § 841(a)(1). I further conclude that Respondent's experience in dispensing controlled substances (factor two) and record of compliance with applicable laws related to controlled substances (factor four) establishes that granting Respondent's application for a new registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Finally, based on Respondent's letter, I find that Respondent has failed to accept responsibility for her misconduct and has therefore not rebutted the Government's *prima facie* case. *See, e.g., Krishna-Iyer,* 74 FR at 464; *see also Hoxie,* 419 F.3d at 483. Accordingly, Respondent's application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Stacey J. Webb, M.D., for a DEA Certificate of Registration as a practitioner be, and it hereby is, denied. This order is effective September 8, 2011.

Dated: August 2, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–20046 Filed 8–8–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–1]

Liddy's Pharmacy, L.L.C. Denial of Application

On September 15, 2008, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA or ''Government''), issued an Order to Show Cause to

Liddy's Pharmacy, L.L.C. (Respondent), of Lakeland, Florida. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BD8523335, as a retail pharmacy, and the denial of any pending applications for renewal or modification of its registration, on the ground that Respondent's continued registration ''is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f).'' Show Cause Order at 1.

More specifically, the Show Cause Order alleged that Respondent ''knowingly engaged in a scheme to distribute controlled substances based on purported prescriptions that were issued for other than legitimate medical purposes and by physicians acting outside the usual course of professional practice, in violation of Federal and State law.'' *Id.* The Order further alleged that Respondent ''aided physicians in the unauthorized practice of medicine in those states that require physicians to be licensed by the state before prescribing controlled substances to state residents and in those states that require a physical examination by the physician prior to prescribing controlled substances.'' *Id.* at 1–2.

By letter of September 29, 2008, Respondent, through its attorney, requested a hearing on the allegations and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJs). Thereafter, on January 13, 2009, an ALJ conducted a hearing in Orlando, Florida at which only the Government presented evidence. Following the hearing, both parties filed briefs containing their proposed findings of fact, conclusions of law, and argument.

On October 6, 2009, the ALJ issued her recommended decision (also ALJ). Therein, the ALJ began by noting that under Federal law ''[a] prescription for a controlled substance . . . must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his practice'' and that a pharmacist has ''a corresponding responsibility'' not to fill an unlawful prescription. ALJ at 19 (quoting 21 CFR 1306.04(a)). The ALJ then found that ''the evidence shows that the Respondent filled over 42,000 prescriptions written by doctors for patients in states where those doctors were not licensed.'' *Id.* at 20. Having found that ''these physicians were * * * engaged in the unauthorized practice of medicine in at least nine states,'' the ALJ concluded that the ''prescriptions issued by such practitioners * * * are therefore invalid under the Controlled Substances Act [(CSA)]'' and that ''Respondent violated the CSA by filling them.'' *Id.* at 22.

The ALJ also found that while Respondent ''is only licensed to practice pharmacy in Florida, Texas, and Illinois,'' it ''nevertheless dispensed medication to patients in Arkansas, Connecticut, New Hampshire, California, and Louisiana'' and thus ''engaged in the unlicensed practice of pharmacy in violation of the laws of these states.'' *Id.* The ALJ further found that Respondent violated Florida law when, despite being ''on notice by the [Florida] Board [of Pharmacy] that prescriptions for controlled substances must be manually signed,'' it ''continued to fill controlled-substance prescriptions containing electronic signatures.'' *Id.* at 23.

Finally, the ALJ found that Respondent ''knowingly filled prescriptions issued in the name of a doctor whose DEA registration was suspended.'' *Id.* Describing such conduct as ''a blatant violation of the pharmacy's corresponding responsibility under the [CSA] and DEA regulations,'' the ALJ found that this conduct ''demonstrate[d] a disturbing lack of appreciation for the responsibilities of a DEA registrant'' and ''threatens the public health and safety by creating a substantial risk of diversion of controlled substances.'' *Id.* at 24. The ALJ thus concluded that ''in total, the Government has proven by a preponderance of the evidence its prima facie case.'' *Id.*

The ALJ then turned to whether Respondent had rebutted the Government's prima facie case. Noting that ''both Mr. Liddy and Mrs. Liddy,'' who are Respondent's owners, ''invoked their Fifth Amendment privilege against self-incrimination'' and refused to testify, the ALJ further found that ''Respondent presented no evidence or testimony whatsoever to rebut any of the Government's evidence.'' *Id.* Accordingly, the ALJ ''conclude[d] that it would be inconsistent with the public interest to allow * * * Respondent to maintain its DEA registration.'' *Id.* at 25. Citing Respondent's ''extensive record of unlawful conduct,'' its ''callous disregard for the serious responsibilities of a DEA registrant,'' as well as its ''failure to present any evidence to show that it has corrected'' its unlawful practices, the ALJ recommended that Respondent's registration be revoked. *Id.* at 25–26.

On October 27, 2009, Respondent filed Exceptions to the ALJ's decision, and on November 9, 2009, the record was forwarded to me for final agency action. On April 14, 2010, Respondent's owner executed a voluntary surrender of its registration. Notice of Surrender and Motion To Terminate Proceedings, at 1. Thereafter, the Government moved to terminate the proceeding on the ground that it is now moot. *Id.* at 2.

Having reviewed the voluntary surrender form (DEA–104), I conclude that this case is not moot because that form contains no language manifesting that Respondent has withdrawn its pending application. Moreover, even if Respondent had withdrawn its application, under the Agency's regulation, once an applicant is served with an order to show cause, an application may only be ''withdrawn with permission of the Administrator * * * where good cause is shown by the applicant or where the * * * withdrawal is in the public interest.'' 21 CFR 1301.16(a). In light of the extensive resources that have been expended in both the litigation and review of this case, the egregious misconduct established by this record, and that neither the voluntary surrender form nor Agency regulations bar Respondent from immediately re-applying for a new registration or impose any time-bar on its reapplying, I conclude that allowing Respondent to withdraw its application would be contrary to the public interest.[1] Accordingly, I conclude that the case is not moot. The Government's motion to terminate the proceeding is therefore denied.

Having considered the entire record in this matter, including Respondent's exceptions, I adopt the ALJ's recommended decision in its entirety except as noted herein. Accordingly, Respondent's pending application will be denied. I make the following findings.

Findings

At the time of the hearing, Respondent held DEA Certificate of Registration BD8523335, which authorized it to dispense controlled substances in schedules II through V as a retail pharmacy at its Lakeland, Florida location. GX 1; ALJ Ex. 5, at 1. While Respondent's registration was initially to expire on March 31, 2009, on February 2, 2009, it timely filed a renewal application. GX 1; ALJ Ex. 5, at 1. Accordingly, Respondent's registration remained valid until April 14, 2010, when Respondent's owner surrendered it. *See* 5 U.S.C. 557(c). However, as explained above, the Voluntary Surrender form contains no language manifesting Respondent's intent to withdraw its application. I

[1] I further note that there is no evidence that Respondent and its owners intend to permanently cease the practice of pharmacy.

therefore find that Respondent's application remains pending before the Agency.

Respondent, which is licensed as a pharmacy in the states of Florida, Texas, and Illinois, Tr. 42, is owned by Mr. Robert Bruce Liddy, Sr., and Mrs. Melinda Carol Liddy. GX 5. Respondent is also known by the name ''Discount Mail Meds.'' Tr. 19; *see also* GX 9.

At the hearing, the Government called both Mr. and Mrs. Liddy to testify. *Id.* at 12, 15. However, both Mr. and Mrs. Liddy asserted their Fifth Amendment right against self-incrimination and thus did not answer questions on various subjects including on whether Respondent was also known as ''Discount Mail Meds,'' on ''all matters regarding [Respondent's] operations,'' and on Respondent's ''association'' with Internet Web sites, doctors, or Web site operators regarding the filling of prescriptions for those Web sites. *Id.* at 12–13, 15–16.

At some point not established by the record, multiple law enforcement agencies including DEA commenced an investigation into Respondent's practices, specifically focusing on its filling of prescriptions for hydrocodone (a Schedule III controlled substance), alprazolam (a Schedule IV controlled substance), and Soma or carisoprodol (a drug controlled under Florida law), which were issued by doctors who did not appear to have valid physician-patient relationships with the recipients of the prescriptions because the latter were located throughout the country. *Id.* at 20–21.

According to the DEA's lead investigator, Respondent was associated with four to five internet prescribing Web sites, including ExpressReliefServices.com and NationwidePills.com. *Id.* at 22; *see also* GXs 7 & 8. Generally, the Web sites offered a person the ability to purchase prescription medication, including controlled substances, based on a person's completion of an online questionnaire and without the prescribing physician's having performed a physical exam of him/her. Tr. at 22; *see also* GX 7, at 3 (terms and conditions for Nationwidepills.com) (''You understand that an on-line medical consultation will not include a physical examination. You hereby waive a physical exam at this time and agree to obtain a timely medical follow-up examination with a physician before you take treatments prescribed by Nationwidepills.com.''). Moreover, while some of the Web sites required medical records and/or identification, others did not. Tr. 22. Physicians who held DEA registrations ''lent their DEA numbers for the filling of * * * prescriptions.'' *Id.* However, the actual creation of the prescriptions ''appear[ed] to have been done by a physician's assistant frequently without the knowledge of the physician.'' *Id.*

Between June and August 2006, DEA Investigators from the Cleveland District Office made four undercover purchases of 10 mg. strength hydrocodone drugs by accessing several unidentified Web sites, completing questionnaires, providing medical records, and speaking with a physician's assistant. *Id.* at 23. The shipments of hydrocodone medication arrived via either UPS or FedEx and had been filled by Respondent. *Id.* at 23–24. Moreover, at some unspecified date in either 2005 or 2006, a DEA Diversion Investigator went to Respondent and interviewed its owners. Tr. 82.

Approximately one year later, on July 30, 2007, a search warrant was executed at Respondent and five other locations. *Id.* at 34; GX 5, at 1. During the search, another DI interviewed Robert Bruce Liddy, Sr.; the DI subsequently provided an affidavit about that interview.

According to the affidavit, Mr. Liddy was first approached by the owner of Express Relief Services (ERS) in December 2004. GX 5, at 1. The owner of ERS was ''seeking a pharmacy to fill prescriptions generated from his 'network of physicians' in the telemedicine field.'' *Id.* At a dinner meeting, ERS's owner explained that Respondent would ''receive prescriptions via facsimile directly from the doctor's [sic] office'' and be paid a "'dispensing fee of $28–$30 for each'' prescription it filled. *Id.* Respondent received ''approximately 500–750 new prescriptions per week'' from ERS's Web site and also filled requests for refills. *Id.* According to the affidavit, ''Mr. Liddy stated that at one point his pharmacy would fill more than 180 prescriptions a [sic] day for Express Relief Services'' for such drugs as hydrocodone, alprazolam and carisoprodol, with the vast majority of the prescriptions being for hydrocodone products. *Id.*

Mr. Liddy told the DI that Respondent received the prescriptions directly from the prescribing physicians, among them one Dr. Jorge Alsina. *Id.* at 2. Mr. Liddy further told the DI that the owner of ERS, whom Mr. Liddy believed to be ''addicted to hydrocodone,'' would ''pick up hydrocodone prescriptions for himself and 'his friends,' '' and that these prescriptions were also written by the doctors who worked for ERS. *Id.*

During the interview, Mr. Liddy stated that, while he worked for ERS, he also contracted with other Internet Web sites to fill prescriptions for them. *Id.* Also at the interview, Mrs. Liddy ''revealed that [Respondent] was also working with Opti Health, First Priority, Nationwide Pills, Pharmanet, U.S. Meds, and CDR.'' *Id.*

Mr. Liddy asserted that he had a pharmacy license ''in each state where he had out-of-state customers.'' *Id.* He also claimed that he was not breaking the law ''because he believed there were safeguards in place against the wrong people getting the drugs.'' *Id.* He further stated his belief that "'people will get the drugs'" anyway and that he "'was not the prescription police.'" *Id.*

During the execution of the search warrant, Respondent's dispensing records were seized by downloading them from the hard drives of its computer system. Tr. 53, 55, 97. The Government introduced into evidence both summaries of data seized at the execution of the search warrant prepared by the National Drug Intelligence Center (NDIC) and DEA's forensic digital laboratory in Lorton, Virginia, as well as data from DEA's Automated Reports and Consummated Order System (ARCOS) which showed the monthly amounts of hydrocodone (in dosage units) which Respondent purchased between January 1, 2004 and September 16, 2008. *Id.* at 91 & 95; GX 3. The latter showed that Respondent's purchases of hydrocodone increased from a total of 47,900 dosage units in calendar year 2004, to 3,688,500 dosage units in 2005, and to 4,557,840 in 2006. GX 3.

Dr. Jorge Alsina was listed as a prescribing physician in records seized from Respondent. *Id.* at 42–43; GXs 13, 14 & 19. Dr. Alsina was licensed to practice medicine only in the State of Florida. Tr. 43. Initially, he received $1,000 per week for writing prescriptions for Respondent; subsequently, according to the DI, he received $2,000 per week. *Id.* at 58–59.

The DI further testified as to manner in which ERS operated. According to the DI, an ERS clerk would request medical records and a copy of a driver's license from a customer; the records were then faxed to either Dr. Alsina or to Mr. Folder, who was a physician's assistant. However, in an interview, Dr. Alsina stated that he did not have a registered supervisory relationship with Folder as required by Florida law. *Id.* at 60–63.

Dr. Alsina also ''did not necessarily review'' the medical records which he would fax to the physician's assistant; Alsina would also e-mail the prescription to Folder as well. *Id.* at 64–65; 67. However, according to Dr. Alsina, sometimes his part in the e-mail

chain was skipped and the prescription was sent directly from the physician's assistant to Respondent. *Id.* Alsina indicated that ERS had a template with his signature so that with the ''hit[ing] of a button,'' his signature could be generated by either himself or Folder. *Id.* at 69, 70.

The Government introduced into evidence eight prescriptions for controlled substances that were sent as e-mail attachments from ''Matthew and Gayle Folder'' to ''Bruce Liddy.'' GX 4, at 2, 4, 8, 10, 12, 14, 18, and 20. All of the prescriptions were dated March 19, 2005 and bore Dr. Alsina's electronic signature. *See id.* The DI testified that these prescriptions were ''representative of the vast majority of the prescriptions that were seized from [Respondent's] computers.'' *Id.* at 85.

The Government also entered into evidence an e-mail dated September 10, 2004, from Danna E. Droz, Executive Director, Board of Pharmacy, State of Florida, to Mr. Liddy at the e-mail address: *bruce@discountmailmeds.com*. GX 11. The e-mail specifically explained that ''[e]lectronic prescriptions such as would come from a PDA or a computer to a pharmacy's fax machine or to a pharmacy's computer may be used only for prescriptions for non-controlled substances.'' GX 11. Continuing, Ms. Droz explained that ''[a] prescription for a controlled substance must be manually signed at this time.'' *Id.;* Tr. 87. While the e-mail further noted that DEA is in the process of developing regulations to permit the electronic transfer of a prescription,'' GX 11, the requirement that a controlled substance prescription be manually signed remained in effect as of the date of the hearing under the regulations of both DEA and the State of Florida. Tr. 88.

The DI testified that the ''vast majority'' of the seized prescriptions did not comply with the manual signature requirement. *Id.* Moreover, the eight prescriptions contained in Government Exhibit 4 were issued subsequent to the date on which Mr. Liddy received notice that controlled substance prescriptions must be manually signed.

Based on the records seized from Respondent, the NDIC prepared a chart compiling the number of prescriptions dispensed by Respondent by each prescriber for hydrocodone, alprazolam and other drugs. GX 14. According to the chart, Respondent filled 19,447 prescriptions which were written by Dr. Alsina; 12,796 of the prescriptions were for hydrocodone products and 5,860 were for alprazolam. GX 14, at 1; GX 15. Only 791 prescriptions were for other drugs, some of which may have also been controlled substances.[2] GX 14, at 1.

Moreover, between October 2004 and the end of December 2005, Respondent dispensed prescriptions written by Dr. Alsina to patients in such states as West Virginia (4,308 prescriptions), Tennessee (4,307 prescriptions), Ohio (2,455 prescriptions), Kentucky (2,346 prescriptions),[3] Virginia (2,345 prescriptions), Alabama (633 prescriptions), Florida (425 prescriptions), California (311 prescriptions), Indiana (275 prescriptions), and North Carolina (177 prescriptions). GX 19, at 1; GX 20, at 1–68.[4] Even if all of the remaining 791 prescriptions which were not specifically identified as being for controlled substances were for non-controlled drugs and are subtracted from the various state figures, the evidence still shows that Dr. Alsina prescribed large quantities of controlled substances to individuals in West Virginia, Tennessee, Ohio, Kentucky, and Virginia, if not the other States as well.

As an example of Dr. Alsina's prescribing of controlled substances across state lines, on July 6, 2005, he issued 351 prescriptions[5] to residents of various States and in the following quantities: West Virginia (98), Tennessee (98), Virginia (65), Ohio (58), Alabama (6), North Carolina (5), Arizona (4), Michigan (4), Indiana (3), Georgia (2), Arizona (1), Connecticut (1), Maryland (1), New Hampshire (1), and Utah (1). GX 20, at 48. Obviously, Dr. Alsina did not fly or drive all over the country on a single day to conduct physical exams on these patients. Nor does it seem likely that any of these patients travelled from all over the country to see him (this was, after all, an internet-based operation). In any event, seeing 351 patients in a single day would be a remarkable achievement for any physician. I therefore find that Respondent either had to have known, or willfully closed its eyes to the fact, that Dr. Alsina could not possibly have issued all of these prescriptions pursuant to a legitimate doctor-patient relationship.

DEA suspended Dr. Alsina's Certificate of Registration on September 26, 2005. Tr. 44–45; GX 10. Dr. Alsina notified Respondent of this fact by an e-mail of October 5, 2005, which Respondent acknowledged with another e-mail of the same date. Tr. 47–48; GX 12. However, Respondent's records reflect that through December 2005, Respondent continued to fill prescriptions issued using Dr. Alsina's registration. GX 20, at 66–68. More specifically, it appears that Respondent filled 67 prescriptions from the time of the suspension through the end of December 2005. GX 20; GX 13; *see also* ALJ at 9 n.10.[6] However, the Government's evidence does not identify what drugs these prescriptions were for.

Respondent's pharmacy records also listed Dr. Dora Fernandez as a prescribing physician. Tr. 43; GXs 13–14, 19 & 20. Dr. Fernandez is only licensed to practice medicine in the State of Florida. Tr. 43.

The NDIC data indicate that Dr. Fernandez wrote a total of 13,603 prescriptions which were filled by Respondent. Of these, 3,242 were for hydrocodone, 60 were for alprazolam, and 301 were for other medications. GX 14, at 1; GX 15. Between February 2006 and the end of April 2007, Respondent dispensed prescriptions written by Dr. Fernandez to individuals in numerous States, in the following quantities: Florida (1,448 prescriptions), Texas (1,387 prescriptions), Alabama (856 prescriptions), Virginia (837 prescriptions), New York (702 prescriptions), Washington (690 prescriptions), Michigan (652 prescriptions), Pennsylvania (497 prescriptions), Ohio (476 prescriptions)

[2] The Government's evidence lists the prescriptions as being in one of three categories: hydrocodone, alprazolam, or ''other'' medications. GX 14. The evidence does not, however, further identify the drugs listed under ''other'' medications and whether this category includes any controlled substances. *See* GXs 14–20.

[3] As the ALJ noted in her recommended decision, there is a slight discrepancy between the raw data in Government Exhibit 13 and the NDIC-prepared data in Government Exhibit 19, the source cited here. *See* ALJ at 9 n.8. The count in Government Exhibit 13 for Kentucky is 2,345 and not 2,346. Other discrepancies are as follows: Alabama, 632, not 633; Florida, 424, not 425; and California, 310, not 311. *See id.* I concur in the ALJ's determination that, while ''the Government's calculated exhibits may be slightly inaccurate,'' they nevertheless ''are sufficiently close to the actual numbers'' for the purposes of this decision. *See id.*

[4] The ALJ treated all of the prescriptions as if they were for controlled substances including those listed as ''other'' drugs and which were not specifically identified as being for controlled substances. *See* ALJ at 9 (FOF 19 and 20) (discussion of ''Unlicensed Practice of Medicine''). However, even after subtracting out all of the ''other'' prescriptions, it is still clear that the physicians wrote numerous controlled substance prescriptions for residents of States where they were not licensed. The ALJ's error is therefore inconsequential. *See* ALJ at 20–21.

[5] He also issued eight prescriptions to individuals in Florida, for a total of 359 prescriptions on that date. GX 20, at 48.

[6] The ALJ did not count the prescriptions listed under February 1, 2006 and July 26, 2006, noting that the ''date filled'' for those prescriptions is one year earlier in 2005, when Dr. Alsina's license was still valid. Like the ALJ, I conclude that the dates of February 1 and July 26, 2006 are typographical errors. *See* ALJ at 10 n.12.

and Georgia (467 prescriptions). *See* GXs 19, at 1, & GX 20, at 68–195. Even if all of the remaining 301 prescriptions which were not specifically identified as being for controlled substances were for non-controlled drugs, Dr. Fernandez prescribed controlled substances to residents of each of these ten States. Moreover, she also prescribed controlled substances to residents of at least nine States where she did not possess licensure and could not practice medicine.

As an example of her prescribing across state lines, on November 13, 2006, Dr. Fernandez issued 91 prescriptions.[7] GX 20, at 152–53. The States and number of prescriptions are as follows: New York (11), Michigan (8), Arizona (7), Georgia (7), Alabama (6), Texas (6), Virginia (5), Washington (5), Connecticut (4), Ohio (3), Wisconsin (3), Arkansas (2), Colorado (2), Indiana (2), Kansas (2), Pennsylvania (2), Alaska (1), California (1), Iowa (1), Idaho (1), Minnesota (1), Montana (1), New Mexico (1), Oklahoma (1), Oregon (1), Rhode Island (1), and South Carolina (1).

Given the respective locations of Dr. Fernandez and those she prescribed to, it is implausible that Dr. Fernandez conducted physical examinations of these persons and established bona fide doctor-patient relationships with them. Here again, Respondent clearly had reason to know that Dr. Fernandez could not have established a bona fide doctor-patient relationship with these persons. Tr. 43–44.

Respondent's records also listed Dr. Jose Mercado Francis as a prescribing physician. Tr. 43; GXs 13–15, 19 & 20. Dr. Francis is only licensed to practice medicine in the State of Michigan.

The NDIC data indicates that Dr. Francis wrote 7,319 prescriptions which were filled by Respondent, including 5,135 for hydrocodone products, 1,135 for alprazolam, and 1,049 for other medications. GX 14, at 1. Between February 2006 and the end of April 2007, Respondent dispensed prescriptions written by Dr. Francis to individuals in a number of States, the top ten being as follows: Alabama (1,294 prescriptions), California (568 prescriptions), Louisiana (518 prescriptions), Texas (486 prescriptions), Washington (456 prescriptions), Ohio (404 prescriptions), Florida (386 prescriptions), Georgia (337 prescriptions), Virginia (272 prescriptions), and Maine (268 prescriptions). GXs 19, at 1; GX 20, at 195–270. Again, even assuming that all of the non-specified prescriptions were for non-controlled drugs and subtracting them out, Dr. Francis still clearly issued numerous controlled substance prescriptions to residents of Alabama.

As an example of his prescribing across state lines, on March 3, 2006, Dr. Francis issued thirty prescriptions to residents of the following States: Georgia (7), South Carolina (4), Florida (3), Maryland (3), Ohio (3), California (2), Indiana (2), Louisiana (2), Colorado (1), Maine (1), North Carolina (1), and Texas (1). GX 20, at 196. Clearly, Dr. Francis could not have established bona fide doctor-patient relationships with these patients or performed physical examinations on them. Here again, Respondent, when it filled these prescriptions, had reason to know this.

Respondent's records list Dr. Edward Cheslow as a prescribing physician. Tr. 44; GXs 13–14, 19–20. Dr. Cheslow is only licensed to practice in the State of New York. Tr. 44.

NDIC data show that Dr. Cheslow wrote 6,577 prescriptions which were filled by Respondent; of these, 6,362 were for hydrocodone products, 36 were for alprazolam, and 179 were for other medications. GX 14, at 1. From February 2006 through May 1, 2007, Dr. Cheslow wrote prescriptions for medications which were filled by Respondent for residents of numerous States, the top ten being California (2,831 prescriptions), Texas (349 prescriptions), Florida (299 prescriptions), Georgia (232 prescriptions), New York (206 prescriptions), New Jersey (185 prescriptions), Ohio (177 prescriptions), Washington (168 prescriptions), Virginia (162 prescriptions), and Alabama (140 prescriptions). GX 19, at 1–2; GX 20, at 270–343. Subtracting out the 179 prescriptions for ''other'' medication, the evidence still shows that Dr. Cheslow wrote controlled substance prescriptions for individuals in California, Texas, Florida, Georgia, and New Jersey.

As an example of Dr. Cheslow's daily prescribing, on October 23, 2006, he issued thirty prescriptions to residents of States where he was not licensed to practice as follows: California (16), Texas (3), Florida (2), Mississippi (2), Alabama (1), Maine (1), Minnesota (1), New Jersey (1), Ohio (1), Utah (1), and Virginia (1). GX 20, at 305. Again, Respondent dispensed these prescriptions having reason to know that Dr. Cheslow was prescribing to persons who resided in States where he was not licensed to practice medicine and that he was prescribing to persons he did not physically examine and with whom he did not establish a bona fide doctor-patient relationship.

Respondent's records list Dr. Gerard Romain as a prescribing physician. Tr. 44; GXs 13–14, 19–20. Dr. Romain is only licensed to practice medicine in the State of Florida. Tr. 44.

The NDIC data indicate that Respondent filled 6,121 prescriptions issued by Dr. Romain, of which 5,103 were for hydrocodone products, 681 were for alprazolam, and 337 were for other medications. GX 14, at 2. Between May 2004 and June 18, 2007, Respondent dispensed prescriptions issued by Dr. Romain to individuals in numerous States, the top ten being as follows: Virginia (672 prescriptions), California (433 prescriptions), West Virginia (367 prescriptions), Ohio (354 prescriptions), Florida (339 prescriptions), Tennessee (321 prescriptions), Alabama (309 prescriptions), Texas (294 prescriptions), Georgia (231 prescriptions), and Indiana (205). GXs 19, at 2, & 20, at 428–517. Again, even if the 337 prescriptions for other medications were for non-controlled drugs, at a minimum, Dr. Romain prescribed controlled substances to residents of Virginia, California, West Virginia, and Ohio, and likely other States as well.

As an example of Dr. Romain's daily prescribing, on September 23, 2005, he issued twenty-two prescriptions to individuals in the following States: West Virginia (6), Virginia (5), Ohio (3), California (2), Washington (2), Alabama (1), Connecticut (1), Kansas (1), and Texas (1). GX 20, at 435. Again, in filling these prescriptions, Respondent had reason to know that Dr. Romain did not physically examine the patients and could not have established bona fide doctor-patient relationships with them.

Respondent's pharmacy records also list Dr. Felix Llamido as a prescribing physician. Tr. 44; GXs 13–14; GXs 19–20, at 343–428. Dr. Llamido is only licensed to practice in the State of Florida. Tr. 44.

According to the NDIC data, Respondent filled 6,481 prescriptions written by Dr. Llamido, of which 6,290 were for hydrocodone products, 32 were for alprazolam, and 159 for other medications. GX 14, at 1. Between February 2006 and the end of April 2007, Respondent dispensed prescriptions written by Dr. Llamido to patients in numerous States, the top ten being California (766 prescriptions), New Jersey (582 prescriptions), Georgia (550 prescriptions), Massachusetts (518 prescriptions), Maryland (470 prescriptions), Texas (363 prescriptions), Illinois (350

[7] She additionally issued seven prescriptions to individuals in the State of Florida. GX 20, at 152.

prescriptions), Florida (302 prescriptions), New Hampshire (215 prescriptions), and Washington (175 prescriptions). GX 14, at 2; GX 20 at 343–428. Thus, at a minimum, Dr. Llamido issued controlled substance prescriptions to individuals in California, New Jersey, Georgia, Massachusetts, Maryland, Texas, Illinois, New Hampshire and Washington.

As an example of his daily prescribing, on March 27, 2006, Dr. Llamido issued thirty-nine prescriptions to residents of the following states: California (6), Maryland (5), New Hampshire (3), Ohio (3), Pennsylvania (3), New Jersey (2), Texas (2), Virginia (2), Washington (2), West Virginia (2), Connecticut (1), Georgia (1), Hawaii (1), Indiana (1), Minnesota (1), Mississippi (1), Oklahoma (1), Utah (1), and Wisconsin (1). GX 20, at 350. Again, Respondent had reason to know that Dr. Llamido could not have performed physical examinations on these patients and did not have bona fide doctor-patient relationships with them.

Finally, Respondent's pharmacy records listed Dr. Caroline Moore as a prescribing physician. Tr. 44; GXs 13–14, 19–20, at 517–35. Dr. Moore is licensed only in the State of Florida. Tr. 44.

The NDIC data shows that Respondent filled 2,687 prescriptions written by Dr. Moore, including 1,884 for hydrocodone products, 659 for alprazolam, and 144 for other medications. GX 14, at 1–2. From January 2, 2005 through the end of December 2006,[8] Dr. Moore issued prescriptions to individuals in numerous States, the top ten including West Virginia (790), Ohio (463), Virginia (422), Alabama (106), California (94), Florida (89), Tennessee (70), Texas (57), Georgia (53), and Indiana (44). GXs 19, at 2, & 20, at 517–35. Again, even subtracting out the 144 prescriptions for other medications, Dr. Moore clearly issued controlled substance prescriptions to individuals in West Virginia, Ohio, and Virginia.

As an example of Dr. Moore's out-of-state prescribing practices, on November 21, 2005, she issued seventy-two prescriptions to residents in States other than Florida, as follows: West Virginia (22), Ohio (14), California (10), Virginia (3), Georgia (2), Indiana (2), Massachusetts (2), Missouri (2), North Carolina (2), New Jersey (2), New York (2), Pennsylvania (2), Texas (2), Arkansas (1), Arizona (1), Illinois (1), Oklahoma (1), and Washington (1). GX 20, at 524. Given the geographically diverse locations of Dr. Moore's ''patients,'' in filling these prescriptions, Respondent clearly had reason to know that Dr. Moore did not physically examine them and did not establish bona fide doctor-patient relationships with them.

The Government also entered into evidence a letter from Robert Bruce Liddy, Sr., to Peter A. Grasso, Chief Compliance Investigator, New Hampshire Board of Pharmacy, dated November 18, 2005. GX 9. In the letter, Mr. Liddy wrote that Respondent did not ''solicit prescription sales [from] the State of New Hampshire or any other state outside of Florida.'' *Id.* He also indicated that Respondent had ''three customers who winter in Florida and reside in New Hampshire during the summer months.'' *Id.* According to Mr. Liddy, Respondent's records showed that Respondent had ''mailed 3 packages to New Hampshire in the past two years'' of its operation. *Id.* Mr. Liddy added that ''[i]f in the future I increase or determine it beneficial for my business to advertise or solicit for prescription sales in your state I will certainly abide by the guidelines set forth by the New Hampshire Board of Pharmacy for Non-Resident Pharmacy licensure.'' *Id.*

The Government submitted into evidence data showing that between May 25, 2004 and May 14, 2007, Respondent dispensed a total of 472 prescriptions to New Hampshire residents; the evidence also shows that Respondent dispensed twenty-four prescriptions prior to the date of the above-referenced letter. GX 18, at 1, 11. Moreover, prior to Mr. Liddy's letter, Respondent had dispensed seven prescriptions for controlled substances (as well as refills for several of the prescriptions) for drugs which included alprazolam, temazepam, hydrocodone, and oxycodone. *See* GX 13 (spreadsheet lines ## 10930 (alprazolam), 25397 (oxycodone/acetaminophen), 45243–45, 46893–95, 53407–09, and 68484–86 (all for hydrocodone/acetaminophen and including two refills) and 55611 (temazepam)). Moreover, subsequent to Liddy's letter, Respondent continued to dispense controlled substance prescriptions (typically for hydrocodone) to New Hampshire residents. *See, e.g. id.* (spreadsheet lines ## lines 109622–23, 110538–39, 112493, 112502, 115778).

Respondent rested without calling any witnesses or introducing any other evidence. Moreover, as noted above, when called to testify by the Government, Respondent's owners invoked their privilege under the Fifth Amendment and refused to answer any questions regarding their ownership of Respondent, the pharmacy's operations and its association with various Web sites. Tr. 12–13 (testimony of Robert Bruce Liddy, Sr.); *id.* at 15–16 (testimony of Melinda Carol Liddy).

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that ''[t]he Attorney General may deny an application for [a practitioner's] registration if he determines that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In determining the public interest, section 303(f) directs that the following factors be considered:

> (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
> (2) The applicant's experience in dispensing * * * controlled substances.
> (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.
> (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
> (5) Such other conduct which may threaten the public health and safety.

Id.

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked or an application should be denied.'' *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

Having considered all of the factors, I conclude that the evidence pertaining to factors two and four is dispositive and establishes that Respondent has committed acts which render the issuance of a registration to it ''inconsistent with the public interest.''[9]

[8] There appear to be some typographical errors in GX 20, page 535. The page lists a prescription on December 30, 2006 and then jumps to three prescriptions supposedly written in November 2008 and one prescription in December 2008. GX 20, at 535. Obviously, that would be impossible, as the four prescriptions in 2008 would postdate the execution of the search warrant of July 30, 2007.

[9] This Agency has repeatedly held that the possession of a valid state license is not dispositive of the public interest inquiry. *See Patrick W. Stodola,* 74 FR 20727, 20730 n.16 (2009); *Robert A. Leslie,* 68 FR at 15230. DEA has long held that ''the Controlled Substances Act requires that the Administrator * * * make an independent determination as to whether the granting of controlled substances privileges would be in the

21 U.S.C. 823(f). I also find that Respondent has not rebutted the Government's *prima facie* showing. Accordingly, Respondent's pending application to renew its registration will be denied.

Factors Two and Four—Respondent's Experience in Dispensing Controlled Substances and Its Compliance With Applicable Federal, State and Local Laws Relating to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is unlawful unless it has been ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). Moreover, while ''[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner * * * a corresponding responsibility rests with the pharmacist who fills the prescription.'' *Id.* Accordingly, the ''person knowingly filling such a purported prescription, as well as the person issuing it, [is] subject to the penalties provided for violations of the provisions of laws relating to controlled substances.'' [10] *Id.*

The Agency has interpreted this regulation as ''prohibiting a pharmacist from filling a prescription for controlled substances when he either 'knows or has reason to know that the prescription was not written for a legitimate medical purpose.' '' *Trinity Healthcare Corp.,* 72 FR 30849, 30854 (2007) (quoting *Medic-Aid Pharmacy,* 55 FR 30043, 30044 (1990)); *see also United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007); *Frank's Corner Pharmacy,* 60 FR 17574, 17576 (1995); *Ralph J. Bertolino,* 55 FR 4729, 4730 (1990); *see also United States* v. *Seelig,* 622 F.2d 207, 213 (6th Cir. 1980). The Agency has further held that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Bertolino,* 55 FR at 4730 (citations omitted); *see also United Prescription Services,* 72 FR at 50407.

As I explained in *United Prescription Services,* ''when a pharmacy receives a prescription which indicates that the prescriber and patient are located nowhere near each other, it should be obvious that further inquiry is warranted to determine whether the prescription was issued pursuant to a valid doctor-patient relationship.'' 72 FR at 50409. ''Determining whether a physician has acted in accordance with this standard necessarily requires that the pharmacist have knowledge of the applicable State's law.'' 72 FR at 50405 n.19 (citing *United States* v. *Smith,* 2006 WL 3702656 (D. Minn. 2006)).

Moreover, ''[a] physician who engages in the unauthorized practice of medicine is not a 'practitioner acting in the usual course of * * * professional practice.' '' *United,* 72 FR at 50407 (quoting 21 CFR 1306.04(a)). Under the CSA, the ''term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices * * * to * * * dispense * * * a controlled substance.'' 21 U.S.C. 802(21); *see also* 21 U.S.C. 823(f) (''The Attorney General shall register practitioners * * * to dispense * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices'').

Consistent with the statutory text, shortly after the CSA's enactment, the Supreme Court explained that ''[i]n the case of a physician, [the Act] contemplates that he is authorized by the State to practice medicine and to dispense drugs in connection with his professional practice.'' *United States* v. *Moore,* 423 U.S. 122, 140–41 (1975). Accordingly, a controlled substance prescription issued by a physician who lacks the license necessary to practice medicine within a State is therefore unlawful under the CSA. *Cf.* 21 CFR 1306.03(a)(1) (''A prescription for a controlled substance may be issued only by an individual practitioner who is * * * [a]uthorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession''); *see also United Prescription Services,* 72 FR at 50407.

As found above, Respondent dispensed millions of dosage units of hydrocodone (a schedule III controlled substance, *see* 21 CFR 1308.13(e)) and alprazolam (a schedule IV controlled substance, *see* 21 CFR 1308.14(c)), based on prescriptions issued by physicians who were prescribing to persons who resided in States where the physicians were not licensed to practice medicine (although they were required to be) and were thus engaged in the unauthorized practice of medicine. The prescriptions violated both the CSA and the laws of the respective States including, *inter alia,* Alabama, California, Georgia, Indiana, North Carolina, Ohio, Texas, and Virginia. *See* Ala. Code §§ 34–24–50 (defining practice of medicine to include prescribing), 34–24–51 (requiring a license for the practice of medicine), 34–24–502 (requiring special license for practice of medicine across state lines); Cal. Bus. & Prof. Code §§ 2052 (criminalizing the practice of medicine without state license); Ga. Code Ann. §§ 43–34–26(a) (requiring license), 43–34–31 (requiring state license for medical treatment of individual in state by physician in another state); Ind. Code Ann. §§ 25–22.5–8–1 (prohibiting the practice of medicine without a state license) & 25–22.5–1–1.1(a) (defining practice of medicine); N.C. Gen. Stat. Ann. § 90–18 (prohibiting practice of medicine across state lines unless licensed in state); Ohio Rev. Code Ann. §§ 4731.296 (prohibiting out-of-state practice of telemedicine without a special permit), 4731.41 (prohibiting practice of medicine without state license); Tex. Occup. Code Ann. §§ 155.001 (requiring license to practice medicine), 151.056(a) (making out-of-state treatment of individual in state the practice of medicine in state); Va. Code Ann. §§ 54.1–2902 (prohibiting practice of medicine without state licensure), 54.1–2903 (making prescribing the practice of medicine), 54.1–2929 (requiring license for the practice of medicine).[11]

As found above, five of the doctors whose prescriptions Respondent filled were licensed to practice medicine only in Florida and yet wrote controlled substance prescriptions to residents of States where they were unlicensed and thus engaged in the unauthorized practice of medicine. More specifically, the evidence clearly establishes that Dr. Alsina wrote controlled substance prescriptions for residents of Virginia, Ohio, California, Alabama, and Georgia; that Dr. Fernandez wrote controlled substance prescriptions for residents of Texas, Ohio, and Georgia; that Dr. Romain wrote controlled substance prescriptions to residents of Virginia, California, and Ohio; that Dr. Llamido wrote controlled substance prescriptions for residents of California, Georgia, Texas; and that Dr. Moore wrote controlled substance

public interest.'' *Mortimer Levin,* 57 FR 8680, 8681 (1992). Nor is the lack of any criminal convictions related to controlled substances dispositive. *Edmund Chein,* 72 FR 6580, 6593 n.22 (2007). Thus, the fact that Respondent may still hold its Florida pharmacy license and that neither it, nor its owners, have been convicted of a criminal offense is not dispositive.

[10] As the Supreme Court has explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

[11] All cited statutes were enacted and in effect at the time of the conduct in question.

prescriptions for residents of Ohio and Virginia, as well as other States.

The record also establishes that while Dr. Francis was licensed to practice medicine only in Michigan, he wrote controlled substance prescriptions to residents of Alabama and other States. Finally, while Dr. Cheslow was licensed to practice medicine only in New York, he wrote controlled substance prescriptions in California, Texas, and Georgia as well as other States.

As found above, Respondent filled prescriptions written by each of the above doctors on a regular basis for a lengthy period of time, and in each case, Respondent received prescriptions (which it filled) which were written by a physician on a single day for persons located in numerous States in which the physicians were not licensed. As explained above, ''[a] physician who engages in the unauthorized practice of medicine is not a 'practitioner acting in the usual course of * * * professional practice.' '' *United,* 72 FR at 50407 (quoting 21 CFR 1306.04(a)). The prescriptions were therefore unlawful under the CSA and Respondent had ample reason to know that these physicians were engaged in the unauthorized practice of medicine and that the prescriptions they issued were unlawful under both Federal and state laws.

In its Exceptions, Respondent invokes an Agency rulemaking which clarified the registration requirements for practitioners to argue that prior to January 2, 2007 (when the regulation became effective), ''a physician could prescribe in any state provided the physician held a [DEA] registration in a single state.'' Exceptions at 4 (discussing DEA, Final Rule, *Clarification of Registration Requirements for Individual Practitioners,* 71 FR 69478 (Dec. 1, 2006)). Respondent further maintains that ''there was no evidence produced that [it] was aware that the physician may have been acting outside the scope of their certificate or aided in any way the unlicensed practice of medicine by filling prescriptions for patients in other states.'' *Id.*

Beyond the fact that Respondent simply misstates the Agency's published interpretation of the authority conveyed by a DEA registration (and which had been published before much of the conduct at issue here had occurred), its argument conflates two separate issues: (1) The requirements for holding a DEA registration for a particular location, and (2) the licensure requirements for prescribing under state law. As the Agency explained in its Notice of Proposed Rulemaking, ''[t]o be valid in a particular jurisdiction, a controlled substance prescription must be written by a practitioner *who possesses valid state authority in that jurisdiction* and, equally important, the practitioner must possess a DEA registration predicated upon valid state authority in that jurisdiction.'' DEA, Notice of Proposed Rulemaking, *Clarification of Registration Requirements for Individual Practitioners,* 69 FR 70576 (Dec. 7, 2004) (emphasis added).

Contrary to Respondent's contention that there is no evidence that it aided the unlicensed practice of medicine, the evidence exists in the thousands of prescriptions it filled which indicated that the patients resided in one State and the prescribing physician practiced in another. *See, e.g.,* GX 4. Moreover, as the California Court of Appeals has noted, the ''proscription of the unlicensed practice of medicine is neither an obscure nor an unusual state prohibition of which ignorance can reasonably be claimed, and certainly not by persons * * * who are licensed health care providers. Nor can such persons reasonably claim ignorance of the fact that authorization of a prescription pharmaceutical constitutes the practice of medicine.'' *Hageseth* v. *Superior Court,* 59 Cal.Rptr.3d 385, 403 (Ct. App. 2007). As a state-licensed pharmacy and participant in the health care industry, Respondent (and its owners) cannot reasonably claim ignorance of the fact that prescribing a drug constitutes the practice of medicine and that a physician must be licensed to do so.

The controlled substance prescriptions Respondent filled were unlawful for a further reason. Under the CSA, it is fundamental that ''a practitioner must establish a bona fide doctor-patient relationship in order to act 'in the usual course of * * * professional practice' and to issue a prescription for a 'legitimate medical purpose.' '' *Patrick W. Stodola,* 74 FR 20727, 20731 (2009) (citing *Moore,* 423 U.S. at 141–43). At the time of the events at issue here, the CSA generally looked to state law to determine whether a doctor has established a bona fide doctor-patient relationship with an individual.[12] *Stodola,* 74 FR at 20731; *see also Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services,* 72 FR at 50407. As explained below, prior to the dispensings at issue here, numerous States had either enacted legislation or promulgated administrative rules which generally prohibited (except for in narrow circumstances not relevant here) a physician from prescribing a controlled substance to a person without first performing a physical examination.

Since January 2001, California has prohibited the prescribing or dispensing of a dangerous drug ''on the Internet for delivery to any person in this state, without an appropriate prior examination and medical indication therefore, except as authorized by Section 2242.'' Cal. Bus. & Prof. Code § 2242.1. In 2003, the Medical Board of California made clear that ''[b]efore prescribing a dangerous drug, a physical examination must be performed'' by the prescribing physician. *In re Steven Opsahl, M.D.,* Decision and Order, at 3 (Med. Bd. Cal. 2003) (available by query at *http://publicdocs.medbd.ca.gov/pdl/mbc.aspx*). Furthermore, the Medical Board of California determined that ''[a] physician cannot do a good faith prior examination based on a history, a review of medical records, responses to a questionnaire and a telephone conversation with the patient, without a physical examination of the patient.'' *Id.*

Moreover, well before Respondent commenced to dispense the prescriptions at issue here, the Medical Board of California had issued numerous Citation Orders to out-of-state physicians for prescribing over the Internet to California residents. These Orders invariably cited not only the physicians' failure to perform a ''good faith prior examination,'' but also their lack of a ''valid California Physician and Surgeon's License to practice medicine in California.'' Citation Order, Martin P. Feldman (August 15, 2003); *see also* Citation Order, Harry Hoff (June 17, 2003); Citation Order, Carlos Gustavo Levy (Jan. 28, 2003); Citation Order, Carlos Gustavo Levy (November 30, 2001).

Doctors Cheslow, Romain, and Llamido all wrote a substantial number of controlled substance prescriptions based on internet consultations with

[12] On October 15, 2008, the President signed into law the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110–425, 122 Stat. 4820 (2008). Section 2 of the Act prohibits the dispensing of a prescription controlled substance ''by means of the Internet without a valid prescription'' and defines, in relevant part, the ''[t]he term 'valid prescription' [to] mean[] a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by * * * a practitioner who has conducted at least 1 in-person medical evaluation of the patient.'' 122 Stat. 4820 (codified at 21 U.S.C. 829(e)(1) & (2)). Section 2 further defines ''[t]he term 'in-person medical evaluation' [to] mean[] a medical evaluation that is conducted with the patient in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals.'' *Id.* (codified at 21 U.S.C. 829(e)(2)(B)). These provisions do not, however, apply to Respondent's conduct.

California residents which Respondent then dispensed. Given the respective locations of the physicians (New York for Dr. Cheslow and Florida for Drs. Romain and Llamido) and the California residents, it was obvious that doctors Cheslow, Romain and Llamido were not performing physical examinations and did not establish bona fide doctor-patient relationships with the Californians. Respondent and its owners had ample reason to know that these prescriptions lacked a legitimate medical purpose and were issued outside of the usual course of professional practice and therefore violated both state and Federal law. *See, e.g.*, Cal. Bus. & Prof. Code § 2242.1; 21 CFR 1306.04(a). By dispensing the prescriptions, Respondent violated its corresponding responsibility under Federal law. 21 CFR 1306.04(a).

Similar to California, regulations adopted by the States of Ohio and Indiana require that a physician perform a physical examination of his/her patient prior to prescribing a controlled substance, except in limited circumstances not applicable here. Ind. Admin. Code § 5–4–1(a); Ohio Admin Code § 4731–11–09(A). Doctors Llamido and Moore issued a substantial number of prescriptions for controlled substances to individuals in Indiana; Doctors Alsina, Fernandez, Romain, and Moore issued a substantial number of controlled substance prescriptions to individuals in Ohio. These doctors violated Indiana and Ohio law respectively, as it is inconceivable that they went to Indiana or Ohio to perform physical examinations on the patients when they were not licensed to practice in those States (or that the patients travelled to see them) and were also issuing numerous prescriptions to the residents of multiple States on the same day. And as explained above, given the respective locations of the patients and the physicians, Respondent had reason to know that the prescriptions were issued outside of the usual course of professional practice and lacked a legitimate medical purpose. 21 CFR 1306.04(a). By dispensing the prescriptions, Respondent further violated the CSA.

Under Virginia law, a doctor must establish a bona fide practitioner-patient relationship prior to prescribing a controlled substance. Va. Code Ann. § 54.1–3303(A).[13] Moreover, Virginia law expressly requires that a practitioner ''perform or have performed an appropriate examination of the patient, either physically or by use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically'' and that ''except for [in] medical emergencies, the examination shall have been performed by the practitioner himself, within the group in which he practices, or by a consulting practitioner prior to issuing a prescription.'' *Id.*

Doctors Alsina, Fernandez, Romain, and Moore, all of whom were licensed to practice only in Florida, issued controlled substance prescriptions to residents of Virginia. Here again, these physicians issued prescriptions to Virginia residents under circumstances which render it inconceivable that they met the requirements of Virginia for establishing a bona fide doctor-patient relationship prior to prescribing the controlled substances. These physicians thus violated Virginia law. Here again, given the respective locations of the physicians and the patients, Respondent (and its owners) had reason to know that these physicians did not establish bona fide doctor-patient relationships with the individuals to whom they prescribed controlled substances and that the prescriptions were issued outside of the usual course of professional practice and lacked a legitimate medical purpose as required by Federal law. 21 CFR 1306.04(a). By filling these prescriptions, Respondent again failed to comply with its ''corresponding responsibility'' under Federal law to dispense only lawful prescriptions. *Id.*

Respondent simply ignores these various state medical practice standards. Instead, in its Exceptions, Respondent argues that Florida's telemedicine rule ''does not require that the physician issuing the prescription have a face to face consultation with the patient or that the physician issuing the prescription conduct a physical examination, rather that their [sic] be a 'documented patient evaluation.'' Exceptions at 3 (quoting Fla. Admin. Code Ann. r. 64B8–9.003). However, even if it is the case that the State of Florida interprets its regulation as authorizing a physician to prescribe without having personally performed a physical examination of a patient, Florida has no authority to promulgate the standards of medical practice applicable in other States for prescribing a controlled substance to those States' residents. Thus, even if the prescriptions issued by the Florida-based physicians would have been lawful if they had been issued to residents of Florida, they were still illegal under the laws of California, Ohio, Indiana and Virginia.

Finally, Respondent cites to a recommended order of a state ALJ in a proceeding before the Florida Board of Pharmacy to argue ''that it would be 'problematic' to require a pharmacist to 'independently determine the validity of the patient/physician relationship' because the standards used to determine the validity of such a relationship 'differ from state to state.'" Exceptions at 3–4 (quoting *Florida Dept. of Health* v. *RX Network of South Florida*, 2003 WL 124675, at *32 (Fla. Div. Admin. Hrgs. 2003) (Conclusion of Law # 192). Continuing, the state ALJ reasoned that if Florida law ''were construed to require [the pharmacist] to exercise her own judgment on this issue, it is unclear whether [she] would apply Florida law to determine the validity of the professional relationship of a physician licensed outside of Florida or would apply the law of the state where the physician is licensed.'' *Rx Network* at *32.

To the extent the Florida Board adopted the state ALJ's reasoning,[14] its holding as to the scope of a pharmacist's duty under Florida law is not binding on this Agency's interpretation of Federal law and regulations. Moreover, the state ALJ's reasoning is wholly unpersuasive as ''an entity which voluntarily engages in commerce by shipping controlled substances to persons located in other States is properly charged with knowledge of the laws regarding the practice of medicine in those States.'' *United Prescription Services,* 72 FR at 50407. Just as licensed health care providers cannot ''reasonably claim ignorance'' of state laws prohibiting the unlicensed practice of medicine, so too they cannot reasonably claim ignorance of various States' laws and rules which establish the standards of medical practice for prescribing a drug.

Finally, Respondent violated the laws of numerous States by engaging in the unauthorized practice of pharmacy.[15]

[13] This statute was enacted and in effect at the time of the conduct in question.

[14] In its Final Order, the Board expressly noted that it was responding to the ALJ's conclusions of law in which this reasoning is found. *See* Final Order at 9–10, *Department of Health* v. *RX Networks of South Florida, LLC.* (Fla. Bd. of Pharm. 2003). While the Board did not specifically address the ALJ's reasoning that it is ''problematic'' to require a pharmacist to ''determine the validity of the patient-physician relationship'' because standards ''differ from state to state,'' it did note that ''pharmacists must be aware of the regulations governing those health care practitioners who prescribe drugs so that a pharmacist can make a reasoned decision as to whether the professional standards for legitimate dispensing have been met.'' *Id.* at 10.

[15] In its Exceptions, Respondent contends that its failure to obtain pharmacy licenses for those States (other than Florida) which it dispensed into is

Continued

For example, New Hampshire law requires a pharmacy to obtain a license and provides for the licensing of out-of-state pharmacies licensed elsewhere upon the passing of an examination. N.H. Rev. Stat. §§ 318:1 (defining ''pharmacy''), 318:21 (licensure of out-of-state pharmacies), 318:37 (requiring license to operate a pharmacy), and 318:42 (prohibiting the sale of prescription drugs by any other than a licensed pharmacist in a registered pharmacy).[16] Nevertheless, even after consulting with the state's Chief Compliance Officer, Respondent, through Mr. Liddy, continued to dispense prescriptions to individuals in New Hampshire. Moreover, Liddy's statement that his records showed that in the prior two years, his pharmacy had only shipped three packages to New Hampshire residents, was a bald-faced lie. I therefore find that Respondent violated New Hampshire law. Indeed, Liddy's continued violation of the law, even after being placed on notice, and his willingness to lie about his misconduct, makes clear that Respondent cannot be entrusted with a registration.

Most other States also prohibit an out-of-state pharmacy from dispensing medication to state residents without being licensed to do so. *See, e.g.,* Ark. Code Ann. §§ 17–92–301 (prohibiting practice of pharmacy without a license) & 17–92–302 (prohibiting filling of prescription by other than Arkansas-licensed pharmacist); Conn. Gen. Stat. Ann. § 20–627 (requiring registration of nonresident pharmacies); Cal. Bus. & Prof. Code § 4120 (requiring special permit for nonresident pharmacies); La. Rev. Stat. Ann. § 37:1221 (requiring special permit for out-of-state pharmacies to provide pharmacy services to residents of the state).[17] Respondent dispensed prescriptions to residents of all of these States without holding the pharmacy licenses required to do so. *See* GX 17. I therefore find that Respondent violated these laws as well. Respondent's flagrant disregard for the rules governing its profession manifests that it and its owners cannot be trusted to properly comply with Federal law and DEA regulations.

Finally, the evidence shows that Respondent violated DEA regulations by filling controlled substance prescriptions which were unlawful because they were not manually signed by the prescribing practitioner. Under 21 CFR 1306.05(a), ''prescriptions shall be written with ink or indelible pencil and shall be manually signed by the practitioner.'' Moreover, while ''the prescribing practitioner is responsible in case the prescription does not conform in all essential respects to the law and regulations[,] [a] corresponding liability rests upon the pharmacist * * * who fills a prescription not prepared in the form prescribed by DEA regulations.'' *Id.* As the DI testified, the ''vast majority'' of the controlled substance prescriptions Respondent filled did not comply with this requirement. Tr. 88. Rendering these violations especially egregious is that Mr. Liddy had been previously told by the Executive Director of the Florida Board of Pharmacy that ''a control substance prescription must be manually signed.'' GX 11. Once again, Mr. Liddy's flagrant disregard for the law makes it clear that Respondent cannot be entrusted with a DEA registration.[18]

As the forgoing demonstrates, Respondent's experience in dispensing controlled substances and its record of compliance with applicable controlled substance laws is marked by its (and its owner's) repeated and egregious violations in dispensing prescriptions that were unlawful under both the CSA and numerous state laws. I therefore hold that the Government has shown that Respondent has committed numerous acts which render issuing it a new registration ''inconsistent with the public interest.''[19] 21 U.S.C. 823(f).

Sanction

Under Agency precedent, where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must ' ''present[] sufficient mitigating evidence to assure the Administrator that it can be entrusted with the responsibility carried by such a registration.'' '' *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). ''Moreover, because 'past performance is the best predictor of future

outside of the scope of the proceeding. However, '''[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law.''' *Citizens State Bank of Marshfield* v. *FDIC,* 751 F.2d 209, 213 (8th Cir. 1984) (quoting *Aloha Airlines* v. *Civil Aeronautics Bd.,* 598 F.2d 250, 262 (DC Cir. 1979)). *See also Boston Carrier, Inc.* v. *ICC,* 746 F.2d 1555, 1560 (DC Cir. 1984) (quoted in *Edmund Chein,* 72 FR 6580, 6592 n.21 (2007) (''an agency is not required 'to give every [Respondent] a complete bill of particulars as to every allegation that [he] will confront'')). Thus, the failure of the Government to disclose an allegation in the Order to Show Cause is not dispositive, and an issue can be litigated if the Government otherwise timely notifies a respondent of its intent to litigate the issue.

The Agency has thus recognized that ''the parameters of the hearing are determined by the prehearing statements.'' *Darrell Risner, D.M.D.,* 61 FR 728, 730 (1996). Accordingly, in *Risner,* the Agency held that where the Government has failed to disclose ''in its prehearing statements or indicate at any time prior to the hearing'' that an issue will be litigated, the issue cannot be the basis for a sanction. 61 FR at 730. *See also Nicholas A. Sychak, d/b/a Medicap Pharmacy,* 65 FR 75959, 75961 (2000) (noting that the function of pre-hearing statements is to provide Due Process through ''adequate * * * disclosure of the issues and evidence to be submitted in * * * proceedings''); *cf. John Stafford Noell,* 59 FR 47359, 47361 (1994) (holding that notice was adequate where allegations were not included in Order to Show Cause but ''were set forth in the Government's Prehearing Statement'').

While the Order to Show Cause did not allege that Respondent had failed to obtain the necessary pharmacy licenses to dispense to States other than Florida, in its supplemental prehearing statement, the Government notified Respondent that it intended to litigate the issue by eliciting the testimony of its owner as to its ''licensure status * * * in those jurisdictions where [it] shipped controlled substance prescriptions and whether [it] was licensed as an out-of-state pharmacy in any jurisdiction that required such licensure.'' Gov. Supp. Prehearing Stmt. at 1. The Government also notified Respondent that it intended to litigate the issue of Respondent's communications with the New Hampshire Board of Pharmacy ''regarding the licensure requirement to ship controlled substances into that state.'' *Id.*

[16] These statutes were enacted and in effect at the time of the conduct in question.

[17] These statutes were enacted and in effect at the time of the conduct in question.

[18] The evidence does not, however, establish that Respondent dispensed controlled substance prescriptions issued under the authority of the registration held by Dr. Alsina after he notified Mr. Liddy (on October 5, 2005) that his registration had been suspended. *See* GX 12. While GX 20 lists various dates after October 5, 2005 on which Respondent dispensed prescriptions presumably authorized by Dr. Alsina, the exhibit does not identify what drugs these prescriptions were for. Thus, the evidence does not establish that these prescriptions were for controlled substances. However, given the scope of the violations that have been proved, this allegation is inconsequential.

[19] In numerous decisions, DEA has noted the serious risk of diversion created by internet prescribing and dispensing of controlled substances and the threat this poses to public health and safety. *See Trinity Health Care Corp.,* 72 FR 30849, 30855 (2007) (internet pharmacy dispensed more than 43,000 illegal prescriptions and two million dosage units of controlled substances; ''it is manifest that diversion on this scale creates an extraordinary threat to the public health and safety''); *William R. Lockridge,* 71 FR 77791, 77799 (2006) (noting that internet prescriber ''was a drug dealer'' and that conduct created ''imminent danger to public health and safety''); *Mario Avello,* 70 FR 11695, 11697 (2005); *cf. Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007) (discussing increase in the rates of prescription drug abuse and the Internet's ''role in facilitating the growth of prescription drug abuse''); *see also* National Center on Addiction and Substance Abuse, ''*You've Got Drugs!'' IV: Prescription Drug Pushers on the Internet* (2007), at 8 (''[T]he wide availability of dangerous and addictive drugs on the Internet reveals a wide-open channel of distribution. This easy availability has enormous implications for public health, particularly the health of our children, since research has documented the tight connection between availability of drugs to young people and substance abuse and addiction.'').

performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for its actions and demonstrate that it will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Trong Tran,* 63 FR 64280, 62483 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

As the ALJ observed, both of Respondent's owners invoked their Fifth Amendment privilege when called to testify by the Government and refused to answer any questions. ALJ at 24. I therefore find that Respondent (and its owners) have failed to accept responsibility for their misconduct. This alone provides reason to hold that Respondent has not rebutted the Government's *prima facie* showing that issuing it a new registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

In its Exceptions, Respondent nonetheless contends that ''even though the [Liddy's] invoked their Fifth Amendment Privilege, the record * * * demonstrate[s] that the complained of conduct was no longer present'' and that it had ceased the offending conduct prior to the execution of the search warrant in July 2007. Exceptions at 1–2. Respondent thus asserts that it has changed its practices and that its then–existing registration should not be revoked. *Id.* at 2. However, the evidence shows that at some time in either 2005 or 2006, a DEA Investigator had visited Respondent and interviewed Respondent's owners. Tr. 82.

While the record does not establish the precise subject matter that was discussed, it is not everyday that the DEA comes knocking at one's door, and it is reasonable to infer that the Investigator's visit had something to do with the illegality of Respondent's activities in dispensing the internet prescriptions. Accordingly, even were I to ignore the failure of Respondent's owners to acknowledge their illegal behavior (which I decline to do), the weight to be given Respondent's cessation of its unlawful practices is substantially diminished by the fact that this followed, rather than preceded, its owners becoming aware that they were under investigation. Moreover, as the ALJ noted, Respondent put on no evidence as to what steps it has undertaken to reform its practices. ALJ at 24.

I therefore concur with the ALJ's conclusion that Respondent's ''extensive record of unlawful conduct * * *, its callous disregard for the serious responsibility of a DEA registrant, and its failure to present any evidence to show how it has corrected these practices outweigh'' the fact that the State Pharmacy Board has taken no action against its license (factor one) and the absence of any criminal convictions (factor three). *Id.* at 25. I further adopt the ALJ's conclusion that ''it would be inconsistent with the public interest to allow * * * Respondent to maintain its registration.'' *Id.* at 24. Accordingly, Respondent's pending renewal application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I deny the Government's motion to terminate the proceeding as moot. I further order that the application of Liddy's Pharmacy, L.L.C., for a DEA Certificate of Registration be, and it hereby is, denied. This Order is effective September 8, 2011.

Dated: August 2, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–20055 Filed 8–8–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–70]

Sheryl Lavender, D.O. Decision and Order

On October 28, 2010, Administrative Law Judge (ALJ) Timothy D. Wing, issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having reviewed the record in its entirety [1] including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 21 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, BL1667596, issued to Sheryl Lavender, D.O., be, and it hereby is, revoked. I further order that any pending application of Sheryl Lavender, D.O., to renew or modify her registration, be, and it hereby is, denied. This Order is effective immediately.

Dated: July 27, 2011.

Michele M. Leonhart,

Administrator.

Brian Bayly, Esq.,

for the Government.

Shawn B. McKamey, Esq.,

for the Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge

Timothy D. Wing, Administrative Law Judge. On July 26, 2010, the Deputy Administrator, DEA, issued an Order to Show Cause and Immediate Suspension (OSC/IS) of DEA COR BL1667596, dated July 26, 2010, and served on Respondent on August 2, 2010. The OCS/IS alleged that Respondent's continued registration constitutes an imminent danger to the public health and safety. The OSC/IS also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR BL1667596 pursuant to 21 U.S.C. 824(a)(4), on the grounds that Respondent lacks authority to handle controlled substances in Florida, the state in which she maintains her DEA registration, and on the grounds that Respondent's continued registration would be inconsistent with the public interest under 21 U.S.C. 823(f). On August 31, 2010, Respondent, acting *pro se,* in a letter dated August 23, 2010, timely requested a hearing with the DEA Office of Administrative Law Judges (OALJ).

I issued an Order for Prehearing Statements on September 8, 2010. On the same date, OALJ sent Respondent a letter informing her of her right to representation under 21 CFR 1316.50.

On September 10, 2010, the Government filed a Motion for Summary Judgment. On September 13, 2010, I issued an order directing Respondent to reply to the Government's motion by September 20, 2010. On September 17, 2010, Respondent, through counsel, filed Respondent's Unopposed Motion for Extension of Time to Allow Respondent to Answer Motion for Summary Judgment, seeking an extension of time so that Respondent might obtain

[1] I note that the Government also cited 21 U.S.C. 824(a)(3) in both the Order to Show Cause and its Motion for Summary Judgment as authority for revoking Respondent's registration. *See* Order to Show Cause, at 2; Mot. for Summ. Judg., at 2–3.

permanent counsel.[1] I granted that motion on September 17, 2010, and granted Respondent until October 12, 2010, to respond to the Government's motion.

On October 12, 2010, having secured permanent counsel,[2] Respondent filed a second unopposed motion requesting additional time to respond. I granted that motion on October 13, 2010, and granted Respondent until October 15, 2010, to respond to the Government's Motion for Summary Judgment.

On October 15, 2010, Respondent timely filed her response to the Government's Motion for Summary Judgment.

II. The Parties' Contentions

A. The Government

In support of its motion for summary judgment, the Government asserts that on May 7, 2010, the State of Florida, Department of Health, issued an Order of Emergency Suspension of Respondent's osteopathic medical license, and that Respondent consequently lacks authority to possess, dispense or otherwise handle controlled substances in Florida, the jurisdiction in which she maintains her DEA registration. The Government contends that such state authority is a necessary condition for maintaining a DEA COR and therefore asks that I summarily recommend to the Deputy Administrator that Respondent's COR be revoked. In support of its motion, the Government attaches three documents: (1) The Emergency Order of Suspension referred to above; (2) a copy of Respondent's request for a hearing, filed August 31, 2010, in which Respondent denies that the state suspension ''should remain in full force and effect, thereby prohibiting Sheryl Lavender, D.O., from practicing medicine, and prescribing medications to patients'' (Gov't Mot. Sum. J. at 2 ¶(3) (citing Resp't Req. Hg. at 1 ¶(B)(2))); and (3) a printout dated September 9, 2010, from a Web site maintained by the Florida Department of Health indicating that Respondent's suspension remained in effect as of that date.

B. Respondent

Respondent opposes summary judgment and seeks the opportunity to ''discuss the merits of this matter.'' (Resp't Opp'n Gov't Mot. Sum. J. 2 ¶5.) In sum and in substance, Respondent argues that while ''it is technically true Respondent lacks state authorization to practice medicine at this time, this shall soon be remedied and having the DEA registration withdrawn or otherwise revoked would unnecessarily elongate Dr. Lavender's return to medicine * * *.'' (*Id.* at 1 ¶2.) Respondent also seeks to present evidence contesting two assertions: first, that she failed to comply with federal law in prescribing controlled substances; and second, that her continued registration would be a danger to the public. (*Id.* at 2 ¶4.) Finally, Respondent raises an estoppel and detrimental reliance argument, but concedes ''this particular tribunal is not the appropriate forum in which to argue [those] grounds.'' (*Id.* at ¶3.)

III. Discussion

At issue is whether Respondent may maintain her DEA COR given that Florida has suspended her state license to practice medicine.

Under 21 U.S.C. 824(a)(3), a practitioner's loss of state authority to engage in the practice of medicine and to handle controlled substances is grounds to revoke a practitioner's registration. Accordingly, this agency has consistently held that a person may not hold a DEA registration if she is without appropriate authority under the laws of the state in which she does business. *See Scott Sandarg, D.M.D.,* 74 FR 17,528 (DEA 2009); *David W. Wang, M.D.,* 72 FR 54,297 (DEA 2007); *Sheran Arden Yeates, M.D.,* 71 FR 39,130 (DEA 2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104 (DEA 1993); *Bobby Watts M.D.,* 53 FR 11,919 (DEA 1988).

Summary judgment in a DEA suspension case is warranted even if the period of suspension of a Respondent's state medical license is temporary, or even if there is the potential for reinstatement of state authority because ''revocation is also appropriate when a state license had been suspended, but with the possibility of future reinstatement.'' *Stuart A. Bergman, M.D.,* 70 FR 33,193 (DEA 2005); *Roger A. Rodriguez, M.D.,* 70 FR 33,206 (DEA 2005).

It is well-settled that when no question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, under the rationale that Congress does not intend administrative agencies to perform meaningless tasks. *See Layfe Robert Anthony, M.D.,* 67 FR 35,582 (DEA 2002); *Michael G. Dolin, M.D.,* 65 FR 5661 (DEA 2000); *see also Philip E. Kirk, M.D.,* 48 FR 32,887 (DEA 1983), *aff'd sub nom. Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984); *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F.3d 600, 605 (1st Cir. 1994).

In the instant case, the Government asserts, and Respondent concedes, that Respondent's Florida medical license is presently suspended. While Respondent disagrees that the state suspension of her Florida medical license ''*should* remain in full force and effect, thereby prohibiting [her] from practicing medicine and prescribing medication to patients,'' (Resp't Req. Hg. at 1 ¶ (B)(2) (emphasis supplied)), she does not deny that the state suspension presently removes the state authority upon which her DEA registration is premised. To the contrary, she admits ''it is technically true Respondent lacks state authorization to practice medicine at this time * * * .'' (Resp't Opp'n Gov't Mot. Sum. J. 1 ¶2.)

I therefore find that there is no genuine dispute as to any material fact, and that substantial evidence shows that Respondent is presently without state authority to handle controlled substances in Florida. Because ''DEA does not have statutory authority under the Controlled Substances Act to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices,'' *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (DEA 2006), I do not reach Respondent's other contentions. Under the circumstances discussed above, I conclude that further delay in ruling on the Government's Motion for Summary Judgment is not warranted.

Recommended Decision

I grant the Government's motion for summary judgment and recommend that Respondent's DEA COR BL1667596 be revoked and any pending applications denied.

Dated: October 28, 2010.

Timothy D. Wing,

Administrative Law Judge.

[FR Doc. 2011–20068 Filed 8–8–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Robert Leigh Kale, M.D., Decision and Order

On September 9, 2010, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Robert Leigh Kale, M.D. (Registrant), of Fort Smith, Arkansas.

[1] In Respondent's first motion for an extension of time, counselor Patrick R. McKamey stated that he represents Respondent in a separate criminal case; that he practices exclusively in criminal litigation; and that he filed a limited appearance in this case only so that Respondent might retain permanent counsel for these administrative proceedings.

[2] Shawn B. McKamey, Esq., filed his notice of appearance on October 13, 2010.

The Show Cause Order proposed the revocation of Registrant's DEA Certificate of Registration, BK9514375, as a practitioner in Schedules II through V, on the ground that he does ''not have authority to practice medicine or handle controlled substances in the state of Arkansas.'' Show Cause Order at 1 (citing 21 U.S.C. 824(a)(3)).

The Show Cause Order alleged that as a result of action by the Arkansas State Medical Board, Registrant was ''without authority to handle controlled substances in the State of Arkansas, the state in which [he is] registered with DEA,'' and that therefore, his registration was subject to revocation. *Id.* (citing cases). The Show Cause Order also notified Registrant of his right to request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedure for doing either, and the consequence for failing to do either. *Id.* at 2 (citing 21 CFR 1301.43).

On September 10, 2010, the Government initially attempted to serve the Show Cause Order on Registrant by certified mail to him at the address of his registered location. However, the mailing was returned and marked ''Returned to Sender'' and ''Vacant.'' GX E. The Government then attempted to serve the Show Cause Order by certified mail to him at his last known address in Oklahoma, where he also previously held a state license. GXs C & F. However, this package was returned as ''unclaimed.'' GX F.

On October 21, 2010, the Government then sent the Show Cause Order as an attachment to an e-mail which was sent to Respondent at an address that he had previously provided to DEA. GX G. In the accompanying e-mail, the Government wrote: ''Upon receiving this, please confirm receipt via email.'' *Id.* According to the Government's counsel, he ''has not received a response to this e-mail.'' Req. for Final Agency Action at 2. The Government's counsel further represents that upon sending the e-mail, he did not receive an error message or a message that the e-mail was undeliverable. Govt's Statement Regarding Service of the Order to Show Cause, at 1.

On January 7, 2011, the Government filed a Request for Final Agency Action and the Investigative Record with this Office. Req. for Final Agency Action, at 3. Therein, the Government requests that I find that Registrant has waived his right to a hearing because more than thirty days have now passed since the date of service of the Show Cause Order, and that neither Registrant, nor anyone purporting to represent him, has requested a hearing or submitted a written statement in lieu of a hearing. *Id.* at 1. The Government also requests that I issue a Final Order revoking Registrant's registration.

Before proceeding to the merits, it is necessary to determine whether the means employed by the Government to serve the Show Cause Order on Registrant were constitutionally sufficient. The Supreme Court has long held ''that due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' '' *Jones* v. *Flowers,* 547 U.S. 220, 226 (2006) (quoting *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)). Moreover, '' 'when notice is a person's due * * * [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' '' *Jones,* 547 U.S. at 229 (quoting *Mullane,* 339 U.S. at 315).

In *Jones,* the Court further noted that its cases ''require[] the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.'' *Id.* at 230. The Court cited with approval its decision in *Robinson* v. *Hanrahan,* 409 U.S. 38 (1972), where it ''held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison.'' *Jones,* 547 U.S. at 230.[1] *See also Robinson,* 409 U.S. at 40 (''[T]he State knew that appellant was not at the address to which the notice was mailed * * * since he was at that very time confined in * * * jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise appellant of the pendency of the * * * proceedings.''); *Covey* v. *Town of Somers,* 351 U.S. 141 (1956) (holding that notice by mailing, publication, and posting was inadequate when officials knew that recipient was incompetent).

The *Jones* Court further explained that ''under *Robinson and Covey,* the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice.'' 547 U.S. at 230. The Court also noted that '' ' ''a party's ability to take steps to safeguard its own interests [such as by updating his address] does not relieve the State of its constitutional obligation.'' ' '' *Id.* at 232 (quoting Brief for United States as *Amicus Curiae* 16 n.5 (quoting *Mennonite Bd. of Missions* v. *Adams,* 462 U.S. 791, 799 (1983))). However, the Government is not required to undertake ''heroic efforts'' to find a registrant. *Dusenbery* v. *United States,* 534 U.S. 161, 170 (2002). Nor is actual notice required. *Id.*

Thus, in *Jones,* the Court held that where the State had received back a certified mailing of process as unclaimed and took ''no further action'' to notify the property owner, the State did not satisfy due process. 547 U.S. at 230. Rather, the State was required to ''take further reasonable steps if any were available.'' *Id.*

I conclude that the Government has satisfied its obligation under the Due Process Clause ''to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' '' *Id.* at 226 (quoting *Mullane,* 339 U.S. at 314). Here, following the failure of the first attempt at service, the Government then attempted to serve Registrant by certified mail to him at his last known address in Oklahoma, where he also practices. While *Jones* suggests that once this mailing was returned as unclaimed, the Government could have satisfied its constitutional obligation simply by mailing the Show Cause Order by regular mail, *see id.* at 234–35, the Government then attempted to serve Registrant by e-mailing the Order to him.

Several courts have held that the e-mailing of process can, depending on the facts and circumstances, satisfy due process, especially where service by conventional means is impracticable because a person secretes himself. *See Rio Properties, Inc.* v. *Rio Int'l Interlink,* 284 F.3d 1007, 1017–18 (9th Cir. 2002); *see also Snyder, et al.* v. *Alternate Energy* Inc., 857 N.Y.S.2d 442, 447–449 (N.Y. Civ. Ct. 2008); *In re International Telemedia Associates, Inc.,* 245 B.R. 713, 721–22 (Bankr. N.D. Ga. 2000).

[1] The CSA states that ''[b]efore taking action pursuant to [21 U.S.C. 824(a)] * * * the Attorney General shall serve upon the * * * registrant an order to show cause why registration should not be * * * revoked[] or suspended.'' 21 U.S.C. 824(c). In contrast to the schemes challenged in *Jones* and *Robinson,* which provided for service to the property owner's address as listed in state records, neither the CSA nor Agency regulations state that service shall be made at any particular address such as the registered location. In any event, while in most cases, service to a registrant's registered location provides adequate notice, the Supreme Court's clear instruction is that the Government cannot ignore ''unique information about an intended recipient'' when its seeks to serve that person with notice of a proceeding that it is initiating. *Jones,* 547 U.S. at 230.

While courts have recognized that use of e-mail to serve process has ''its limitations,'' including that ''[i]n most instances, there is no way to confirm receipt of an email message,'' *Rio Properties,* 284 F.3d at 1018, I conclude that the use of e-mail to serve Registrant satisfied due process because service was made to an e-mail address which Registrant provided to the Agency and the Government did not receive back either an error or undeliverable message.[2]

Having found that the service of the Show Cause Order was constitutionally adequate, I further find that Respondent has waived his right to a hearing or to submit a written statement in lieu of a hearing. I therefore issue this Decision and Final Order based on relevant evidence contained in the Investigative Record submitted by the Government. 21 CFR 1301.43(d) and (e). I make the following additional findings of fact.

Findings

Registrant is an anesthesiologist and the holder of DEA Certificate of Registration BK9514375, which authorizes him to dispense controlled substances in Schedules II through V as a practitioner, at the registered address of 2300 South 57th Street, Suite 11, Fort Smith, Arkansas 72903. *See* GX A. His registration expires on December 31, 2011. *Id.*

On April 7, 2009, the Arkansas State Medical Board (Arkansas Board) issued an Emergency Order of Suspension and Notice of Hearing charging Registrant with violations of the Arkansas Medical Practices Act, including that he violated a statute or rule governing the practice of medicine by a medical licensing authority or agency of another State. *See* GX B, at 1 (citing Ark. Code Ann. § 17–95–409(a)(2)(r)).[3] More specifically, the Arkansas Board charged that following a hearing, on March 31, 2009, the Oklahoma Board of Medical Licensure and Supervision found that Registrant had violated numerous provisions of the Oklahoma Statutes and Administrative Code and was guilty of Unprofessional Conduct; the Oklahoma Board thus revoked his Oklahoma medical license. *Id.* at 2 (citations omitted). The Arkansas Board thus suspended Registrant's license to practice medicine ''on an emergency basis, pending a disciplinary hearing * * * or further orders of the Board.'' *Id.* at 3.

Registrant subsequently allowed his Arkansas medical license to expire; his license remains in inactive status as of the date of this order. GX C. I therefore find that Registrant is currently without authority to dispense controlled substances under the laws of the State in which he is registered with DEA.

Discussion

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in the ''jurisdiction in which he practices'' in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) (''[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice''). *See also id.* § 823(f) (The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''). As these provisions make plain, possessing authority under state law to handle controlled substances is an essential condition for obtaining and maintaining a DEA registration.

The CSA further authorizes the Agency to revoke a registration ''upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances.'' 21 U.S.C. 824(a)(3). Moreover, DEA has consistently held that revocation of a registration is warranted whenever a practitioner's state authority to dispense controlled substances has been suspended or revoked, and has done so even when a practitioner's state authority has been summarily suspended and the State has yet to provide the practitioner with a hearing to challenge the State's action and at which he may ultimately prevail. *See Robert Wayne Mosier,* 75 FR 49950 (2010) (''revocation is warranted * * * even in those instances where a practitioner's state license has only been suspended, and there is the possibility of reinstatement''); *accord Bourne Pharmacy,* 72 FR. 18273, 18274 (2007). Finally, because holding state authority is a statutory requirement for registration as a practitioner, *see* 21 U.S.C. 802(21) and 823(f), DEA has held that revocation is warranted even when a registrant has merely allowed his registration to expire. *James Stephen Ferguson,* 75 FR 49994, 49995 (2010); *Mark L. Beck,* 64 FR 40899, 40900 (1999). *See also Anne Lazar Thorn,* 62 FR 12847, 12848 (1997) (''the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather, it is whether the Respondent is currently authorized to handle controlled substances'').

As found above, on April 7, 2010, the Arkansas State Medical Board suspended Registrant's state medical license. Moreover, his Arkansas license is now expired and in inactive status. Because Registrant is without authority to dispense controlled substances in Arkansas, the State in which he holds the DEA registration which is the subject of this proceeding, he is not entitled to maintain the registration. *See* 21 U.S.C. 802(21), 823(f), 824(a)(3). Accordingly, Registrant's registration will be revoked and any pending application will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, BK9514375, issued to Robert Leigh Kale, M.D., be, and it hereby is, revoked. I further order that any pending application of Robert Leigh Kale, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[4]

Dated: July 27, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–20053 Filed 8–8–11; 8:45 am]

BILLING CODE 4410–09–P

[2] To make clear, however, the use of e-mail to serve an Order to Show Cause is acceptable only after traditional methods of service have been tried and been ineffective.

[3] Under Arkansas law, the ''Board may revoke an existing license, impose penalties as listed in § 17–95–410, or refuse to issue a license in the event the holder or applicant * * * has committed any of the acts or offenses defined in this section to be unprofessional conduct.'' Ark. Code Ann. § 17–95–409(a)(1). The statute further provides that ''[t]he words 'unprofessional conduct' as used in the Arkansas Medical Practices Act, § 17–95–201 *et seq.,* § 17–95–301 *et seq.,* and § 17–95–401 *et seq.,* mean * * * [h]aving been found in violation of a statute or a rule governing the practice of medicine by a medical licensing authority or agency of another state.'' *Id.* § 17–95–409(a)(2)(r).

[4] For the same reasons cited by the Arkansas Board as warranting its Emergency Order of Suspension, I find that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Powered Industrial Trucks Standard

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, ''Powered Industrial Trucks Standard,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before September 8, 2011.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the *RegInfo.gov* Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, *Attn:* OMB Desk Officer for the Department of Labor, Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–6929/*Fax:* 202–395–6881 (these are not toll-free numbers), *e-mail: OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The Powered Industrial Trucks Standard contains several information collection requirements addressing truck design, construction, and modification, as well as certification of training and evaluation for truck operators. *See* 29 CFR 1910.178. These information collections are subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1218–0242. The current OMB approval is scheduled to expire on August 31, 2011; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on April 20, 2011 (76 FR 22154).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1218–0242. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Occupational Safety and Health Administration (OSHA).

Title of Collection: Powered Industrial Trucks Standard.

OMB Control Number: 1218–0242.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 1,769,162.

Total Estimated Number of Responses: 2,506,607.

Total Estimated Annual Burden Hours: 777,244.

Total Estimated Annual Other Costs Burden: $247,640.

Dated: August 4, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–20164 Filed 8–8–11; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Office of Trade and Labor Affairs; National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements; Notice of Open Meeting

AGENCY: Bureau of International Labor Affairs, U.S. Department of Labor.

ACTION: Notice of Open Meeting, August 25, 2011.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), as amended, 5. U.S.C. App. 2, the Office of Trade and Labor Affairs (OTLA) gives notice of a meeting of the National Advisory Committee for Labor Provisions of U.S. Free Trade Agreements (''Committee'' or ''NAC''), which was established by the Secretary of Labor.

The purpose of the meeting is to provide advice to the Secretary of Labor through the Bureau of International Labor Affairs (ILAB) concerning the implementation of the North American Agreement on Labor Cooperation (NAALC)—the labor side accord to the North American Free Trade Agreement (NAFTA)—and the labor provisions of free trade agreements.

DATES: The Committee will meet on Thursday, August 25, 2011 from 9 a.m. to 5 p.m.

ADDRESSES: The Committee will meet at the U.S. Department of Labor, 200 Constitution Avenue, NW., Secretary's Conference Room, Washington, DC 20210. Mail comments, views, or statements in response to this notice to Paula Church Albertson, Office of Trade and Labor Affairs, ILAB, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–5004, Washington, DC 20210; phone (202) 693–4789; fax (202) 693–4784.

FOR FURTHER INFORMATION CONTACT: Paula Church Albertson, Designated Federal Officer, Office of Trade and Labor Affairs, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–5004, Washington, DC 20210; phone (202) 693–4789 (this is not a toll free number). Individuals with disabilities wishing to attend the meeting should contact Ms. Albertson no later than August 18, 2011, to obtain appropriate accommodations.

SUPPLEMENTARY INFORMATION: NAC meetings are open to the public on a first-come, first-served basis, as seating is limited. Attendees must present valid identification and will be subject to security screening to access the Department of Labor for the meeting.

Agenda: The NAC agenda will include: an overview of labor provisions in U.S. free trade agreements; an update on labor chapter submissions and processes; a discussion of the NAALC; and sessions on engaging with trade partner governments and enhancing public dialogue.

Public Participation: Written data, views, or comments for consideration by the NAC on the various agenda items listed above should be submitted to Paula Church Albertson at the address listed above. Submissions received by August 18, 2011, will be provided to Committee members and will be included in the record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits.

Sandra Polaski,

Deputy Undersecretary, International Affairs.

[FR Doc. 2011–20084 Filed 8–8–11; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Solicitation of Nominations for the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor

The United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor presented by Secretary Hilda Solis, United States Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210:

1. *Subject:* The United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor.

2. *Purpose:* To outline the eligibility criteria, the nomination process and the administrative procedures for the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor, and to solicit nominations for the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor.

3. *Originator:* Office of Child Labor, Forced Labor and Human Trafficking of the Bureau of International Labor Affairs (ILAB/OCFT).

4. *Background:* The award is to recognize exceptional efforts to reduce the worst forms of child labor and is in response to Senate Committee direction (Significant Report 110–107 DM/ILAB), that the Secretary of Labor:

> Establish an annual non-monetary award recognizing the extraordinary efforts by an individual, company, organization or national government toward the reduction of the worst forms of child labor. The award shall be named, ''the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor.'' Iqbal Masih was a Pakistani carpet weaver sold into slavery at age four. He escaped from his servitude at age 12 and became an outspoken advocate against child slavery. He told the world of his plight when he received the Reebok Human Rights Award in 1994. He was tragically killed a year later at the age of 13 in his native Pakistan.

In view of inspiring and motivating those who are working to eliminate the worst forms of child labor, the award's two major goals are to:

> a. Honor and give public recognition to a recipient demonstrating extraordinary efforts to combat the worst forms of child labor internationally, and who shares qualities demonstrated by Iqbal Masih including leadership, courage, integrity, and a search to end the labor exploitation of children, and,
>
> b. Raise awareness about the worst forms of child labor internationally.

5. *Eligibility and Selection Criteria:*

A. The nominees may include individuals, companies, organizations, or national governments and nominations may be submitted by other persons and entities with the knowledge and permission of the nominee.

B. Nominees for the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor will be judged by the following selection criteria:

> 1. Implemented extraordinary efforts that contribute towards the reduction of the worst forms of child labor.
>
> 2. Generated positive international attention in support of efforts to reduce the worst forms of child labor.
>
> 3. Inspired others, including young persons, to become champions against the worst forms of child labor following the spirit and example of Iqbal Masih.
>
> 4. Fomented constructive change regarding the labor exploitation of children under great odds or at great personal cost.

6. *Nomination Submission Requirements:*

A. Nominations must identify the proposed candidate and include a justification statement.

B. The nomination packages should be limited to information relevant to the nominee. Nomination packages should be no longer than two (2) typed pages double-spaced. A page is 8.5 × 11 (on one side only) with one-inch margins (top, bottom, and sides).

C. Nomination packages must include the following for consideration:

1. An executive summary about the nominee, which clearly identifies the specific attributes of the nominee relevant to the selection criteria as listed in Section 5(B).

2. A data summary on the nominee. See Section 6(D).

D. A data summary on the nominee will include the following:

1. Name(s) of the individual, company, organization or national government being nominated.

2. Full street address, telephone number and e-mail address of nominee.

3. Name, title, street address, telephone number and e-mail address of the person or organization submitting the nomination.

E. Timing and Acceptable Methods of Submission of Nominations:

Nomination packages must be submitted to The United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor, Office of Child Labor, Forced Labor and Human Trafficking, Room S–5317, 200 Constitution Avenue, NW., Washington, DC 20210 by September 30, 2011. Any application received after 4:45 p.m. EDT on September 30, 2011 will not be considered unless it was received before the award is made and:

1. It was sent by registered or certified mail no later than September 15, 2011.

2. It is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the U.S. Department of Labor at the address indicated; or

3. It was sent by U.S. Postal Service Express Mail Next Day Service—Post Office to Addressee, not later than 5 p.m. EDT at the place of mailing, September 29, 2011.

The only acceptable evidence to establish the date of mailing of a late application sent by registered or certified mail is the U.S. Postal Service postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service. If the postmark is not legible, an application received after the above closing time and date will be processed as if mailed late. ''Postmark'' means a printed, stamped, or otherwise placed impression (not a postage meter machine impression) that is readily identifiable without further action as having been applied and affixed by an employee of the U.S. Postal Service on the date of mailing. Therefore, applicants should request that the postal clerk place a legible hand cancellation ''bull's-eye'' postmark on both the receipt and the envelope or wrapper.

The only acceptable evidence to establish the time of receipt at the U.S. Department of Labor is the date/time stamp of the ILAB/OCFT on the application wrapper or other documentary evidence or receipt maintained by that office. Applications sent by other delivery services, such as Federal Express, UPS, e-mail (to *cook.katherine@dol.gov*), etc., will also be accepted; however, the applicant bears the responsibility of timely submission.

Confirmation of receipt of your application can be made by contacting Katie Cook, by e-mail *cook.katherine@dol.gov,* telephone (202) 693–4838, or OCFT telephone (202) 693–4843, prior to the closing deadline.

4. The U.S. Department of Labor will also consider nomination packages from previous years that were deemed responsive but not yet selected for award.

7. *The Administrative Review Process:*

A. ILAB/OCFT will perform a preliminary administrative review to determine the sufficiency of all submitted application packages relative to the selection criteria listed in Section 5(B).

B. ILAB/OCFT will conduct an initial substantive review of the nominations received and will identify a short list of candidates to be considered.

C. A panel of Department of Labor representatives will perform a secondary review to make a determination of the semi-finalists.

D. The Secretary of Labor will conduct the final review and selection.

8. *Other Factors to be Considered During the Administrative Review Process:* Receipt of this award will not preclude a nominee from being considered for the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor in subsequent years. Specific accomplishments that served as the basis of a prior award, however, may not be considered as the basis for a subsequent award application.

9. *Procedures Following Selection:* The awardee will be notified of selection via the contact person identified in the application package at least four weeks prior to the awards ceremony.

10. *Location:* The Department of Labor anticipates that the awards ceremony will be held in late 2011 or early 2012 at a location to be determined by the Secretary of Labor.

Paperwork Reduction Act Notice (Pub. L. 104–13): Persons are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. This collection of information is approved under OMB Number 1290–0007 (Expiration Date: 12/31/2012). The obligation to respond to this information collection is voluntary; however, only nominations that follow the nomination procedures outlined in this notice will receive consideration. The average time to respond to this information of collection is estimated to be 10 hours per response; including the time for reviewing instructions, researching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Submit comments regarding this estimate; including suggestions for reducing response time or for improving any aspect of this collection of information to the Departmental Clearance Officer, U.S. Department of Labor, Office of the Chief Information Officer, Room N–1301, 200 Constitution Avenue, NW., Washington DC 20210 or e-mail to *DOL_PRA_PUBLIC@dol.gov.* Please do not send completed nominations to this address.

We are very interested in your thoughts and suggestions about your experience in preparing and filing this nomination packet for the United States Department of Labor's Iqbal Masih Award for the Elimination of Child Labor. Your comments will be very useful to the ILAB/OCFT in making improvements in our solicitation for nominations for this award in subsequent years. All comments are strictly voluntary and strictly private. We would appreciate your taking a few minutes to tell us—for example, whether you thought the instructions were sufficiently clear; what you liked or disliked; what worked or didn't work; whether it satisfied your need for information or if it didn't, or anything else that you think is important for us to know. Your comments will be most helpful if you can be very specific in relating your experience.

Please send any comments you have to Katie Cook at *cook.katherine@dol.gov* or via mail to the U.S. Department of Labor, Office of Child Labor, Forced Labor, and Human Trafficking, Room S–5317, 200 Constitution Avenue, NW., Washington, DC 20210.

Sandra Polaski,

Deputy Undersecretary for International Affairs.

[FR Doc. 2011–20085 Filed 8–8–11; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

157th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 157th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on August 30–September 1, 2011.

The three-day meeting will take place in C–5515 Room 1–A, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. The purpose of the open meeting is for Advisory Council members to hear testimony from invited witnesses and to receive an update from the Employee Benefits Security Administration (EBSA). The meeting will run from 9 a.m. to approximately 5 p.m. on August 30 and from 8:30 a.m. to approximately 5 p.m. on August 31 and September 1, with a one hour break for lunch each day. The EBSA update is scheduled for the afternoon of August 31, subject to change.

The Advisory Council will study the following issues: (1) Current Challenges and Best Practices for ERISA Compliance for 403(b) Plan Sponsors, (2) Hedge Funds and Private Equity Investments, and (3) Privacy and Security Issues Affecting Employee Benefit Plans (other than health care plans). The schedule for testimony and discussion of these issues generally will be one issue per day in the order noted above. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site, at *http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before August 19, 2011 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue, NW., Washington, DC 20210. Statements also may be submitted as e-mail attachments in text or pdf format transmitted to *good.larry@dol.gov.* It is requested that statements not be included in the body of the e-mail. Statements deemed relevant by the Advisory Council and received on or before August 19, 2011 will be included in the record of the meeting and available in the EBSA Public Disclosure room, along with witness statements. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Written statements submitted by invited witnesses also will be posted, without change, on the Advisory Council page of the EBSA Web site—*http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html.* Statements posted on the Internet can be retrieved by most Internet search engines.

Individuals or representatives of organizations wishing to address the

Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by August 19 at the address indicated.

Signed at Washington, DC this 3rd day of August, 2011.

Michael L. Davis,

Deputy Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2011–20107 Filed 8–8–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment And Training Administration

Announcement Regarding the Virgin Islands Triggering ''on'' Tier Three of Emergency Unemployment Compensation 2008 (EUC08).

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: Announcement regarding the Virgin Islands triggering ''on'' Tier Three of Emergency Unemployment Compensation 2008 (EUC08).

Public law 111–312 extended provisions in public law 111–92 which amended prior laws to create a Third and Fourth Tier of benefits within the EUC08 program for qualified unemployed workers claiming benefits in high unemployment states. The Department of Labor produces a trigger notice indicating which states qualify for EUC08 benefits within Tiers Three and Four and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notice covering state eligibility for the EUC08 program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.*

Based on data published July 8, 2011, by the Bureau of Labor Statistics, the following trigger change has occurred for the Virgin Islands' EUC08 program:

- The estimated three month average, seasonally adjusted total unemployment rate for the Virgin Islands rose to meet or exceed the 6.0% threshold to trigger ''on'' in Tier Three of the EUC 2008 program. The payable period in Tier Three for the Virgin Islands began July 24, 2011, and claimants there will be eligible for up to an additional 13 weeks of benefits.

Information for Claimants

The duration of benefits payable in the EUC program, and the terms and conditions under which they are payable, are governed by public laws 110–252, 110–449, 111–5, 111–92, 111–118, 111–144, 111–157, 111–205 and 111–312, and the operating instructions issued to the states by the U.S. Department of Labor. Persons who believe they may be entitled to additional benefits under the EUC08 program, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue NW., Frances Perkins Bldg. Room S–4524, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov.*

Signed in Washington, DC, this 3rd day of August, 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–20109 Filed 8–8–11; 8:45 am]

BILLING CODE 4510–FW–P

LEGAL SERVICES CORPORATION

Request for Comments—Poverty Data and LSC Funding Distribution

AGENCY: Legal Services Corporation.

ACTION: Request for comments.

SUMMARY: Since 1996, the Legal Services Corporation's annual appropriation has mandated that the Corporation distribute most of its appropriated funds to basic field programs for LSC-defined geographic areas so as to provide an equal figure per individual in poverty for each geographic area. The appropriation has further mandated that the number of individuals in poverty in each geographic area be determined by the Bureau of the Census ''on the basis of the most recent decennial census.'' The 2010 decennial census, however, did not collect poverty data for the 50 states, the District of Columbia or Puerto Rico, so ''the most recent decennial census'' will not provide a basis for determining how many people in poverty are within those jurisdictions. The LSC Board of Directors requests comments on a proposal by LSC's management to address this issue by making recommendations to the President and to Congress that: (1) The determination of the number of individuals in poverty in each geographic area be made by the Bureau of the Census, without any reference to the decennial census as the basis for that determination; (2) funding be reallocated among geographic areas every three years based on updated poverty population determinations by the Bureau of the Census; and (3) the first reallocation be phased in over two years, in Fiscal Year 2013 and Fiscal Year 2014.

DATES: Written comments will be accepted until September 8, 2011.

ADDRESSES: Written comments may be submitted by mail, fax or e-mail to Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; 202–295–1623 (phone); 202–337–6519 (fax); *mfreedman@lsc.gov.*

FOR FURTHER INFORMATION CONTACT: Mark Freedman, Senior Assistant General Counsel, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; 202–295–1623 (phone); 202–337–6519 (fax); *mfreedman@lsc.gov.*

SUPPLEMENTARY INFORMATION: The Legal Services Corporation (''LSC'' or ''Corporation'') was established by the United States Congress ''for the purpose of providing financial support for legal assistance in noncriminal matters or proceedings to persons financially unable to afford such assistance.'' 42 U.S.C. 2996b(a). LSC performs this function primarily through providing Federal funding to civil legal aid programs providing legal services to low-income persons throughout the United States and its possessions and territories in geographic areas determined by LSC. Since 1996, the Legal Services Corporation's annual appropriation has mandated that the Corporation distribute most of its appropriated funds to basic field programs for LSC-defined geographic areas so as to provide an equal figure per individual in poverty for each geographic area. The appropriation has further mandated that the number of individuals in poverty in each geographic area be determined by the Bureau of the Census ''on the basis of the most recent decennial census.'' (Certain exceptions apply for areas in which other adjusted population counts have been historically used.) Public Law 104–134, Title V, 501(a), 110 Stat. 1321, 1321–50 (1996) (incorporated by reference thereafter). Under that mandate, LSC has reallocated funding every ten years. The 2010 U.S. census,

however, did not collect poverty population data for the 50 states, the District of Columbia or Puerto Rico. The Bureau of the Census has other data for making U.S. poverty population determinations in those areas.

LSC management has proposed to the LSC Board of Directors (''Board'') that LSC request an update to the statutory mandate in light of the elimination of poverty data from almost all of the 2010 census. LSC management has proposed that LSC make recommendations to the President and to Congress that: (1) The determination of the number of individuals in poverty in each geographic area be made by the Bureau of the Census, without any reference to the decennial census as the basis for that determination; (2) funding be reallocated among geographic areas every three years based on updated poverty population determinations by the Bureau of the Census; and (3) the first reallocation be phased in over two years, in Fiscal Year 2013 and Fiscal Year 2014.

LSC management presented this proposal to the Board's Operations and Regulations Committee (''Committee'') on July 20, 2011, which also received a presentation of recommendations from the National Legal Aid and Defender Association (''NLADA''). The Committee then presented management's proposal to the full board on July 21, 2011. The Board adopted the recommendation of management and the Committee that LSC publish management's proposal in the **Federal Register** for comment. The committee will meet to consider all comments received and make a recommendation to the Board for a final decision by early September of 2011.

LSC management's proposal ''Management Recommendation on Funding Reallocation Issues'' (July 13, 2011) and NLADA's recommendations can both be found at: *http://www.lsc.gov/about/mattersforcomment.php.*

LSC invites public comment on this issue. Interested parties may submit comments to LSC within 30 days.

Dated: August 3, 2011.

Victor M. Fortuno,

Vice President & General Counsel.

[FR Doc. 2011–20162 Filed 8–8–11; 8:45 am]

BILLING CODE 7050–01–P

OFFICE OF MANAGEMENT AND BUDGET

United States Government Inter-Agency Anti-Counterfeiting Working Group: Request for Public Comments Regarding Strategy to Eliminate Counterfeit Products from the United States Government Supply Chain

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Request for written submissions from the public.

SUMMARY: The Federal Government is currently undertaking a significant effort to eliminate counterfeit products from the U.S. Government supply chain. In June 2010, Vice President Biden and White House Intellectual Property Enforcement Coordinator, Victoria Espinel, announced the Joint Strategic Plan on Intellectual Property Enforcement, laying out a coordinated government-wide approach to strengthening intellectual property enforcement and directing the establishment of an inter-agency working group. Recent reports issued by the Department of Commerce and the Government Accountability Office have found that counterfeits have infiltrated many sectors of the U.S. Government supply chain and have the potential to cause serious disruptions in national defense, critical infrastructure and other vital applications. This working group will develop a framework for reducing vulnerability to counterfeits that is flexible enough to accommodate the wide variety of missions across Federal agencies. This cross-functional working group will identify any gaps in legal authority, regulation, policy and guidance that undermine the security of U.S. Government supply chain from counterfeit parts. The working group's examination will include reviewing current industry standards, the ability of prime contractors and their suppliers to authenticate or trace at-risk items to the original manufacturer, government evaluation and detection capabilities and limitations, and contractual enforcement of authenticity.

DATES: Submissions must be received on or before September 16, 2011 at 5 p.m.

ADDRESSES: Public comment should be electronically submitted to *http://www.regulations.gov*, docket number OMB–2011–0003. The regulations.gov Web site is a Federal E–Government Web site that allows the public to find, review and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. If you are unable to provide submissions to *http://www.regulations.gov*, please contact James Schuelke at (202) 395–1808 to arrange for an alternate method of transmission. Submissions filed via the regulations.gov Web site will be available to the public for review and inspection. If you want to submit confidential business information that supports your comments, please contact Michael Lewis at *intellectualproperty@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Michael Lewis, Office of the Intellectual Property Enforcement Coordinator, at (202) 395–1808.

SUPPLEMENTARY INFORMATION: The core members of the Working Group are the Office of the Intellectual Property Enforcement Coordinator (IPEC) in the Office of Management and Budget (OMB) of the Executive Office of the President; Department of Defense (DoD); National Aeronautics and Space Administration (NASA); and the General Services Administration (GSA). These core members, along with other government components, have partnered to identify areas of common interest and compare progress and best practices to ultimately eliminate counterfeits in the government-wide supply chains. The working group will work to accomplish the following objectives:

- Objective #1—Develop procedures for program managers to identify items at risk for counterfeiting or requiring authentication of legitimacy. These procedures will, to the greatest extent practicable, utilize current industry standards.
- Objective #2—Examine whether additional administrative actions, including regulatory actions, are needed to require suppliers to take stronger anti-counterfeiting measures.
- Objective #3—Examine when and how product and package traceability, reporting and marking processes can be used by prime contractors, their suppliers, Federal government personnel and potentially other customers to confirm production authority by the original manufacturer of at-risk items.
- Objective #4—Examine government/industry evaluation capabilities and determine whether improvement is needed.
- Objective #5—Develop an anti-counterfeiting training and outreach strategy for the Federal workforce.
- Objective #6—Examine whether additional measures are needed to protect the rights and interests of the United States, recoup costs and prosecute offenders.

The purpose of the request for comments and recommendations is to solicit feedback and best practices from industry, academia, research laboratories, and other stakeholders on issues related to identifying areas of common interest and compare progress and best practices to ultimately eliminate counterfeits in Federal Government supply chains. This request for comments and for recommendations is divided into six categories. Responses to this request for comments may be directed to any or all of the six categories.

Request for Comments Categories

Category 1: General

The U.S. Government Inter-Agency Anti-Counterfeiting Working group seeks written comment submissions on the following topics:

- Describe functional responsibilities, procedures and programs specifically designed to address prevention, identification and control of suspect/counterfeit items.
- Describe any procedures for the disposal of items identified as suspect/counterfeit items. Do these procedures include segregation, evaluation of safety/mission impact, extent of condition, removal, destruction or return to the vendor?
- Describe both internal and/or external notification procedures used when a suspect/counterfeit item is discovered. Identify suspect/counterfeit industry information exchanges to which you report counterfeit items.
- Describe any testing and inspection procedures used to authenticate a procured item.
- Describe any rules or procedures that can improve the use and functionality of the Government-Industry Data Exchange Program (GIDEP).
- Recommend best practices for identifying counterfeit products entering the U.S. Government supply chain and for curbing their entry into that supply chain.

Category 2: Objective #1—Establish procedures for program managers to identify items at risk for counterfeiting or requiring authentication of legitimacy. These procedures will, to the greatest extent practicable, utilize current industry standards.

- Describe methodologies for determining the functional criticality of parts and whether critical parts have unintentional or intentional vulnerabilities that may subject them to counterfeiting. For critical parts, describe the consequences of counterfeiting and the likelihood that counterfeiting will occur.
- As the likelihood of the counterfeiting of critical parts increases, describe ways to establish more stringent traceability requirements for direct suppliers and their subcontractors to assure and support evidence of part authenticity.
- Describe processes for the verification of direct suppliers' trustworthiness for consistent delivery of authentic and conforming parts that meet specifications.
- Describe procedures for tracking parts and materials received from suppliers to the original manufacturer, or other acceptable source, to authenticate that they meet the requirements of the customer's specifications.
- Describe procedures that you follow to ensure that counterfeit parts are not incorporated into products during the manufacturing processes, including the means of identifying suspect parts during receiving inspection and preventing their acceptance.
- Describe effective international and industry standards used in anti-counterfeiting risk management efforts.

Category 3: IPEC Objective #2—Examine Whether Regulations Are Needed To Require Suppliers To Take Stronger Anti-Counterfeiting Measures

- Describe contractual requirements used by customers to assure the authenticity of the products upon delivery. Describe the provisions of these requirements, if any. Describe any process or procedures used to flow authenticity requirements down to suppliers. Describe any conflicts between requirements from different customers.
- Are contract clauses that notify suppliers that they are prohibited from providing suspect/counterfeit items effective?
- Describe any special quality assurance provisions that may be contained in anti-counterfeiting contract clauses that require parties to confirm compliance.
- Describe effective methods for addressing counterfeit prevention during the source selection process.
- Describe any risk factors used in determining risk for counterfeit items/commodity groups.
- Describe procedures for processing potentially counterfeit items. Describe any requirements imposed on suppliers when potential counterfeit items are identified.

Category 4: IPEC Objective #3—Examine When and How Product and Package Traceability, Reporting and Marking Processes Can Be Used by Prime Contractors, Their Suppliers, Federal Government Personnel and Potentially Other Customers To Confirm Production Authority by the Original Manufacturer of At-Risk Items

- Describe procedures that require the labeling, stamping or marking of authentic parts and/or part packaging prior to purchasing parts and material for installation in products.
- Describe the use of part markings to address the following:

(1) Identification of distributors and/or suppliers who have a documentation system, and receiving inspection system that ensures the traceability of their parts to a production or design authority-approved source, and

(2) Methods of screening part markings to identify unfamiliar distributors and/or suppliers to determine if the parts present a potential risk of being unapproved by a production or design authority.

- Describe procedures for establishing product and packaging identification and authenticity documentation requirements for at-risk items and applying these requirements to suppliers to ensure traceability of product authenticity throughout the supply chain.
- Describe how the use of enhanced product/package identification marking methods (such as marking products/packages with globally unique item identifiers (UIIs) using international standards, and then registering these UIIs and their product/package pedigree information in a database to enable tracking them back to their originating source as they transit the supply chain) might help reduce or eliminate counterfeits in the supply chain. Does the use of these identification marking methods impose a substantial burden on manufacturers/suppliers? Identify the types of incentives that would encourage manufacturers/suppliers to consistently use identification markings.
- Describe how the use of advanced technology for ensuring the integrity of products delivered in the supply chain (including such techniques as digital signatures, hologram tags, tamper-resistant and tamper-evident packaging) might help reduce or eliminate counterfeits in the supply chain.
- Describe any techniques that may be employed when product authentication cannot be confirmed by use of product and packaging identification and authenticity documentation requirements.

Category 5: IPEC Objective #4—Examine Government/Industry Evaluation Capabilities and Determine Whether Improvement Is Needed.

- List physical inspection, non-destructive examination, and laboratory testing equipment that your organization owns and operates and that is capable of authenticating a suspected counterfeit part.
- Describe specific products that can be inspected/tested using this equipment and how the inspection/testing technique(s) can be used to distinguish counterfeit product from authentic product.
- List any laboratory/testing certifications or accreditations that your facility(ies) maintains.
- List any governmental or industry customers that employ your testing facilities.
- Describe handling and storage techniques that your facility employs to prevent comingling, tampering and unauthorized release of suspect counterfeit items.
- How much capacity would your facility be able to manage—how many parts per day can you handle? Can your test facility handle classified information?

Category 6: IPEC Objective #5—Establish an Anti-Counterfeiting Training and Outreach Strategy for the Federal Workforce

- Does your organization provide anti-counterfeit training for employees? Identify the type of training that is available. List the types of employees who receive anti-counterfeit training (*e.g.,* Buyers, Inspectors, Engineers, Project Managers).
  - Did you model your training after another industry standard or company, or outsource the training? If so, please describe.
  - How frequently do you provide anti-counterfeiting training to your employees?
  - How do you educate/train your new hires?
  - What is the venue and medium for this training? (*e.g.,* Classroom, Web-based, Reading materials)
  - How long are the training sessions?
- How do you track and benchmark the effectiveness of your training in anti-counterfeiting?
- What training resources do you provide to suppliers or customers on anti-counterfeit tactics and strategies for your industry or products?
- Do you formally test recipients on the contents of the training and/or provide formal qualifications/certifications upon completion of the training?
- Describe the scope and contents of your anti-counterfeiting training.

Request for Information Response Guidelines: Responses to this Request for Comments must be submitted electronically to *http://www.regulations.gov* docket number OMB–2011–0003.

To submit comments via *http://www.regulations.gov,* enter docket number OMB–2011–0003 on the home page and click ''search''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Submit a Comment.'' (For further information on using the *http://www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page.)

The *http://www.regulations.gov* site provides the option of providing comments by filling in a ''Type Comment and Upload File'' field, or by attaching a document. It is expected that most comments will be provided in an attached document. If a document is attached, it is sufficient to type ''See attached'' in the ''Type Comment and Upload File'' field. If you want to submit confidential business information that supports your comments, please contact Michael Lewis at *intellectualproperty@omb.eop.gov.*

Victoria Espinel,

United States Intellectual Property Enforcement Coordinator.

[FR Doc. 2011–20204 Filed 8–8–11; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0065]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on May 3, 2011.

(1) *Type of submission, new, revision, or extension:* Extension.

(2) *The title of the information collection:* Grant and Cooperative Agreement Provisions.

(3) *Current OMB approval number:* 3150–0107.

(4) *The form number if applicable:* Not applicable.

(5) *How often the collection is required:* Technical performance reports are required every six months; other information is submitted on occasion, as needed.

(6) *Who will be required or asked to report:* Grant and Cooperative Agreement Recipients.

(7) *An estimate of the number of annual responses:* 1064 (714 responses + 350 recordkeepers).

(8) *The estimated number of annual respondents:* 350.

(9) *An estimate of the total number of hours needed annually to complete the requirement or request:* 8,077 (7,540 reporting hours plus 537 recordkeeping hours).

(10) *Abstract:* The Division of Contracts is responsible for awarding grants and cooperative agreements (financial assistance) for the NRC. The Division of Contracts collects information from assistance recipients in accordance with grant and cooperative agreement provisions in order to administer NRC's financial assistance program. The information collected under the provisions ensures that the Government's rights are protected, the agency adheres to public laws, the work proceeds on schedule, and that disputes between the Government and the recipient are settled.

The public may examine and have copied for a fee publicly available documents, including the final supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC *Web site: http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by September 8, 2011. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–0107), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *CWhiteman@omb.eop.gov* or submitted by telephone at 202–395–4718.

The NRC Clearance Officer is Tremaine Donnell, 301–415–6258.

Dated at Rockville, Maryland, this 2nd day of August, 2011.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2011–20027 Filed 8–8–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2011–0160]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Employment Application System for Entry-Level Legal Positions.

2. *Current OMB approval number:* 3150–XXXX.

3. *How often the collection is required:* On occasion.

4. *Who is required or asked to report:* Applicants seeking employment through the NRC Office of the General Counsel Honor Law Graduate Program or Summer Internship Program.

5. *The number of annual respondents:* 1,500.

6. *The number of hours needed annually to complete the requirement or request:* 1,500.

7. *Abstract:* The NRC is seeking to implement a Web-based job application system that will allow the NRC Office of the General Counsel to track, manage, and interact with applicants seeking entry-level attorney positions through the Honor Law Graduate program or temporary, summer legal positions through the Summer Internship Program. Applicants seeking employment consideration will submit application materials, including cover letters, resumes, school transcripts, lists of references, and writing samples, via a Web-based interface. These application materials may contain names, addresses, phone numbers, e-mail addresses, school information/grades, employment information/histories, and works of writing.

Submit, by October 11, 2011, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. OMB clearance requests are available at the NRC Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html*. The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2011–0160. You may submit your comments by any of the following methods: Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2011–0160. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV*.

Dated at Rockville, Maryland, this 3rd day of August 2011.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2011–20094 Filed 8–8–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0175]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 14, 2011, to July 27, 2011. The last biweekly notice was published on July 26, 2011 (76 FR 44614).

ADDRESSES: Please include Docket ID NRC–2011–0175 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You may submit comments by any one of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0175. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*
- *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2011–0175.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. NRC regulations are accessible electronically from the NRC Library on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one

contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E–Filing rule (72 FR 49139, August 28, 2007). The E–Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/EHD/*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited

excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of amendment request: April 6, 2011.

Description of amendment request: The proposed amendment would modify the actions to be taken when the containment atmosphere gaseous radioactivity monitoring system and the primary containment pressure and temperature monitoring system are the only operable reactor coolant leakage detection monitoring systems. The modified actions require additional, more frequent monitoring of other indications of Reactor Coolant System (RCS) leakage and provide appropriate time to restore another monitoring system to operable status. This change is consistent with the U.S. Nuclear Regulatory Commission (NRC) approved safety evaluation on Technical Specification Task Force (TSTF) Traveler, TSTF–514–A, Revision 3, ''Revise BWR [Boiling Water Reactor] Operability Requirements and Actions for RCS Leakage Instrumentation,'' dated November 24, 2010.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below, with NRC edits in brackets:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No

The proposed changes [ ] modify the time allowed for the plant to operate when the only operable RCS leakage detection instrumentation monitors are the containment atmosphere gaseous radioactivity monitoring system and the primary containment pressure and temperature monitoring system. The monitoring of RCS leakage is not a precursor to any accident previously evaluated. The monitoring of RCS leakage is not a direct method used to mitigate the consequences of any accident previously evaluated. [The RCS leakage detection instruments are used to detect a degradation of the RCS pressure boundary and are used to determine the need to initiate mitigative actions.] Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes also renumber [certain] current TS Actions to accommodate the new TS Action. This change is administrative in nature and does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes [ ] modify the time allowed for the plant to operate when the only operable RCS leakage detection instrumentation monitor monitors are the containment atmosphere gaseous radioactivity monitoring system and the primary containment pressure and temperature monitoring system. The proposed changes do not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed changes also renumber [certain] current TS Actions to accommodate the new TS Action. This change is administrative in nature and does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes [ ] increase the time allowed for the drywell floor drain sump flow monitoring system and the drywell unit coolers condensate flow rate monitoring system to be inoperable concurrently from 12 hours to 7 days. Increasing the amount of time the plant is allowed to operate with these two leakage detection monitors inoperable does not significantly decrease the margin of safety due to the addition of compensatory actions to analyze grab samples of the primary containment atmosphere once per 12 hours and monitor RCS leakage by administrative means once per 12 hours. The overall likelihood that an increase in RCS leakage will be detected before it potentially results in gross failure is maintained with the addition of the actions. Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The proposed changes also renumber [certain] current TS Actions to accommodate the new TS Action. This change is administrative in nature and does not involve a significant reduction in a margin of safety. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, including the edits in brackets above, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: J. Bradley Fewell, Esquire, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of amendment request: June 2, 2011.

Description of amendment request: The proposed change would revise the Technical Specifications for each unit by changing the method of calculating core reactivity for the purpose of performing the reactivity anomaly surveillance at Limerick Generating Station, Units 1 and 2. The proposed change would allow performance of the surveillance based on a comparison of predicted to actual (or monitored) core reactivity. The reactivity anomaly verification is currently determined by a comparison of predicted versus actual control rod density.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below, with NRC edits in brackets:

1. Does the proposed amendment involve a significant increase in the probability or

consequences of an accident previously evaluated?

Response: No

The proposed Technical Specifications changes do not affect any plant systems, structures, or components designed for the prevention or mitigation of previously evaluated accidents. The amendment would only change how the reactivity anomaly surveillance is performed. Verifying that the core reactivity is consistent with predicted values ensures that accident and transient safety analyses remain valid. This amendment changes the Technical Specification requirements such that, rather than performing the surveillance by comparing predicted to actual control rod density, the surveillance is performed by a direct comparison of [effective multiplication factor] k_{eff}. Present day on-line core monitoring systems, such as the one in use at Limerick Generating Station (LGS), Units 1 and 2 are capable of performing the direct measurement of reactivity.

Therefore, since the reactivity anomaly surveillance will continue to be performed by a viable method, the proposed amendment does not involve a significant increase in the probability or consequence of a previously evaluated accident.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This Technical Specifications amendment request does not involve any changes to the operation [ ] or maintenance of any safety-related, or otherwise important to safety systems. All systems important to safety will continue to be operated and maintained within their design bases. The proposed changes to the reactivity anomaly Technical Specifications will only provide a new, more efficient method of detecting an unexpected change in core reactivity.

Since all systems continue to be operated within their design bases, no new failure modes are introduced and the possibility of a new or different kind of accident is not created.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

This proposed Technical Specifications amendment proposes to change the method for performing the reactivity anomaly surveillance from a comparison of predicted to actual control rod density to a comparison of predicted to actual k_{eff}. The direct comparison of k_{eff} provides a technically superior method of calculating any differences in the expected core reactivity. The reactivity anomaly surveillance will continue to be performed at the same frequency as is currently required by the Technical Specifications, only the method of performing the surveillance will be changed. Consequently, core reactivity assumptions made in safety analyses will continue to be adequately verified.

Therefore, the proposed amendment does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: J. Bradley Fewell, Esquire, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of amendment request: June 14, 2011.

Description of amendment request: The proposed change would revise the Technical Specification (TS) 3.4.3.1, ''LEAKAGE DETECTION SYSTEMS,'' to support the addition of an alternative method of verifying that unidentified leakage in the drywell is within limits. The proposed alternate method uses the installed drywell equipment drain sump (DWEDS) monitoring system, with the drywell floor drain sump (DWFDS) overflowing to the DWEDS, to verify that Reactor Coolant System leakage in the drywell is within limits. This configuration would only be used when the DWFDS monitoring system is unavailable.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change does not involve physical changes to any plant structure, system, or component. As a result, no new failure modes of the Reactor Coolant System (RCS) leakage detection systems are being introduced. Additionally, the RCS leakage detection systems have no impact on any initiating event frequency.

The consequences of a previously analyzed accident are dependent on the initial conditions assumed for the analysis, the behavior of the fuel during the analyzed accident, the availability and successful functioning of the equipment assumed to operate in response to the analyzed event, and the setpoints at which these actions are initiated. The RCS leakage detection systems do not perform an accident mitigating function. Emergency Core Cooling System, Reactor Protection System, and primary and secondary containment isolation actuations are not affected by the proposed change. The proposed change has no impact on any setpoints or functions related to these actuations. There are no changes in the types or significant increase in the amounts of any effluents released offsite.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change allows use of the drywell equipment drain system as an alternative method of quantifying unidentified leakage in the drywell. The drywell equipment drain system will continue to be used for leakage collection and quantification. There is no alteration to the parameters within which the plant is normally operated or in the setpoints that initiate protective or mitigative actions. As a result, no new failure modes are being introduced.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The current TS require a periodic measurement of RCS leakage. The proposed change maintains the existing level of safety by allowing use of the drywell equipment drain sump system to quantify unidentified leakage in the drywell. No changes are being made to any of the RCS leakage limits specified in the TS. The impact of the change is that measured unidentified and identified leakage within the drywell will be quantified as equivalent values since the drywell equipment drain sump monitoring system will also be used to measure leakage into the drywell floor drain sump. In addition, the alternative method conservatively assumes that all leakage in the drywell is unidentified leakage.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: J. Bradley Fewell, Esquire, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

NextEra Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit 1, Rockingham County, New Hampshire

Date of amendment request: April 21, 2011.

Description of amendment request: The proposed change would revise operability requirements for the leakage detection systems, eliminate redundant Technical Specification (TS) requirements, and revise the TS actions to include conditions and required actions for inoperable leakage detection systems similar to those in NUREG 1431, ''Standard Technical Specifications—Westinghouse Plants.'' The proposed amendment would also incorporate the requirements of TSTF–513, Revision 3, ''Revise [Pressurized Water Reactor] Operability Requirements and Actions for [Reactor Coolant System] Leakage Instrumentation.''

Basis for proposed no significant hazards consideration (NSHC) determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of NSHC, which is presented below, with NRC edits shown in square brackets:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change does not impact the physical function of plant structures, systems, or components (SSCs) or the manner in which SSCs perform their design function. The proposed change neither adversely affects accident initiators or precursors, nor alters design assumptions. The proposed change does not alter or prevent the ability of operable SSCs to perform their design function to mitigate the consequences of an initiating event within assumed acceptance limits. The [reactor coolant system (RCS)] leakage detection instruments are not used in [the] mitigation of any accidents. [The RCS leakage detection instruments are used to detect a degradation of the RCS pressure boundary and are used to determine the need to initiate mitigative actions].

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change will not impact the accident analysis. The change does not involve a physical alteration of the plant (*i.e.,* no new or different type of equipment will be installed), a significant change in the method of plant operation, or new operator actions [to mitigate an accident]. The proposed change will not introduce failure modes that could result in a new accident. The change does not alter assumptions made in the safety analysis.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in the margin of safety.

Margin of safety is associated with confidence in the ability of the fission product barriers (*i.e.,* fuel cladding, reactor coolant system pressure boundary, and containment structure) to limit the level of radiation dose to the public. The proposed change does not involve a significant change in the method of plant operation, and no accident analyses will be affected by the proposed changes. Additionally, the proposed changes will not relax any criteria used to establish safety limits and will not relax any safety system settings. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Therefore, these proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: M.S. Ross, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Branch Chief: Harold K. Chernoff.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov*.

Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Unit 1, 2, and 3, Maricopa County, Arizona

Date of application for amendment: July 22, 2010, as supplemented by letters dated September 29 and November 30, 2010, and January 20, March 31, and June 29, 2011.

Brief description of amendment: The amendments approved the cyber security plan and associated implementation schedule, and revise Paragraph 2.E of Facility Operating License Nos. NPF–41, NPF–51, and NPF–74, respectively, to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 26, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on March 31, 2011, and approved by the NRC staff with this license amendment.

All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: Unit 1—185; Unit 2—185; Unit 3—185.

Renewed Facility Operating License Nos. NPF–41, NPF–51, and NPF–74: The amendment revised the Operating Licenses.

Date of initial notice in **Federal Register:** November 9, 2010 (75 FR 68833). The supplemental letters dated September 29 and November 30, 2010, and January 20, March 31, and June 29, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 26, 2011.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of application of amendments: October 19, 2009, as supplemented November 15, 2010.

Brief description of amendments: The amendments revised the Technical Specifications to allow the use of gadolinia as an integral burnable absorber in the uranium oxide fuel matrix.

Date of Issuance: July 21, 2011.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 374, 376, and 375.

Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55: Amendments revised the licenses and the technical specifications.

Date of initial notice in **Federal Register:** March 16, 2010 (75 FR 12576).

The supplement dated November 15, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 21, 2011.

No significant hazards consideration comments received: No.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of application for amendment: July 22, 2010, as supplemented by letters dated September 27 and November 30, 2010, and March 31, 2011.

Brief description of amendment: The amendment approved the cyber security plan and associated implementation schedule, and revised Paragraph 2.E of Facility Operating License No. NPF–21 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 27, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on March 31, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 222.

Facility Operating License No. NPF–21: The amendment revised the Facility Operating License.

Date of initial notice in **Federal Register:** August 20, 2010 (75 FR 51492). The supplemental letters dated September 27 and November 30, 2010, and March 31, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 27, 2011.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Date of application for amendment: July 20, 2010.

Brief description of amendment: The amendment revises Technical Specification (TS) 3.8.3, ''Diesel Fuel, Lube Oil, and Starting Air,'' by relocating the current stored diesel fuel oil and lube oil numerical volume requirements from TS to the TS Bases so that they may be modified under licensee control. The TS are modified so that the stored diesel fuel oil and lube oil inventory will require that a 7-day supply be available for either diesel generator. Condition A and Condition B in the Action table are revised and Surveillance Requirements (SR) 3.8.3.1 and 3.8.3.2 are revised to reflect the above change. The amendment also revises TS 3.8.3 by reducing the Completion Time for Condition C.

Date of issuance: July 26, 2011.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 242.

Facility Operating License No. DPR–20: Amendment revised the Technical Specifications.

Date of initial notice in **Federal Register:** December 14, 2010 (75 FR 77912).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 26, 2011.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–293, Pilgrim Nuclear Power Station, Plymouth County, Massachusetts

Date of application for amendment: July 15, 2010, as supplemented by letters dated February 15, and April 4, 2011.

Brief description of amendment: The proposed amendment to the Facility Operating License (FOL) includes: (1) the proposed Pilgrim Nuclear Power Station (PNPS) Cyber Security Plan, (2) an implementation schedule, and (3) a proposed sentence to be added to the existing FOL Physical Protection license condition for PNPS requiring Entergy to fully implement and maintain in effect all provisions of the Commission-approved PNPS Cyber Security Plan as required by 10 CFR 73.54, ''Protection of digital computer and communication systems and networks.'' A **Federal Register** notice dated March 27, 2009, issued the final rule that amended 10 CFR part 73. The regulations in 10 CFR 73.54, establish the requirements for a Cyber Security Program. This regulation specifically requires each licensee currently licensed to operate a nuclear power plant under part 50 of this chapter to submit a cyber security plan that satisfies the requirements of the Rule. Each submittal must include a proposed implementation schedule and implementation of the licensee's Cyber Security Program must be consistent with the approved schedule. The

background for this application is addressed by the NRC Notice of Availability, **Federal Register** Notice, Final Rule 10 CFR part 73, Power Reactor Security Requirements, published on March 27, 2009 (74 FR 13926).

Date of issuance: July 22, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the CSP, including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on July 15, 2010, as supplemented by letters dated February 15 and April 4, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 236.

Facility Operating License No. DPR–35: The amendment revised the License

Date of initial notice in **Federal Register:** August 20, 2010 (75 FR 51493).

The supplements dated February 15, and April 4, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 22, 2011.

No significant hazards consideration comments received: No.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of application for amendment: July 16, 2010, as supplemented by letters dated February 15 and April 4, 2011.

Brief description of amendment: The amendment to the Renewed Facility Operating License (FOL) includes: (1) the Vermont Yankee Nuclear Power Station (VY) Cyber Security Plan (CSP), (2) an implementation schedule, and (3) a proposed sentence to be added to the existing FOL Physical Protection license condition for VY requiring Entergy to fully implement and maintain in effect all provisions of the Commission-approved VY CSP as required by Title 10 of the Code of Federal Regulations (10 CFR) 73.54 ''Protection of digital computer and communication systems and networks.'' A **Federal Register** notice dated March 27, 2009, issued the final rule that amended 10 CFR part 73. The regulations in 10 CFR 73.54 establish the requirements for a CSP. This regulation specifically requires each licensee currently licensed to operate a nuclear power plant under part 50 of this chapter to submit a CSP that satisfies the requirements of the Rule. Each submittal must include a proposed implementation schedule and implementation of the licensee's CSP must be consistent with the approved schedule. The background for this application is addressed by the NRC Notice of Availability, **Federal Register** Notice, Final Rule 10 CFR part 73, Power Reactor Security Requirements, published on March 27, 2009 (74 FR 13926).

Date of Issuance: July 20, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the CSP, including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on July 16, 2010, as supplemented by letters dated February 15 and April 4, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 247.

Renewed Facility Operating License No. DPR–28: The amendment revised the License.

Date of initial notice in **Federal Register:** August 20, 2010 (75 FR 51494).

The supplements dated February 15 and April 4, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated July 20, 2011.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket Nos. 50–313 and 50–368, Arkansas Nuclear One, Unit 1 and 2, Pope County, Arkansas

Date of amendment request: July 9, 2010, as supplemented by letters dated September 23 and November 30, 2010, and February 15 and April 1, 2011.

Brief description of amendment: The amendment approved the Arkansas Nuclear One, Units 1 and 2 cyber security plan and associated implementation schedule, and revised Paragraph 2.c.(4) of Renewed Facility Operating License No. DPR–51 for Unit 1 and Paragraph 2.D of Renewed Facility Operating License No. NPF–6 for Unit 2 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 27, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on April 1, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment Nos.: Unit 1—244; Unit 2—294.

Renewed Facility Operating License Nos. DPR–51 and NPF–6: Amendment revised the operating licenses.

Date of initial notice in **Federal Register:** October 12, 2010 (75 FR 62597). The supplemental letters dated September 23 and November 30, 2010, and February 15 and April 1, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 27, 2011.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of application for amendment: July 22, 2010, as supplemented by letters dated September 23 and November 30, 2010, and February 15 and April 4, 2011.

Brief description of amendment: The amendment approved the cyber security plan and associated implementation

schedule, and revised Paragraph 2.E of Facility Operating License No. NPF–29 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is generally consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 27, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on April 4, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No: 186.

Facility Operating License No. NPF–29: The amendment revises the Facility Operating License.

Date of initial notice in **Federal Register:** August 20, 2010 (75 FR 51494). The supplemental letters dated September 23 and November 30, 2010, and February 15 and April 4, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 27, 2011.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: July 15, 2010, as supplemented by letters dated September 27 and November 30, 2010, and February 15 and April 4, 2011.

Brief description of amendment: The amendment approved the cyber security plan and associated implementation schedule, and revised Paragraph 2.E of Facility Operating License No. NPF–38 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 20, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on April 4, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 234.

Facility Operating License No. NPF–38: The amendment revised the Facility Operating License.

Date of initial notice in **Federal Register:** October 12, 2010 (75 FR 62598). The supplemental letters dated September 27 and November 30, 2010, and February 15 and April 4, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 20, 2011.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of application for amendments: January 6, 2010, as supplemented by letters dated August 20, October 14, and December 2, 2010, and February 7, 2011.

Brief description of amendments: The amendments changes paragraph 2.B.(5) of Facility Operating License (FOL) Nos. NFP–11 and NPF–18 for LaSalle County Station (LSCS), Units 1 and 2 which enable LSCS to possess and store byproduct material from Braidwood Station, Units 1 and 2, Byron Station, Units 1 and 2, and Clinton Power Station, Unit 1 in the LSCS Interim Radwaste Storage Facility.

Date of issuance: July 21, 2011.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 202/189.

Facility Operating License Nos. NPF–11 and NPF–18: The amendments revised paragraph 2.B.(5) of FOL Nos. NFP–11 and NPF–18.

Date of initial notice in **Federal Register:** July 21, 2010 (75 FR 42465). The August 20, October 14, and December 2, 2010, and February 7, 2011 supplements, contained clarifying information and did not change the Nuclear Regulatory Commission staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 21, 2011.

No significant hazards consideration comments received: No.

Luminant Generation Company LLC, Docket Nos. 50–445 and 50–446, Comanche Peak Nuclear Power Plant, Unit 1 and 2, Somervell County, Texas

Date of amendment request: July 15, 2010, as supplemented by letters dated September 27 and November 30, 2010, and March 31, 2011.

Brief description of amendments: The amendments approved the cyber security plan and associated implementation schedule, and revised Paragraph 2.H of Facility Operating License Nos. NPF–87 and NPF–89 for Comanche Peak Nuclear Power Plant, Units 1 and 2, respectively, to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 26, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on March 31, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment Nos.: Unit 1—155; Unit 2—155.

Facility Operating License Nos. NPF–87 and NPF–89: The amendments revised the Facility Operating Licenses.

Date of initial notice in **Federal Register:** October 12, 2010 (75 FR 62601). The supplemental letters dated September 27 and November 30, 2010, and March 31, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 26, 2011.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: July 20, 2010, as supplemented by letters dated September 27 and November 30, 2010, and March 30, 2011.

Brief description of amendment: The amendment approved the cyber security plan and associated implementation schedule, and revised Paragraph 2.C.(3) of Renewed Facility Operating License No. DPR–46 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 27, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on March 30, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 238.

Renewed Facility Operating License No. DPR–46: Amendment revised the Facility Operating License.

Date of initial notice in **Federal Register:** October 12, 2010 (75 FR 62602). The supplemental letters dated September 27 and November 30, 2010, and March 30, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 27, 2011.

No significant hazards consideration comments received: No.

NextEra Energy Point Beach, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: July 8, 2010, as supplemented by letters dated September 28, November 12, and November 23 of 2010, and March 31 and June 29 of 2011.

Brief description of amendments: The amendments approve the Cyber Security Plan (CSP) and associated implementation schedule, and adds a new License Condition D to the Renewed Facility Operating Licenses for Units 1 and 2. The amendments will specify that NextEra Energy Point Beach fully implement and maintain in effect all provisions of the Commission approved CSP as required by 10 CFR 73.54.

Date of issuance: July 21, 2011.

Effective date: This license amendment is effective as of the date of issuance. The implementation of the CSP, including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on March 31, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment Nos.: 243 (for Unit 1) and 247 (for Unit 2).

Renewed Facility Operating License Nos. DPR–24 and DPR–27: Amendments revised the Renewed Facility Operating License.

Date of initial notice in **Federal Register:** April 12, 2011 (76 FR 20380).

The supplements contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 21, 2011.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit 1, Washington County, Nebraska

Date of amendment request: July 26, 2010, as supplemented by letters dated September 27 and November 30, 2010, and March 31 and April 8, 2011.

Brief description of amendment: The amendment approved the cyber security plan and associated implementation schedule, and revised Paragraph 3.C of Renewed Facility Operating License No. DPR–40 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 27, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on April 8, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 266.

Renewed Facility Operating License No. DPR–40: The amendment revised the operating license.

Date of initial notice in **Federal Register:** November 16, 2010 (75 FR 70035). The supplemental letters dated September 27 and November 30, 2010, and March 31 and April 8, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a safety evaluation dated July 27, 2011.

No significant hazards consideration comments received: No.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit 1 and 2, San Luis Obispo County, California

Date of application for amendments: July 22, 2010, as supplemented by letters dated August 19, September 29, and November 30, 2010, and February 8 and April 4, 2011.

Brief description of amendments: The amendments approved the cyber security plan and associated implementation schedule, and revised Paragraph 2.E of Facility Operating License Nos. DPR–80 and DPR–82 for Diablo Canyon Power Plant, Unit Nos. 1 and 2, respectively, to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber

Security Plan for Nuclear Power Reactors.''

Date of issuance: July 15, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on April 4, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment Nos.: Unit 1—210; Unit 2—212.

Facility Operating License Nos. DPR–80 and DPR–82: The amendments revised the Facility Operating Licenses.

Date of initial notice in **Federal Register:** October 12, 2010 (75 FR 62605). The supplemental letters dated August 19, September 29, and November 30, 2010, and February 8 and April 4, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 15, 2011.

No significant hazards consideration comments received: No.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania

Date of application for amendments: July 22, 2010, as supplemented by letter dated April 4, 2011.

Brief description of amendments: The amendments to the Renewed Facility Operating Licenses (FOL) include: (1) the proposed SSES Units 1 and 2 Cyber Security Plan (CSP), (2) an implementation schedule, and (3) a proposed sentence to be added to the existing renewed FOL Physical Protection license condition for SSES Units 1 and 2 requiring PPL Susquehanna, LLC to fully implement and maintain in effect all provisions of the Commission-approved SSES Units 1 and 2 CSP as required by Title 10 of the Code of Federal Regulations (10 CFR) 73.54, ''Protection of digital computer and communication systems and networks.'' A **Federal Register** notice dated March 27, 2009, issued the final rule that amended 10 CFR part 73. The regulations in 10 CFR 73.54, establish the requirements for a CSP. This regulation specifically requires each licensee currently licensed to operate a nuclear power plant under part 50 of this chapter to submit a CSP that satisfies the requirements of the Rule. Each submittal must include a proposed implementation schedule and implementation of the licensee's CSP must be consistent with the approved schedule. The background for this application is addressed by the NRC Notice of Availability, **Federal Register** Notice, Final Rule 10 CFR part 73, Power Reactor Security Requirements, published on March 27, 2009 (74 FR 13926).

Date of issuance: July 21, 2011.

Effective date: These license amendments are effective as of the date of its issuance. The implementation of the CSP, including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on July 22, 2010, as supplemented by letter dated April 4, 2011, and approved by the NRC staff with these license amendments. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment Nos.: 255 for Unit 1 and 235 for Unit 2.

Facility Operating License Nos. NPF–14 and NPF–22: The amendments revised the license.

Date of initial notice in **Federal Register:** October 12, 2010, 75 FR 62606.

The supplement dated April 4, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 21, 2011.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: October 29, 2010, as supplemented on February 21, 2011.

Brief description of amendment request: The amendments revise the Technical Specifications (TSs) to reflect the adoption of the Nuclear Regulatory Commission-approved TS Task Force (TSTF) traveler TSTF–425, Revision 3, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF [Risk-Informed TSTF] Initiative 5b.''

Date of issuance: July 18, 2011.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment Nos: 185 and 180

Facility Operating License Nos. NPF–2 and NPF–8: The amendments changed the licenses and the technical specifications.

Date of initial notice in **Federal Register:** December 14, 2010 (75 FR 77915).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 18, 2011.

No significant hazards consideration comments received: No.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: July 27, 2010, as supplemented by letters dated September 23 and November 30, 2010, and April 4, April 28, May 18, and June 28, 2011.

Brief description of amendments: The amendments approved the cyber security plan and associated implementation schedule, and revised Paragraph 2.F of Facility Operating License Nos. NPF–76 and NPF–80 for South Texas Project, Units 1 and 2, respectively, to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is generally consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 26, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the cyber security plan (CSP), including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on June 28, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment Nos.: Unit 1—197; Unit 2—185.

Facility Operating License Nos. NPF–76 and NPF–80: The amendments revised the Facility Operating Licenses.

Date of initial notice in **Federal Register:** November 9, 2010 (75 FR 68837). The supplemental letters dated September 23 and November 30, 2010,

and April 4, April 28, May 18, and June 28, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register.**

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 26, 2011.

No significant hazards consideration comments received: No.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: July 19, 2010, as supplemented by letters dated September 24 and November 24, 2010, and January 20, April 1, and April 14, 2011.

Brief description of amendment: The amendment approved the cyber security plan (CSP) and associated implementation schedule, and revised Paragraph 2.E of Renewed Facility Operating License No. NPF–42 to provide a license condition to require the licensee to fully implement and maintain in effect all provisions of the NRC-approved Cyber Security Plan. The proposed change is consistent with Nuclear Energy Institute (NEI) 08–09, Revision 6, ''Cyber Security Plan for Nuclear Power Reactors.''

Date of issuance: July 27, 2011.

Effective date: This license amendment is effective as of the date of its issuance. The implementation of the CSP, including the key intermediate milestone dates and the full implementation date, shall be in accordance with the implementation schedule submitted by the licensee on April 1, 2011, and approved by the NRC staff with this license amendment. All subsequent changes to the NRC-approved CSP implementation schedule will require prior NRC approval pursuant to 10 CFR 50.90.

Amendment No.: 197.

Renewed Facility Operating License No. NPF–42. The amendment revised the Operating License.

*Date of initial notice in **Federal Register:*** October 12, 2010 (75 FR 62607). The supplemental letters dated September 24 and November 24, 2010, and January 20, April 1, and April 14, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 27, 2011.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland this 28th day of July 2011.

For the Nuclear Regulatory Commission.

Louise Lund,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–19775 Filed 8–8–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0006]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of August 8, 15, 22, 29, September 5, 12, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of August 8, 2011

There are no meetings scheduled for the week of August 8, 2011.

Week of August 15, 2011—Tentative

There are no meetings scheduled for the week of August 15, 2011.

Week of August 22, 2011—Tentative

There are no meetings scheduled for the week of August 22, 2011.

Week of August 29, 2011—Tentative

Tuesday, August 30, 2011

9 a.m. Information Briefing on Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) Related Activities (Public Meeting) (Contact: Aida Rivera-Varona, 301–251–4001)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of September 5, 2011—Tentative

There are no meetings scheduled for the week of September 5, 2011.

Week of September 12, 2011—Tentative

There are no meetings scheduled for the week of September 12, 2011.

* * * * *

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by e-mail at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: August 4, 2011.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2011–20257 Filed 8–5–11; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0176]

NRC Enforcement Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Solicitation of comments on proposed revisions.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting written comments from interested parties, including public interest groups, States, members of the public, and the regulated industry (*i.e.,* reactor and materials licensees, vendors, and contractors), on construction-related topics addressed in this notice that the NRC staff is evaluating for discussion in an upcoming Commission paper that will include recommended revisions to the NRC Enforcement Policy. As such, this request for comments is intended to assist the NRC in revising its Enforcement Policy and adequately responding to the Commission's request,

described below. The NRC will also host a public meeting to solicit public comments on these construction related proposed revisions to the Enforcement Policy. The topics discussed in this notice are not intended to represent all the potential changes in the next revision of the Enforcement Policy. Before submitting the next Enforcement Policy revision to the Commission for approval, the staff intends to solicit comments on other topics.

DATES: Submit comments on or before September 8, 2011. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before the specified date.

ADDRESSES: Please include Docket ID NRC–2011–0176 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed. You may submit comments by any one of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0176. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; e-mail: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

You can access publicly available documents related to this document using the following methods:

- *NRC's Public Document Room (PDR):* The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The Enforcement Policy is available electronically under ADAMS Accession Number ML093480037.
- *Federal Rulemaking Web site:* Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0176.

FOR FURTHER INFORMATION CONTACT: Carolyn Faría, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–4050, e-mail to *carolyn.faria-ocasio@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Commission, in SRM–SECY–09–0190, dated August 27, 2010 (ADAMS accession number ML102390327), approved a major revision to its Enforcement Policy. The NRC published a notice (75 FR 60485) announcing an effective date of September 30, 2010, for that revision to the Policy. The Commission, in SRM–SECY–09–0190, also directed the NRC staff (the staff) to reevaluate the portions of the Enforcement Policy associated with construction activities (*e.g.,* reactor or uranium enrichment plants), including under what conditions enforcement discretion could be applied to cases involving the holder of a Limited Work Authorization (LWA) or Combined License (COL). In addressing those topics identified by the Commission, the staff developed a number of approaches that the staff believes appropriate to present collectively to the Commission for its consideration for possible inclusion in the next Enforcement Policy revision. What follows in **bold italics** is the proposed wording for proposed changes to the Enforcement Policy along with background on those topics evaluated by the staff. When appropriate and necessary, the staff also discusses potential regulatory issues associated with a particular topic.

Item 1: Revise Policy Sections for Clarity

(A) Section 1.2, Applicability:

As new last paragraphs in the section, add the following:

It is NRC policy to hold licensees, certificate holders, and applicants responsible for the acts of their employees, contractors, or vendors and their employees, and the NRC may cite the licensee, certificate holder, or applicant for violations committed by its employees, contractors, or vendors and their employees.

The NRC may use the term "licensee" in this Policy when referring to enforcement; however, in most situations the term is applied broadly for any of the above entities. In some situations, the NRC intends that the information applies narrowly, only to license holders. The context of the information described in the Policy will determine the usage of the term "licensee."

The foregoing language was developed by staff to clarify the identity of responsible entities within the context of the Policy. However, the staff does not intend with this proposed language to change or alter any enforcement practice as currently implemented. The staff will ensure that the final policy revision reflects the scope of the term ''licensee'' in the glossary.

(B) Section 2.2, Assessment Of Violations:

In the first sentence of Section 2.2.1.a, revise the sentence to read: '' * * *, onsite or offsite radiation exposures, ***onsite or offsite chemical hazard exposures resulting from licensed or certified activities * * *.''***

Add a new section, as follows:

Section 2.2.6 Construction

In accordance with 10 CFR 50.10, no person may begin the construction of a production or utilization facility on a site on which the facility is to be operated until that person has been issued either a construction permit under 10 CFR part 50, a combined license under 10 CFR part 52, an early site permit authorizing the activities under 10 CFR 50.10(d), or a limited work authorization under 10 CFR 50.10(d). Further, any activities undertaken under the Changes

during Construction (CdC) Preliminary Acceptance Review (PAR) Process, as developed in Interim Staff Guidance (ISG)–025, are at the risk of the licensee, and the licensee is obligated to return to the current licensing basis (CLB) if the related license amendment request (LAR) is subsequently not approved by the NRC.

Also, in accordance with 10 CFR 70.23(a)(7) and 10 CFR 40.32(e), commencement of construction before the NRC finishes its environmental review and issues a license for processing and fuel fabrication, conversion of uranium hexafluoride, or uranium enrichment facility construction and operation is grounds for denial to possess and use special nuclear material in the plant or facility. Additionally, in accordance with 10 CFR 70.23(b), failure to obtain Commission approval for the construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant before the commencement of construction may also be grounds for denial of a license to possess and use special nuclear material.

The revision to Section 2.2.1.a is to ensure consistency with the staff's current process to disposition violations related to chemical hazards exposures. The staff believes that the addition of Section 2.2.6 is necessary to broadly address when and how the assessment of violations during construction occur. The staff is currently developing the CdC PAR process, an elective precursor to the license amendment review, established via license condition. Comments on the CdC PAR process will be solicited under a separate FRN and will not be addressed under this FRN.

(C) Section 6.0, Violation Examples:

Add a second paragraph to the introduction of the section:

Many examples are written to reflect the risks associated with the use of radioactive or special nuclear materials. However, violations during construction generally occur before the nuclear material and its associated risk are present. Therefore, the NRC will consider the lower risk significance of violations that occur during construction in the areas of emergency preparedness, reactor operator licensing, and security and may reduce the severity level for those violations from that indicated by the examples in those areas. The staff must coordinate with the Office of Enforcement before applying this lower risk significance concept for violations that occur during construction.

The staff developed this paragraph to recognize that although certain rules (*i.e.,* requirements for emergency preparedness, reactor operator licensing, and security) apply generally during construction activities, flexibility is needed to factor in the lower risk associated with certain violations that occur during construction. The staff believes that any applicable violation examples in the remaining sections would not likely warrant mitigation during construction solely because there is not nuclear material on site.

Item 2: Revise the Current Section 2.3, Dispostion of Violations

Section 2.3.2 provides the Policy on use of non-cited violations as a method of dispositioning Severity Level IV violations. The staff proposes to revise this section as follows:

Section 2.3.2, Non-cited Violation

If certain criteria (described below) are met, Severity Level IV (SL IV) violations and violations associated with green ROP findings (***for operating reactors***) are normally dispositioned as non-cited violations (NCVs). Inspection reports or inspection records document NCVs and briefly describe the corrective action the licensee has taken or plans to take, if known. Licensees are not required to provide written responses to NCVs; however, they may provide a written response if they disagree with the NRC's description of the NCV and/or dispute the validity of the NCV. Typically all of the criteria described in either 2.3.2.a. or b. must be met for the disposition of a violation as an NCV. ***For all SL IV violations identified by the NRC at fuel cycle facilities (under construction or in operation) in accordance with 10 CFR part 70 or 10 CFR part 40 and reactors under construction in accordance with 10 CFR part 50 or 10 CFR part 52, before the NRC determines that an adequate corrective action program has been implemented, the NRC normally issues a Notice of Violation. Until the determination that an adequate corrective action program has been implemented, NCVs may be issued for licensee/applicant-identified SL IV violations if the NRC has determined that the applicable criteria in 2.3.2.b. below are met:***

a. Power Reactor Licensees

1. The licensee must place the violation into a corrective action program to ***restore compliance and*** address recurrence.

(Delete current footnote—"For reactor facilities under construction in accordance with 10 CFR part 52, the corrective action program must have been demonstrated to be adequate.")

2. (Unchanged)

3. The violation must either not be repetitive as a result of inadequate corrective action, or, if repetitive, the violation must not be NRC identified. This criterion does not apply to violations associated with green ROP findings. ***Delete the rest of the criteria:*** **"AND VIOLATIONS ASSOCIATED WITH FACILITY CONSTRUCTION UNDER 10 CFR PART 50, 'DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES,' AND 10 CFR PART 52, 'LICENSES, CERTIFICATIONS, AND APPROVALS FOR NUCLEAR POWER PLANTS.' "**

4. (Unchanged)

b. All Other Licensees (Unchanged)

Of note regarding this topic, on June 3, 2011, the NRC issued EGM–11–002, ''Enforcement Discretion for Licensee-Identified Violations at Power Reactor Construction Sites Pursuant to Title 10 of the *Code of Federal Regulations* [10 CFR] part 52'' (ADAMS Accession No. ML11152A065). The purpose of this enforcement guidance memorandum is to clarify the guidance for exercising enforcement discretion when the staff dispositions as NCVs those SL IV violations identified by licensees/applicants at power reactors that are under construction. To encourage prompt identification and prompt comprehensive correction of violations at reactor construction sites, the staff is authorized to disposition licensee/applicant-identified SL IV violations as NCVs before the agency determines that the licensee's/applicant's corrective action program (CAP) has been demonstrated to be adequate. For reactors, a method that NRC has found acceptable to determine adequacy of the CAP is for the licensee to commit to and comply with the requirements established by Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' to 10 CFR part 50, ''Domestic Licensing of Production and Utilization Facilities.'' For fuel cycle facilities, the NRC is considering criteria for determining the adequacy of a fuel cycle licensee's CAP. In addition, the remaining criteria of Section 2.3.2.a of the NRC Enforcement Policy must be met, and the licensee must correct, or document its intent to take specific actions to correct, the violation within a reasonable time by the end of the NRC inspection activity,

including both immediate corrective action and any necessary action(s) to reasonably prevent recurrence. EGM–11–002 will be superseded with implementation of this portion of the Policy revision.

SRM–09–0190, Item 1.f requires staff to ''propose revisions to provide fuel cycle licensees with credit for effective corrective actions programs''. The staff acknowledges that further work being done to address Item 1.f of SRM–09–0190 has the potential to generate additional changes to this section of the Policy. The staff will ensure that the final policy revision is coordinated to reflect both initiatives.

Item 3: Revise Policy Sections on Enforcement Discretion

A) Section 3.8, Notices of Enforcement Discretion for Operation Power Reactors and Gaseous Diffusion Plants:

Add a footnote to the section title that states: ***"NOEDs will not be used at reactors during construction before the Commission's 10 CFR 52.103(g) or 10 CFR 50.57 finding, as applicable."***

The staff considered development of an NOED process for use (1) After a COL is issued but prior to the 10 CFR 52.103(g) finding (after which point, the licensee's Technical Specifications are in effect), (2) after the issuance of a construction permit pursuant to 10 CFR 50.50 but prior to the 10 CFR 50.57 operations finding, and (3) after the issuance of an LWA but prior to the issuance of a COL. The Enforcement Policy states, in part, that:

> The NRC may choose not to enforce the applicable technical specification (TS) limiting condition for operation (LCO) or other license conditions, in circumstances where compliance would involve an unnecessary plant transient or the performance of a test, inspection, or system realignment that may not be the most prudent action to take under the specific plant conditions, or unnecessary delays in plant startup, without a corresponding health and safety benefit * * *.
>
> The NRC will issue a notice of enforcement discretion (NOED) only if the staff is clearly satisfied that the action is consistent with protecting the public health and safety or security. The NRC staff may also grant enforcement discretion in cases involving severe weather or other natural phenomena, based upon balancing the public health and safety or common defense and security of not operating against the potential radiological or other hazards associated with continued operation, and a determination that safety will not be impacted unacceptably by exercising this discretion * * *

Consequently, the NOED policy in its current form is predicated upon the expectation that public health and safety will be *enhanced* by the granting of an NOED. In considering the time periods associated with the three situations under consideration, the staff has not identified any plausible scenarios where the risk to public health and safety (or security) would be exacerbated by the failure of the NRC to grant such a licensee or permit holder a NOED.

Moreover, the NOED process, as applied to operating reactors, involves, in essence, a preemptive request by a licensee and an associated preemptive determination by the NRC to permit the licensee to exceed technical specifications limiting conditions for operations. However, technical specifications limiting conditions for operation are not applicable to new reactors under construction until issuance of the operating license under 10 CFR part 50 or the 10 CFR 52.103(g) Commission determination under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' As such, under the current NOED policy paradigm, the staff does not believe it appropriate to use the NOED process for any of the situations under consideration.

With that said, the staff could consider a new paradigm for the granting of NOEDs to COL holders during construction, one premised upon a finding that no adverse impact, or risk increase, to public health and safety, security, or the environment would occur over the period of time enforcement discretion was applied.

However, the staff believes the CdC process, described in more detail in Item 3.B, will provide an appropriate licensing-based change process that will address the vast majority of issues identified during construction, by allowing licensees to effect changes in parallel with staff's review of the acceptability of the change.

In addition, the staff considered the development of a NOED-like process during construction under a Limited Work Authorization (LWA). However, given the limited use of LWAs and their narrow scope, the staff believes that development of an NOED process at this time would require expenditure of resources that would not be commensurate with the benefit.

B) Add a New Section for Enforcement Discretion

Add a new Section 3.9 that states the following:

Section 3.9, Violations Involving Certain Construction Issues

a. Fuel Cycle Facilities

The NRC may choose to exercise discretion for fuel cycle facilities under construction (construction is defined in 10 CFR 40.4 for source material licensees and in 10 CFR 70.4 for special nuclear material licensees) based on the general enforcement discretion guidance contained in Section 3 of this Enforcement Policy.

b. LWA holders

The NRC may exercise discretion for LWA holders during construction using the general enforcement discretion guidance in Section 3 of the Enforcement Policy.

c. COL Holders (Reactor Facilities)

The NRC may reduce or refrain from issuing an NOV/NCV for a violation associated with an unplanned change that deviates from the licensing basis that is implemented during construction [1] without prior NRC approval (in the form of a license amendment) when all of the following criteria are met:

- ***The licensee identifies changes implemented during construction not previously approved by the NRC that the staff would otherwise disposition as a Severity Level IV violation of NRC requirements [2],***
- ***The licensee submits the necessary information to the NRC so that it can conduct a timely evaluation of the change as part of the license amendment review process, and***
- ***Either (1) the cause of the deviation was not within the licensee's control, such that the change was not avoidable by reasonable licensee quality assurance measures or management controls, or (2) the licensee placed the cause of the change in its corrective action program to ensure comprehensive corrective actions to address recurrence.***

For similar issues not identified by the licensee, the NRC may refrain from issuing an NOV/NCV on a case-by-case basis depending upon the circumstances of the issue, such as whether the requirements were clearly understood or should have

[1] ***The NRC may issue enforcement action for the cause of these unplanned changes, such as a failure to implement appropriate work controls or quality control measures, or a failure to adhere to procedures, processes, instructions, or standards that implement NRC requirements. This enforcement may be appropriate for the actions that led to the CdC issue.***

[2] ***NRC-identified violations that result in a "use as built" determination or a resultant unplanned change or both will normally be dispositioned as a cited or non-cited violation, whether or not the unplanned change issue is resolved by a subsequently approved license amendment.***

been understood at the time, the cause of the issue, and why the licensee did not identify the issue.

In all such cases when a licensee determines that an unplanned change during construction associated with a violation of requirements meets the above-outlined criteria and timely submits the necessary information for NRC evaluation, the licensee's continued failure to meet the current licensing basis will not be treated as a willful or continuing violation while NRC reviews the submittal. (Note: If NRC subsequently denies a requested license amendment change, or if the NRC requires additional measures to be taken for the change to be considered acceptable, then a separate NOV or order may be issued to ensure appropriate corrective actions, including restoring the configuration to the current licensing basis are taken).

The staff is currently developing the CdC PAR process including the development of interim staff guidance and the endorsement of industry guidance. The purpose of the CdC PAR process is, as an elective precursor to the license amendment review established by a condition of license, to determine if the NRC has any objection to the licensee proceeding with construction activities different from the licensing basis while the NRC is evaluating the related license amendment request. The NRC will not issue violations for licensee-planned changes properly entered into the CdC PAR process. Comments on CdC are being solicited under a separate FRN and will not be addressed under this FRN.

Procedural Requirements

Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150–0136.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs.

For the Nuclear Regulatory Commission.

Dated at Rockville, MD, this 27th day of July 2011.

Roy Zimmerman,

Director, Office of Enforcement.

[FR Doc. 2011–20112 Filed 8–8–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. A2011–36; Order No. 787]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Hoxie, Iowa post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: *Administrative record due (from Postal Service*): August 15, 2011; *deadline for notices to intervene:* August 29, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on July 29, 2011, the Commission received a petition for review of the Postal Service's determination to close the post office in Hoxie, Arkansas. The petition was filed by Lanny Tinker, Mayor of the city of Hoxie (Petitioner) and is postmarked July 22, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–36 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than September 2, 2011.

Categories of issues apparently raised. Petitioner contends that: (1) The Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); (2) The Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i); and (3) the Postal Service failed to adequately consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is August 15, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is August 15, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions also will be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or

by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before August 29, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

(1) The Postal Service shall file the applicable administrative record regarding this appeal no later than August 15, 2011.

(2) Any responsive pleading by the Postal Service to this notice is due no later than August 15, 2011.

(3) The procedural schedule listed below is hereby adopted.

(4) Pursuant to 39 U.S.C. 505, Cassandra L. Hicks is designated officer of the Commission (Public Representative) to represent the interests of the general public.

(5) The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

PROCEDURAL SCHEDULE

July 29, 2011	Filing of Appeal.
August 15, 2011.	Deadline for the Postal Service to file the applicable administrative record in this appeal.
August 15, 2011.	Deadline for the Postal Service to file any responsive pleading.
August 29, 2011.	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
September 2, 2011.	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
September 22, 2011.	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
October 7, 2011.	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
October 14, 2011.	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
November 21, 2011.	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–20073 Filed 8–8–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2011–37; Order No. 788]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Thayer, Iowa post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: *Administrative record due (from Postal Service*): August 15, 2011; *deadline for notices to intervene:* August 29, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the ''Filing Online'' link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on July 29, 2011, the Commission received a petition for review of the Postal Service's determination to close the post office in Thayer, Iowa. The petition was filed by Mike Tonelli (Petitioner) and is postmarked July 20, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–37 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than September 2, 2011.

Categories of issues apparently raised. Petitioner contends that the Postal Service failed to consider the effect of the closing on the community. *See* 39 U.S.C. 404(d)(2)(A)(i).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the one set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record with the Commission is August 15, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this Notice is August 15, 2011.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions also will be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov*, unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before August 29, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

It is ordered:

1. The Postal Service shall file the applicable administrative record regarding this appeal no later than August 15, 2011.

2. Any responsive pleading by the Postal Service to this Notice is due no later than August 15, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

PROCEDURAL SCHEDULE

July 29, 2011	Filing of appeal.
August 15, 2011.	Deadline for the Postal Service to file the applicable administrative record in this appeal.
August 15, 2011.	Deadline for the Postal Service to file any responsive pleading.
August 29, 2011.	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
September 2, 2011.	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
September 22, 2011.	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
October 7, 2011.	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
October 14, 2011.	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116).
November 17, 2011.	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–20101 Filed 8–8–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65024; File No. SR–NASDAQ–2011–102]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Introduce a Bulk-Quoting Interface

August 3, 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 July 27, 2011, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I 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

NASDAQ is filing with the Commission a proposal to introduce a bulk-quoting interface for NASDAQ market makers that will help them meet their obligations as market makers and to provide liquidity to the market in an efficient manner.

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

NASDAQ currently offers an order-based market making interface on its options trading platform (''NOM''). Market makers use this interface to provide a two-sided quotation on NOM. Since it is an order-based interface, a two-sided quotation requires the entry of both a buy and a sell order.

As part of several technological enhancements NASDAQ plans to implement on NOM, NASDAQ proposes to introduce a bulk-quoting interface for market makers in order to offer an additional market making interface choice to NASDAQ market makers. The proposed bulk-quoting market making interface will be used by market makers to submit and update their quotations in the marketplace much like the current order-based interface is used today. The bulk-quoting interface, however, allows market makers to provide both a bid and an offer in one message. In addition, the bulk-quoting interface allows market makers to bundle several quote updates into one bulk message. This is a useful feature for market makers that provide quotations in many different options. Furthermore, the bulk-quoting market making interface includes certain data elements (described below) which

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

provide market makers with information that will help them meet their obligations as market makers and to provide liquidity to the market in an efficient manner. NASDAQ also proposes to provide this data on the order-based market making interface (collectively, the ''Interfaces'').

The data to be offered over the Interfaces either will be administrative in nature or used to attract liquidity to NASDAQ in response to an auction. NASDAQ believes the data included in this feed is necessary for participants who have written systems to interface with NASDAQ in the case of administrative messages or information regarding auctions and used to attract liquidity. Though these Interfaces are only available to market makers for quoting purposes, non-quoting firms will be allowed to connect to the Interfaces and receive the relevant information, but not send quotes or orders.

Participants who have written interfaces to the NASDAQ system would use the administrative data to determine the current state of the trading system. For example, this data would show which symbols are trading on NASDAQ, the current state of an options symbol (*i.e.,* open for trading, trading, halted or closed from trading). All of this information is vital to a participant's quoting application and by including this information on the Interface used for quoting, participants can streamline their respective system architectures.

NASDAQ holds an opening auction as an efficient and robust mechanism to start each trading day. Additionally, NASDAQ uses an auction to resume trading after a trading halt. During these auction events, NASDAQ advertises the liquidity it has available for execution. This auction information is available on other data feeds and is made available to all exchange participants. The information being added to these market making Interfaces is for convenience purposes so that market participants utilizing them have an additional means to access the information directly impacting their quoting behavior and are not required to take other feeds simply in order to have access to these data elements.

A participant's quoting application will then be able to receive these notifications over the same Interface by which it sends quotes to NASDAQ and could then use the data to respond to auctions quickly and efficiently. This data is not disseminated as a quote to the market because it represents interest that is not immediately executable, but rather interest that is currently gathering in an auction.

Data proposed for these interfaces will initially include the following:

(1) Options Auction Notifications (*e.g.,* opening imbalance, imbalance after a halt);

(2) Options Symbol Directory Messages;

(3) System Event Messages (*e.g.,* start of messages, start of system hours, start of quoting, start of opening); and

(4) Option Trading Action Messages (*e.g.,* halts, resumes).

2. Statutory Basis

NASDAQ believes that its proposal is consistent with Section 6(b) of the Act [3] in general, and furthers the objectives of Section 6(b)(5) of the Act [4] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

NASDAQ believes that this proposal is in keeping with those principles by protecting investors and the public interest, as well as promoting just and equitable principles of trade, through the addition of a new market making interface option for NASDAQ market makers, which by aiding market makers in their market making activities will help to enhance market liquidity for investors. Additionally, permitting the Interfaces to include data elements that are administrative in nature or that are used to attract liquidity to NASDAQ in response to the opening auction, serves to remove impediments to and acts to perfect the mechanism of a free and open market and a national market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 19(b)(3)(A) of the Act [5] and Rule 19b–4(f)(6) thereunder.[6]

A proposed rule change filed under Rule 19b–4(f)(6) [7] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[8] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange notes that the proposed rule change is a non-controversial system change to data and would not affect the execution of trades. The Exchange also notes that it is important to its internal technology roll-out to be able to have this proposed change in place by August 15, 2011, in order for other technological plans to be implemented, and that prompt implementation would extend the benefits and new features to users more quickly. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.[9]

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.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 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.

[7] 17 CFR 240.19b–4(f)(6).

[8] 17 CFR 240.19b–4(f)(6)(iii).

[9] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–102 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–NASDAQ–2011–102. 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–NASDAQ–2011–102 and should be submitted on or before August 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20100 Filed 8–8–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29743; File No. 812–13860]

RidgeWorth Funds and RidgeWorth Capital Management, Inc.; Notice of Application

August 3, 2011.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act and rule 18f–2 under the Act.

SUMMARY OF THE APPLICATION: Applicants request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval.

APPLICANTS: RidgeWorth Funds (the ''Trust'') and RidgeWorth Capital Management, Inc. (the ''Adviser'').

DATES: *Filing Dates:* The application was filed on January 20, 2011 and amended on June 29, 2011.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 29, 2011 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants, 3333 Piedmont Road, NE., Suite 1500, Atlanta, GA 30305–1740.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876, or Dalia Osman Blass, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is a Massachusetts business trust registered under the Act as an open-end management investment company and offers multiple series (each a ''Fund'').[1]

2. The Adviser, a Georgia corporation with its principal office in Atlanta, serves as investment adviser to the Funds and is registered under the Investment Advisers Act of 1940 (the ''Advisers Act'') pursuant to an investment advisory agreement with the Trust (''Advisory Agreement''). The Adviser is a wholly owned subsidiary of SunTrust Banks, Inc. The Advisory Agreement was approved by the board of trustees of the Trust (''Board''),[2], including a majority of the trustees who are not ''interested persons'' (as defined in section 2(a)(19) of the Act) of the Trust or the Adviser (the ''Independent Trustees'') and was approved by the initial shareholder of each Fund in the manner required by sections 15(a) and (c) of the Act and rule 18f–2 thereunder. With respect to new Funds offered in the future, the Advisory Agreement will be approved by the initial shareholder of the Fund in the manner required by sections 15(a) and (c) of the Act and rule 18f–2 thereunder. Applicants are not seeking any exemptions from the provisions of the Act with respect to the

[1] Applicants request that any relief granted pursuant to the application also apply to (a) All other existing or future open-end management investment companies or series thereof that (i) are advised by the Adviser or any entity controlling, controlled by or under common control with the Adviser or its successors (each such entity included in the term ''Adviser''), (ii) are registered under the Act, (iii) use the manager of managers structure (as described in the application), and (iv) comply with the terms and conditions in the application (such companies or series included in the term ''Funds''); and (b) the Adviser. Each existing entity that currently intends to rely on the requested order is named as an Applicant. Any existing or future entity that relies on the order in the future will do so only in accordance with the terms and conditions in the application. If the name of any Fund relying on the requested relief contains the name of a Subadviser (defined below), the name ''RidgeWorth'' or other name being used by the Adviser will precede the name of the Subadviser.

[2] The Board is also the board of each individual Fund.

requirements that the Advisory Agreement be approved by the Board and the shareholders of the relevant Funds.

3. The Adviser, subject to the oversight and authority of the Board, is responsible for furnishing the overall investment program for each Fund and providing continuous investment management for each Fund's assets pursuant to the Advisory Agreement. For the investment management services that it provides to each Fund, the Adviser receives the fee specified in the Advisory Agreement from each Fund based on the Fund's average daily net assets. The Advisory Agreement permits the Adviser to retain one or more unaffiliated investment subadvisers (each a ''Subadviser''), at the Adviser's own expense, subject to the approval of the Fund's Board, including approval by a majority of its Independent Trustees, for the purpose of managing the investment of the assets of one or more Funds.[3] Each Subadviser will be registered as an investment adviser under the Advisers Act. Each Subadviser will be responsible, subject to the supervision of the Adviser and the Board, for the purchase, retention and sale of securities for the applicable Fund. The Adviser will establish an investment program for each Fund and will select, supervise and evaluate the Subadvisers who make the day-to-day investment decisions for the Fund. The Adviser will evaluate and recommend Subadvisers to the Board and will monitor and evaluate each Subadviser's investment programs, performance and compliance. The Adviser will also recommend to the Board whether investment advisory agreements with a Subadviser (''Subadvisory Agreements'') should be renewed, modified or terminated. The Adviser will compensate each Subadviser out of the fee paid to the Adviser under the relevant Fund's Advisory Agreement. Neither the Trust nor any Fund will be responsible for paying subadvisory fees to any subadviser.

4. Applicants request an order to permit the Adviser, subject to Board approval, including a majority of the Independent Trustees, to enter into and materially amend Subadvisory Agreements without shareholder approval.

[3] The Adviser has entered into subadvisory agreements with subadvisers that are ''affiliated persons'' (as defined in section 2(a)(3) of the Act) of the Trust, a Fund or of the Adviser (other than by reason of serving as a subadviser to one or more of the Funds) (''Affiliated Subadvisers'') to assist with monitoring and/or management of certain markets with which the Affiliated Subadvisers have expertise. The requested relief does not apply with respect to existing or future Affiliated Subadvisers.

Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by a vote of a majority of the company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series investment company affected by a matter must approve the matter if the Act requires shareholder approval.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or from any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief meets the necessary standards for the reasons discussed below.

3. Applicants believe that the shareholders expect the Adviser and the Board to select the portfolio manager or Subadviser for a Fund that is best suited to achieve the Fund's investment objective. Applicants assert that, from the perspective of the investor, the role of the Subadvisers with respect to the Funds utilizing the manager of managers structure is substantially equivalent to the role of the individual portfolio managers employed by the traditional investment company advisory firms. In the absence of exemptive relief from section 15(a) of the Act, when a new Subadviser is proposed for retention by a Fund or the Trust on behalf of one or more of the Funds, shareholders would be required to approve the Subadvisory Agreement with that Subadviser. Similarly, if an existing Subadvisory Agreement were to be amended in any material respect (*e.g.*, an increase in the subadvisory fee), approval by the shareholders of the affected Fund would be required. In addition, a Fund would be prohibited from continuing to retain an existing Subadviser whose Subadvisory Agreement had been ''assigned'' as a result of a change of control of the Subadviser unless shareholder approval had been obtained. Applicants contend that this process would be time-intensive, costly and slow and, in the case of a poorly performing Subadviser or one whose management team had left, potentially harmful to a Fund and its shareholders. Applicants also note that the Advisory Agreement is and will remain fully subject to the requirements of section 15(a) of the Act and, where applicable, rule 18f–2 thereunder, including the requirement for shareholder voting.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Fund may rely on the order requested in the application, the operation of the Fund in the manner described in the application will be approved by a majority of the Fund's outstanding voting securities, as defined in the Act or, in the case of a Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the initial shareholder(s) before offering shares of that Fund to the public.

2. Each Fund that relies on the order requested in the application will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. Each Fund relying on the order requested in the application will hold itself out to the public as utilizing the manager of managers structure described in the application. The prospectus will prominently disclose that the Adviser has ultimate responsibility (subject to oversight by the Board) to oversee the Subadvisers and recommend their hiring, termination, and replacement.

3. Within 90 days of the hiring of a new Subadviser, the affected Fund shareholders will be furnished all information about the new Subadviser that would be included in a proxy statement. To meet this obligation, the Fund will provide shareholders of the affected Fund within 90 days of hiring a new Subadviser with an information statement meeting the requirements of Regulation 14C, Schedule 14C, and Item 22 of Schedule 14A under the Securities Exchange Act of 1934, as amended.

4. The Adviser will not enter into a subadvisory agreement with any Affiliated Subadviser without such agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

5. At all times, at least a majority of the Board will be Independent Trustees, and the nomination of new or additional Independent Trustees will be placed within the discretion of the then-existing Independent Trustees.

6. Whenever a subadviser change is proposed for a Fund with an Affiliated Subadviser, the Board, including a majority of the Independent Trustees,

will make a separate finding, reflected in the applicable Board minutes, that such change is in the best interests of the Fund and its shareholders, and does not involve a conflict of interest from which the Adviser or the Affiliated Subadviser derives an inappropriate advantage.

7. The Adviser will provide general management services to each Fund that is subadvised, including overall supervisory responsibility for the general management and investment of the Fund's assets, and, subject to review and approval of the Board, will: (i) Set each Fund's overall investment strategies; (ii) evaluate, select and recommend Subadvisers to manage all or a part of a Fund's assets; (iii) allocate and, when appropriate, reallocate a Fund's assets among one or more Subadvisers; (iv) monitor and evaluate the performance of Subadvisers; and (v) implement procedures reasonably designed to ensure that the Subadvisers comply with the relevant Fund's investment objective, policies, and restrictions.

8. No trustee or officer of the Trust or a Fund, or director, manager or officer of the Adviser, will own, directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in a Subadviser, except for (a) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser, or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of any publicly traded company that is either a Subadviser or an entity that controls, is controlled by or is under common control with a Subadviser.

9. In the event the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20102 Filed 8–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29744; File No. 812–13853]

American Capital, Ltd.; Notice of Application

August 3, 2011.

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice of an application for an order under section 61(a)(3)(B) of the Investment Company Act of 1940 (the ''Act'').

Summary of Application: Applicant, American Capital, Ltd. requests an order approving a proposal to grant stock options to directors who are not also employees or officers of the applicant (the ''Non-employee Directors'') under its 2010 Disinterested Director Stock Option Plan (the ''Plan'').

DATES: *Filing Dates:* The application was filed on December 21, 2010, and amended on July 22, 2011, and July 26, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 29, 2011, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicant, 2 Bethesda Metro Center, 14th Floor, Bethesda, Maryland 20814.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876, or Dalia Osman Blass, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicant's Representations

1. Applicant, a Delaware corporation, is a business development company (''BDC'') within the meaning of section 2(a)(48) of the Act.[1] Applicant's primary business objectives are to increase its net operating income and net asset value (''NAV'') by investing its assets in senior debt, subordinated debt, with and without detachable warrants, and equity of small to medium sized businesses with attractive current yields and potential for equity appreciation. Applicant's investment decisions are made either by its board of directors (the ''Board''), based on recommendations of the executive officers of applicant, or, for investments that meet certain objective criteria established by the Board, by the executive officers of applicant, under authority delegated by the Board. Applicant does not have an external investment adviser within the meaning of section 2(a)(20) of the Act.

2. Applicant requests an order under section 61(a)(3)(B) of the Act approving its proposal to grant stock options under the Plan to its Non-employee Directors.[2] Applicant has a nine member Board with one current vacancy. Seven of the eight current members of the Board are not ''interested persons'' (as defined in section 2(a)(19) of the Act) of the applicant (''Disinterested Directors''). All of the current Non-employee Directors are Disinterested Directors. The Board approved the Plan at a meeting of the Board held on April 29, 2010,[3] and applicant's stockholders approved the Plan at the annual meeting of stockholders held on September 15, 2010.

3. Non-employee Directors are eligible to receive options under the Plan.[4] Under the Plan, a maximum of 1,250,000 shares of applicant's common

[1] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[2] The Non-employee Directors receive a $100,000 per year retainer payment and $3,000 for each Board or committee meeting or other designated Board-related meeting attended, and reimbursement for related expenses. Non-employee Directors who serve as the lead director of the Board receive an additional $25,000 per year retainer and Non-employee Directors who chair a committee of the Board receive an additional $15,000 retainer per year. Non-employee Directors who serve as directors on the boards of portfolio companies also receive an annual retainer from applicant set at $30,000 per board, in lieu of any payment from the portfolio company.

[3] The Board approved amendments to the Plan on April 28, 2011, and July 21, 2011.

[4] The Plan would authorize the issuance of options only to Non-Employee Directors and not to employees or officers of applicant.

stock, in the aggregate, may be issued to Non-employee Directors and options to purchase 156,250 shares of applicant's common stock may be issued to any one Non-employee Director. On the date that the Commission issues an order on the application (''Order Date''), each of the seven Non-employee Directors serving on the Board as of September 15, 2010, will be granted options to purchase 156,250 shares of applicant's common stock (the ''Initial Grants''), provided that the Non-employee Director is a member of the Board on the Order Date. The options issued under the Initial Grants will vest in three equal parts on each of the first three anniversaries of September 15, 2010. Any person who becomes a Non-employee Director after September 15, 2010, will be entitled to receive options to purchase 156,250 shares of applicant's common stock (the ''Other Grants''), if and to the extent that there are options available for grant to Non-employee Directors under the Plan. Each Other Grant will be effective on the later of the date such person becomes a Non-employee Director and the Order Date. The options issued under the Other Grants will vest in three equal parts on each of the first three anniversaries of the date such person becomes a Non-employee Director.

4. Under the terms of the Plan, the exercise price of an option will not be less than 100% of the current market value of the Shares on the date of issuance of the option, or if no such market value exists, the current NAV of the Shares on the date of issuance of the options. The Initial Grants will expire on September 15, 2020, and the Other Grants will expire on the tenth anniversary of the date the person becomes a Non-employee Director. Options granted under the Plan may not be assigned or transferred other than by will or the laws of descent and distribution. In the event of the death or disability (as defined in the Plan) of a Non-employee Director during such director's service, all such director's unexercised options will immediately become exercisable and may be exercised for a period of three years following the date of death (by such director's personal representative) or one year following the date of disability, but in no event after the respective expiration dates of such options. In the event of the termination of a Non-employee Director for cause, any unexercised options will terminate immediately. If a Non-employee Director's service is terminated for any reason other than by death, disability, or for cause, the options may be exercised within one year immediately following the date of termination, but in no event later than the expiration date of such options.

5. Applicant's officers and employees, including directors who are employees, are eligible or have been eligible to receive options under stock option plans that exclude Non-employee Directors as participants (the ''Employee Plans''). Non-employee Directors have been eligible to receive options under applicant's two Disinterested Director stock option plans (the ''1997 Disinterested Director Plan'' and the ''2000 Disinterested Director Plan'', together the ''Disinterested Director Plans''). Additionally, applicant's officers and employees, as well as Non-employee Directors, are eligible or have been eligible to receive options under applicant's 2006 stock option plan (the ''2006 Option Plan''), applicant's 2007 stock option plan (the ''2007 Option Plan''), applicant's 2008 stock option plan (the ''2008 Option Plan''), and applicant's 2009 stock option plan (''2009 Option Plan'') (collectively, the 2009 Option Plan, the 2008 Option Plan, the 2007 Option Plan, the 2006 Option Plan, the Disinterested Director Plans and the Employee Plans are the ''Other Plans''). Non-employee Directors are now eligible to receive options only under the Plan.[5] As of July 14, 2011, applicant had 350,309,123 shares of common stock outstanding.[6] The 1,250,000 shares of applicant's common stock that may be issued to Non-employee Directors under the Plan represent 0.3% of applicant's outstanding voting securities as of July 14, 2011. As of July 14, 2011, the amount of voting securities that would result from the exercise of all outstanding options issued to applicant's directors, officers, and employees under the Other Plans and the Plan would be 50,200,843 shares of applicant's common stock, or 14.3% of applicant's outstanding voting securities. As of July 14, 2011, applicant had no outstanding warrants, options, or rights to purchase its voting securities other than the outstanding options issued to applicant's directors, officers, and employees under the Other Plans and the Plan.

Applicant's Legal Analysis

1. Section 63(3) of the Act permits a BDC to sell its common stock at a price below current NAV upon the exercise of any option issued in accordance with section 61(a)(3). Section 61(a)(3)(B) provides, in pertinent part, that a BDC may issue to its non-employee directors options to purchase its voting securities pursuant to an executive compensation plan, provided that: (a) The options expire by their terms within ten years; (b) the exercise price of the options is not less than the current market value of the underlying voting securities at the date of the issuance of the options, or if no market value exists, the current NAV of the underlying voting securities; (c) the proposal to issue the options is authorized by the BDC's shareholders, and is approved by order of the Commission upon application; (d) the options are not transferable except for disposition by gift, will or intestacy; (e) no investment adviser of the BDC receives any compensation described in section 205(a)(1) of the Investment Advisers Act of 1940, except to the extent permitted by clause (b)(1) or (b)(2) of that section; and (f) the BDC does not have a profit-sharing plan as described in section 57(n) of the Act.

2. In addition, section 61(a)(3) provides that the amount of the BDC's voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance may not exceed 25% of the BDC's outstanding voting securities, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to the BDC's directors, officers, and employees pursuant to any executive compensation plan would exceed 15% of the BDC's outstanding voting securities, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance will not exceed 20% of the outstanding voting securities of the BDC.

3. Applicant represents that its proposal to grant stock options to Non-employee Directors under the Plan meets all the requirements of section 61(a)(3)(B). Applicant states that the Board is actively involved in the oversight of applicant's affairs and that it relies extensively on the judgment and experience of its directors. In addition to their duties as Board members generally, applicant states that the Non-employee Directors provide guidance and advice on operational

[5] The 1997 Disinterested Director Plan has expired, and, therefore, no additional options may be issued under it. The 2000 Disinterested Director Plan, the 2006 Option Plan, the 2007 Option Plan and the 2008 Option Plan have been amended so that no further options will be awarded to Non-employee Directors under any of them. The Board has voted to terminate the granting of any further options to Non-employee Directors under the 2009 Option Plan upon receipt of an order granting the requested relief.

[6] Applicant's common stock constitutes the only voting security of applicant currently outstanding.

issues, underwriting policies, credit policies, asset valuation and strategic direction, as well as serving on committees. Applicant believes that the availability of options under the Plan will provide significant at-risk incentives to Non-employee Directors to remain on the Board and devote their best efforts to ensure applicant's success. Applicant states that the options will provide a means for the Non-employee Directors to increase their ownership interests in applicant, thereby ensuring close identification of their interests with those of applicant and its stockholders. Applicant asserts that by providing incentives such as options, applicant will be better able to maintain continuity in the Board's membership and to attract and retain the highly experienced, successful and dedicated business and professional people who are critical to applicant's success as a BDC.

4. As noted above, applicant states that the amount of voting securities that would result from the exercise of all outstanding options issued to applicant's directors, officers, and employees under the Other Plans and the Plan would be 50,200,843 shares of applicant's common stock, or 14.3% of applicant's outstanding voting securities, as of July 14, 2011. However, applicant represents that the maximum number of voting securities that would result from the exercise of all outstanding options issued and all options issuable to applicant's directors, officers, and employees under the Plan and the Other Plans would be 68,698,074 shares of applicant's common stock, or 19.6% of applicant's outstanding voting securities, as of July 14, 2011. Applicant states that to the extent the number of shares of common stock that would be issued upon the exercise of options issued under the Other Plans and the Plan exceeds 15% of applicant's outstanding voting securities, applicant will comply with the 20% limit in section 61(a)(3) of the Act.

5. Applicant asserts that, given the relatively small amount of common stock issuable to Non-employee Directors upon their exercise of options under the Plan, the exercise of such options would not, absent extraordinary circumstances, have a substantial dilutive effect on the NAV of applicant's common stock.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20103 Filed 8–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65019; File No. SR–CBOE–2011–073]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend its Fees Schedule and Circular Regarding Trading Permit Holder Application and Other Related Fees

August 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 1, 2011, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by CBOE. 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

Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') proposes to amend its Fees Schedule and circular regarding Trading Permit Holder application and other related fees (''Trading Permit Fee Circular'') to amend the fee assessed to Floor Broker Trading Permit Holders that conduct a certain level of activity in CBOE Volatility Index (''VIX'') options. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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. CBOE 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

CBOE Rule 2.20 grants the Exchange the authority to, from time to time, fix the fees and charges payable by Trading Permit Holders. CBOE is proposing to amend its Fees Schedule and Trading Permit Fee Circular effective August 1, 2011 to amend the fee assessed to Floor Broker Trading Permit Holders that conduct a certain level of activity in VIX (''VIX Floor Broker Fee'') to assess one $1,000 fee monthly to each Trading Permit Holder and TPH organization that maintains one or more Floor Broker Trading Permits that collectively meet the criteria for the assessment of the VIX Floor Broker Fee rather than assessing the Fee to each Floor Broker Trading Permit Holder. CBOE is also proposing to eliminate one of the requirements used to calculate the minimum level of activity in VIX that subjects a Floor Broker Trading Permit Holder to this fee.

CBOE assesses a tier appointment fee to CBOE Market-Maker Trading Permit Holders for certain proprietary classes in recognition of the cost to develop those products and of the profit potential in those classes.[3] Additionally, TPH organizations frequently staff more than one Market-Maker in the VIX trading crowd, as in doing so, each Market-Maker present in the trading crowd may participate on a trade.

In January 2011, CBOE amended its Fees Schedule to establish a fee (the VIX Floor Broker Fee) to be assessed to any Floor Broker Trading Permit Holder (a) that executes more than 20,000 VIX contracts during the month and (b) whose aggregate VIX executed contracts during the month comprise more than

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] CBOE Rule 8.3(e) provides that the Exchange may establish one or more types of tier appointments. In accordance with CBOE Rule 8.3(e), a tier appointment is an appointment to trade one or more options classes that must be held by a Market-Maker to be eligible to act as a Market-Maker in the options class or options classes subject to that appointment. CBOE currently assesses a $1,000 monthly VIX Tier Appointment fee. The VIX Tier Appointment fee is assessed to any Market-Maker Trading Permit Holder that either (a) has a VIX Tier Appointment at any time during a calendar month; or (b) conducts any transactions in VIX at any time during a calendar month.

30% of the Floor Broker Trading Permit Holder's exchange-wide total executed contracts.[4] This fee was implemented to reflect the opportunity provided to agents servicing customers in such a high-volume, fast-growing product. In addition, CBOE implemented this fee for Floor Broker Trading Permit Holders in an effort to equalize this opportunity between Market-Makers and Floor Brokers in VIX options. Specifically, the VIX Floor Broker Fee is assessed to CBOE Floor Broker Trading Permit Holders in recognition of the type of business that is conducted in VIX options classes through solicitation of interest for contra parties on orders.

CBOE is proposing to simplify the manner in which this fee is assessed by (i) allocating one fee to each Trading Permit Holder or TPH organization that maintains more than one Floor Broker Trading Permit and that collectively through those Floor Broker Trading Permits meets the criteria to be assessed the VIX Floor Broker Fee rather than to assess the VIX Floor Broker Fee in that instance for each of the individual Floor Broker Trading Permits; and (ii) removing the criterion for the assessment of the fee that looks to aggregate VIX executed contracts during the month in relation to a Floor Broker Trading Permit Holder's exchange-wide total executed contracts. Instead, the only applicable requirement for assessment of the fee would be the current first criterion (*i.e.* whether more than 20,000 VIX contracts have been executed during the month). For example, under the proposal, if Trading Permit Holder A has one Floor Broker Trading Permit that is utilized to execute VIX options transactions (acronym ABC), Trading Permit Holder A will be assessed a single $1,000 monthly fee if ABC's executions exceed 20,000 contracts per month. If Trading Permit Holder B has two Floor Broker Trading Permits that are utilized to execute VIX options transactions (acronyms DEF and XYZ), the VIX executions of DEF and XYZ shall be aggregated for purposes of determining this additional monthly fee and Trading Permit Holder B shall be charged a single $1,000 fee for the combined VIX executions through DEF and XYZ if the executions exceed 20,000 contracts per month. Thus, if DEF executes 15,000 VIX contracts and XYZ executes 10,000 contracts in August 2011, Trading Permit Holder B will be assessed a single $1,000 VIX Floor Broker Fee for the month of August 2011.

CBOE believes the proposal to allocate one fee to each Trading Permit Holder or TPH organization, as applicable, is reasonable and appropriate in that each Market-Maker present in the VIX trading crowd has the ability to participate on a trade, regardless of whether those Market-Makers are associated with the same TPH organization. However, for Floor Broker Trading Permit Holders, each Trading Permit Holder or TPH organization, as a single agent, is limited in their ability to participate on behalf of any account in which the Trading Permit Holder has an interest or on behalf of a non-Market-Maker customer to a single Floor Broker Trading Permit Holder.[5] The presence of multiple Floor Broker Trading Permit Holders that are associated with the same TPH organization does not provide additional participation rights. Only one Floor Broker Trading Permit Holder associated with a TPH organization representing such a proprietary or non-Market-Maker customer account may participate on each transaction. Therefore, CBOE believes the assessment of one VIX Floor Broker fee to each Trading Permit Holder or TPH organization is appropriate and reasonable to ensure it is in congruence with that level of opportunity available to Floor Broker Trading Permit Holders in comparison to Market-Makers.

In addition, the proposal will level the playing field between Trading Permit Holders and TPH organizations that maintain multiple Floor Broker Trading Permits in VIX rather than one Floor Broker Trading Permit in VIX. Under the existing structure, Trading Permit Holders may have only one Floor Broker Trading Permit assigned to execute orders in VIX but may have others providing VIX orders to that particular Floor Broker for execution. This enables these Trading Permit Holders and TPH organizations to avoid being assessed more than one VIX Floor Broker Fee. Thus, this proposal will eliminate the disparity between the VIX Floor Broker Fees that are assessed to those Trading Permit Holders or TPH organizations that elect to maintain multiple Floor Broker Trading Permits to execute VIX orders and those that choose to only maintain one Floor Broker Trading Permit to execute VIX orders.

In addition, by removing the 30% aggregate calculation, affiliated Trading Permit Holders and TPH organizations will be able to better monitor whether the fee will be assessed throughout the month. Based on the numbers generated for May 2011, the removal of this criterion would not subject additional Trading Permit Holders to the fee.

In addition to the proposed changes to the Fees Schedule described above, CBOE is proposing to revise its regulatory circular that sets forth the existing Trading Permit Holder application and other related fees. The Exchange proposes to revise this circular to incorporate the changes to Section 10 of the CBOE Fees Schedule that are described above. The proposed changes to the circular are included as Exhibit 2 to the Form 19b–4.

2. Statutory Basis

The proposed rule change will treat all Trading Permit Holders in the same manner and is equitable and not discriminatory in that there is an objective test for the application of this fee. CBOE believes this proposal is reasonable in that, based on the data for May 2011, the removal of the criterion that aggregates VIX executed contracts during the month to determine if the aggregated amount comprises more than 30% of the Floor Broker Trading Permit Holder's exchange-wide total executed contracts does not appear to increase, in and of itself, the number of Trading Permit Holders that are subject to this fee. In addition, CBOE believes the assessment of one VIX Floor Broker fee to each Trading Permit Holder or TPH organizations is reasonable to ensure it is in congruence with that level of opportunity available to Floor Broker Trading Permit Holders as compared to the level of opportunity available to Market-Makers. Further, the assessment of one fee to each Trading Permit Holder or TPH organization ''levels the playing field'' for Trading Permit Holders and TPH organizations that maintain more than one Floor Broker Trading Permit to execute orders in VIX options. Accordingly, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(4) of the Act[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

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 that is not necessary or appropriate in furtherance of purposes of the Act.

[4] *See* Securities Exchange Act Release No. 63706 (January 12, 2011), 76 FR 3184 (January 19, 2011) (SR–CBOE–2011–004).

[5] *See* CBOE Rule 6.55.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and subparagraph (f)(2) of Rule 19b–4 [9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–2011–073 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–2011–073. 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 CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2011–073 and should be submitted on or before August 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20066 Filed 8–8–11; 8:45 am]

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[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65021; File No. SR–ISE–2011–45]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Complex Orders

August 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 1, 2011, the International Securities Exchange, LLC (the ''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend fees for certain complex orders executed on the Exchange. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses per contract transaction charges and credits to market participants that add or remove liquidity from the Exchange (''maker/taker fees'') in a number of options classes (the ''Select Symbols'').[3]

For complex orders in the Select Symbols, the Exchange currently charges a ''take'' fee of: (i) $0.30 per contract for Market Maker,[4] Market Maker Plus,[5] Firm Proprietary and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Options classes subject to maker/taker fees are identified by their ticker symbol on the Exchange's Schedule of Fees. *See* Securities Exchange Act Release Nos. 61869 (April 7, 2010), 75 FR 19449 (April 14, 2010) (SR–ISE–2010–25), 62048 (May 6, 2010), 75 FR 26830 (May 12, 2010) (SR–ISE–2010–43), 62282 (June 11, 2010), 75 FR 34499 (June 17, 2010) (SR–ISE–2010–54), 62319 (June 17, 2010), 75 FR 36134 (June 24, 2010) (SR–ISE–2010–57), 62508 (July 15, 2010), 75 FR 42809 (July 22, 2010) (SR–ISE–2010–65), 62507 (July 15, 2010), 75 FR 42802 (July 22, 2010) (SR–ISE–2010–68), 62665 (August 9, 2010), 75 FR 50015 (August 16, 2010) (SR–ISE–2010–82), 62805 (August 31, 2010), 75 FR 54682 (September 8, 2010) (SR–ISE–2010–90), 63283 (November 9, 2010), 75 FR 70059 (November 16, 2010) (SR–ISE–2010–106), 63534 (December 13, 2010), 75 FR 79433 (December 20, 2010) (SR–ISE–2010–114); 63664 (January 6, 2011), 76 FR 2170 (January 12, 2011) (SR–ISE–2010–120); and 64303 (April 15, 2011), 76 FR 22425 (April 21, 2011) (SR–ISE–2011–18).

[4] Market Makers who remove liquidity in the Select Symbols from the Complex Order Book by trading with orders preferenced to them are charged $0.28 per contract.

[5] A Market Maker Plus is a market maker who is on the National Best Bid or National Best Offer 80% of the time for series trading between $0.03 and $5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to $100) and between $0.10 and $5.00 (for options whose underlying stock's previous trading day's last sale price was greater than $100) in

Continued

Customer (Professional)[6] orders; and (ii) $0.35 per contract for Non-ISE Market Maker[7] orders. Priority Customer[8] orders are not charged a take fee for complex orders. For complex orders, the Exchange currently charges a ''make'' fee of: (i) $0.10 per contract for Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) $0.20 per contract for Non-ISE Market Maker orders. Priority Customer orders are not charged a make fee for complex orders.

Additionally, the Exchange provides a rebate of $0.25 per contract to Priority Customer complex orders that trade with non-customer orders in the Complex Order Book.

The Exchange now proposes to extend the fees and credits for complex orders applicable to the Select Symbols to all symbols that are in the Penny Pilot Program.[9] Thus, pursuant to this proposed rule change, for complex orders in the Penny Pilot Symbols, the Exchange will charge a ''take'' fee of: (i) $0.30 per contract for Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) $0.35 per contract for Non-ISE Market Maker orders. Priority Customer orders will not be charged a take fee for complex orders. For complex orders in the Penny Pilot Symbols, the Exchange will charge a ''make'' fee of: (i) $0.10 per contract for Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) $0.20 per contract for Non-ISE Market Maker orders. Priority Customer orders will not be charged a make fee for complex orders.

Additionally, the Exchange currently provides a rebate of $0.25 per contract to Priority Customer complex orders that trade with non-customer orders in the Complex Order Book and proposes to extend this rebate to the Penny Pilot Symbols. Finally, the Exchange currently charges a Payment for Order Flow (PFOF) fee of $0.25 per contract for each customer order executed in the Penny Pilot Symbols, including complex orders. As part of this proposed rule change, the Exchange proposes not to charge a PFOF fee for customer complex orders transacted in the Penny Pilot Symbols.

The Exchange has designated this proposal to be operative on August 1, 2011.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(4) of the Act[11] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to add or remove liquidity in options overlying the symbols that are subject to the Exchange's maker/taker fees.

The Exchange believes that its complex order fees and credits remain competitive with fees charged by other exchanges and therefore are reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than to a competing exchange. The Exchange believes that its proposal to extend its complex order pricing to all Penny Pilot Symbols is reasonable because doing so will attract additional order flow to the Exchange. The complex order pricing employed by the Exchange for the Select Symbols has proven to be an effective pricing mechanism and attractive to Exchange participants and their customers. The Exchange believes extending that pricing structure will attract additional complex order business while at the same time creating standardization in complex order pricing across symbols that make up the majority of daily volume in options trading. The Exchange further believes that the amounts of the proposed fees are reasonable because they are identical to fees assessed by the Exchange for execution of complex orders in the Select Symbols.

The Exchange believes it is reasonable to eliminate the PFOF fee for customer complex orders in the Penny Pilot Symbols because the Exchange does not charge a PFOF fee for symbols that are subject to the Exchange's maker/taker pricing, *i.e.,* the Select Symbols. PFOF fees are pricing incentives offered by exchanges to attract order flow. Since the Exchange is proposing to adopt maker/taker pricing for complex orders, which provides incentives to attract order flow in the form of rebates, the Exchanges does not have a need to charge PFOF fees for these orders.

The Exchange also believes that extending the maker/taker pricing to complex orders in the Penny Pilot Symbols is reasonable and equitable because the Exchange is not changing its maker/taker pricing structure; it is merely extending it to additional symbols, *i.e.,* Penny Pilot Symbols. The Exchange also believes that eliminating

premium in each of the front two expiration months and 80% of the time for series trading between $0.03 and $5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to $100) and between $0.10 and $5.00 (for options whose underlying stock's previous trading day's last sale price was greater than $100) in premium across all expiration months in order to receive the rebate. The Exchange determines whether a market maker qualifies as a Market Maker Plus at the end of each month by looking back at each market maker's quoting statistics during that month. If at the end of the month, a market maker meets the Exchange's stated criteria, the Exchange rebates $0.10 per contract for transactions executed by that market maker during that month. The Exchange provides market makers a report on a daily basis with quoting statistics so that market makers can determine whether or not they are meeting the Exchange's stated criteria.

[6] A Customer (Professional) is a person who is not a broker/dealer and is not a Priority Customer.

[7] A Non-ISE Market Maker, or Far Away Market Maker (''FARMM''), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended (''Exchange Act''), registered in the same options class on another options exchange.

[8] A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[9] The Penny Pilot Program, which commenced on January 26, 2007, permits ISE and all of the other options exchanges to quote certain option classes in pennies. The current pilot is scheduled to expire on December 31, 2011. The following options classes are currently in the Penny Pilot Program: A, AA, AAPL, ABK, ABT, ABX, ACAS, ACI, ADBE, ADM, ADSK, AEM, AET, AFL, AGO, AIG, AKAM, AKS, ALL, AMAT, AMD, AMED, AMGN, AMLN, AMR, AMZN, ANF, ANR, APA, APC, APOL, APWR, ARNA, ATPG, ATVI, AUY, AXP, BA, BAC, BAX, BBBY, BBD, BBT, BBY, BCRX, BHI, BHP, BIDU, BK, BMY, BP, BPOP, BRCD, BRCM, BRKB, BSX, BTU, BUCY, BX, C, CAT, CB, CELG, CENX, CF, CHK, CI, CIEN, CIT, CL, CLF, CMA, CMCSA, CNX, COF, COP, COST, CREE, CRM, CSCO, CSX, CTIC, CVS, CVX, CX, DAL, DCTH, DD, DE, DELL, DHI, DIA, DIS, DNDN, DO, DOW, DRYS, DTV, DVN, EBAY, EEM, EFA, EK, EMC, ENER, EOG, EP, ERTS, ESI, ESRX, ETFC, EWJ, EWT, EWW, EWY, EWZ, F, FAS, FAZ, FCX, FDX, FFIV, FIS, FITB, FLEX, FNM, FRE, FSLR, FWLT, FXE, FXI, FXP, GDX, GE, GFI, GG, GGP, GILD, GIS, GLD, GLW, GM, GMCR, GME, GNW, GPS, GRMN, GS, HAL, HBAN, HBC, HD, HES, HGSI, HIG, HK, HL, HOG, HON, HOT, HPQ, HSY, IBM, IBN, INTC, IOC, IP, ITMN, IWM, IYR, JCP, JDSU, JNJ, JNPR, JOYG, JPM, JWN, KBH, KEY, KFT, KGC, KMP, KO, KRE, LCC, LDK, LEAP, LEN, LLY, LNC, LO, LOW, LVS, M, MA, MBI, MCD, MCO, MCP, MDT, MDVN, MEE, MET, MGM, MJN, MMM, MMR, MNKD, MNX, MO, MON, MOS, MRK, MRO, MRVL, MS, MSFT, MSI, MT, MTG, MU, MYL, NBR, NE, NEM, NFLX, NKE, NLY, NOK, NOV, NTAP, NUE, NVDA, NYX, OIH, ORCL, OXY, PARD, PBR, PCL, PCX, PEP, PFE, PG, PHM, PM, PNC, POT, PRU, PXP, QCOM, QID, QLD, QQQ, RCL, RF, RIG, RIMM, RMBS, RSH, RTN, RVBD, S, SBUX, SD, SDS, SEED, SHLD, SIRI, SKF, SLB, SLM, SLV, SLW, SMH, SNDK, SO, SPG, SPWRA, SPY, SQNM, SRS, SSO, STEC, STI, STP, STT, STX, SU, SUN, SVNT, SWN, SYMC, T, TBT, TCK, TEVA, TGT, TIF, TIVO, TLB, TLT, TM, TSL, TSO, TWX, TXN, TXT, TYC, TZA, UAL, UNG, UNH, UNP, UPS, URE, USB, USO, UTX, UUP, UYG, V, VALE, VLO, VRSN, VVUS, VXX, VZ, WAG, WDC, WFC, WFM, WFR, WFT, WHR, WIN, WLP, WLT, WMB, WMT, WYNN, X, XHB, XL, XLB, XLE, XLF, XLI, XLK, XLNX, XLP, XLU, XLV, XLY, XME, XOM, XOP, XRT, XRX, YHOO, YRCW, YUM and ZION (the ''Penny Pilot Symbols'').

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

the PFOF fee for complex orders in the Penny Pilot Symbols is reasonable and equitable because it will benefit customers. The Exchange further believes that the Exchange's maker/taker fees are not unfairly discriminatory because the fee structure is consistent with fee structures that exist today at other options exchanges.

Finally, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory because the proposed fees are consistent with price differentiation that exists today at other option exchanges. Additionally, the Exchange believes it remains an attractive venue for market participants to trade complex orders despite its proposed fee change as its fees remain competitive with those charged by other exchanges for similar trading strategies. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–ISE–2011–45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2011–45. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–ISE–2011–45 and should be submitted on or before August 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20099 Filed 8–8–11; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65031; File No. SR–CBOE–2011–040]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Proposed Rule to Simplify the $1 Strike Price Interval Program

August 4, 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 July 26, 2011, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend its rules in order to simplify the $1 Strike Price Interval Program. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Interpretation and Policy .01 to Rule 5.5 in order to simplify the $1 Strike Price Interval Program (''Program'').

In 2003, the Commission issued an order permitting the Exchange to establish the Program on a pilot basis.[3] At that time, the underlying stock had to close at $20 on the previous trading day in order to qualify for the Program. The range of available $1 strike price intervals was limited to a range between $3 and $20 and no strike price was permitted that was greater than $5 from the underlying stock's closing price on the previous trading day. Series in $1 strike price intervals were not permitted within $0.50 an existing strike [sic]. In addition, the Exchange was limited to selecting five (5) classes and reciprocal listing was permitted. Furthermore, LEAPS in $1 strike price intervals were not permitted for classes selected to participate in the Program.

The Exchange renewed the pilot program on a yearly basis and in 2007, the Commission granted permanent approval of the Program.[4] At that time, the Program was expanded to increase the upper limit of the permissible strike price range from $20 to $50. In addition, the number of class selections per exchange was increased from five (5) to ten (10).

Since the Program was made permanent, the number of class selections per exchange has been increased from ten (10) classes to 55 classes [5] and subsequently increased from 55 classes to 150 classes.[6]

Amendments To Simplify Non-LEAPS Rule Text

The most recent expansion of the Program was approved by the Commission in early 2011 and increased the number of $1 strike price intervals permitted within the $1 to $50 range.[7] This expansion was a proposal of another exchange and CBOE submitted its filing for competitive reasons. This expansion, however, has resulted in very lengthy rule text that is complicated and difficult to understand. CBOE believes that the proposed changes to simplify the rule text of the Program will benefit market participants since the Program will be easier to understand and will maintain the expansions made to the Program in early 2011. Through the current proposal, the Exchange also hopes to make administration of the Program easier, *e.g.,* system programming efforts. To simply the rules of the Program and, as a proactive attempt to mitigate any unintentional listing of improper strikes, CBOE is proposing the following streamlining amendments:

- When the price of the underlying stock is equal to or less than $20, permit $1 strike price intervals with an exercise price up to 100% above and 100% below the price of the underlying stock.[8]
  - However, the above restriction would not prohibit the listing of at least five (5) strike prices above and below the price of the underlying stock per expiration month in an option class.[9]
  - For example, if the price of the underlying stock is $2, the Exchange would be permitted to list the following series: $1, $2, $3, $4, $5, $6 and $7.[10]
- When the price of the underlying stock is greater than $20, permit $1 strike price intervals with an exercise price up to 50% above and 50% below the price of the underlying security up to $50.[11]
- For the purpose of adding strikes under the Program, the ''price of the underlying stock'' shall be measured in the same way as ''the price of the underlying security'' is as set forth in Rule 5.5A(b)(i).[12]
- Prohibit the listing of additional series in $1 strike price intervals if the underlying stock closes at or above $50 in its primary market and provide that additional series in $1 strike price intervals may not be added until the underlying stock closes again below $50.[13]

Amendments To Simplify LEAPS Rule Text

The early 2011 expansion of the Program permitted for some limited listing of LEAPS in $1 strike price intervals for classes that participate in the Program. The Exchange is proposing to maintain the expansion as to LEAPS, but simplify the language and provide examples of the simplified rule text. These changes are set forth subparagraph (v) to Rule 5.5.01(b)(2).

For stocks in the Program, the Exchange may list one $1 strike price interval between each standard $5 strike interval, with the $1 strike price interval being $2 above the standard strike for each interval above the price of the underlying stock, and $2 below the standard strike for each interval below the price of the underlying stock (''$2 wings''). For example, if the price of the underlying stock is $24.50, the Exchange may list the following standard strikes in $5 intervals: $15, $20, $25, $30 and $35. Between these standard $5 strikes, the Exchange may list the following $2 wings: $18, $27 and $32.[14]

In addition, the Exchange may list the $1 strike price interval which is $2 above the standard strike just below the underlying price at the time of listing. In the above example, since the standard strike just below the underlying price ($24.50) is $20, the Exchange may list a $22 strike. The Exchange may add additional long-term options series strikes as the price of the underlying stock moves, consistent with the OLPP.

[3] *See* Securities Exchange Act Release No. 47991 (June 5, 2003), 68 FR 35243 (June 12, 2003) (SR–CBOE–2001–60).

[4] *See* Securities Exchange Act Release No. 57049 (December 27, 2007), 73 FR 528 (January 3, 2008) (SR–CBOE–2007–125).

[5] *See* Securities Exchange Act Release No. 59587 (March 17, 2009), 74 FR 12414 (March 24, 2009) (SR–CBOE–2009–001).

[6] *See* Securities Exchange Act Release No. 62443 (July 2, 2010), 75 FR 39608 (July 9, 2010) (SR–CBOE–2010–064).

[7] *See* Securities Exchange Act Release No. 63772 (January 25, 2011), 76 FR 5644 (February 1, 2011) (SR–CBOE–2011–006).

[8] *See* proposed new subparagraph (i) to Rule 5.5.01(a)(2).

[9] *Id.*

[10] *Id.*

[11] *See* proposed new subparagraph (ii) to Rule 5.5.01(a)(2).

[12] *See* proposed new subparagraph (iii) to Rule 5.5.01(a)(2). Rule 5.5A(b)(i) provides, ''[t]he price of a security is measured by: (1) For intra-day add-on series and next-day series additions, the daily high and low of all prices reported by all national securities exchanges; (2) for new expiration months, the daily high and low of all prices reported by all national securities exchanges on the day the Exchange determines it preliminary notification of new series; and (3) for option series to be added as a result of pre-market trading, the most recent share price reported by all national securities exchanges between 7:45 a.m. and 8:30 a.m. (Chicago time).''

[13] *See* proposed new subparagraph (iv) to Rule 5.5.01(a)(2). The Exchange believes that it is important to codify this additional series criterion because there have been conflicting interpretations among the exchanges that have adopted similar programs. The $50 price criterion for additional series was intended when the Program was originally established (as a pilot) in 2003. *See* Securities Exchange Act Release No. 47991 (June 5, 2003), 68 FR 35243 (June 12, 2003) (SR–CBOE–2001–60) (''CBOE may list an additional expiration month provide that the underlying stock closes below $20 on its primary market on expiration Friday. If the underlying stock closes at or above $20 on expiration Friday, CBOE will not list an additional month for a $1 strike series until the stock again closes below $20.'')

[14] The Exchange notes that a $2 wing is not permitted between the standard $20 and $25 strikes in the above example. This is because the $2 wings are added based on reference to the price of the underlying and as being between the standard strikes above and below the price of the underlying stock. Since the price of the underlying stock ($24.50) straddles the standard strikes of $20 and $25, no $2 wing is permitted between these standard strikes.

Non-Substantive Amendments to Rule Text

The early 2011 expansion of the Program prohibited the listing of $2.50 strike price intervals for classes that participate in the Program. This prohibition applies to non-LEAP and LEAPS. The Exchange proposes to maintain this prohibition and codify it in Rule 5.5.01(a)(1) (Program Description).

For ease of reference, the Exchange is proposing to add the headings ''Program Description,'' ''Initial and Additional Series'' and ''LEAPS'' to Rule 5.5.01.

The Exchange is proposing to more accurately reflect the nature of the Program and is proposing to make stylistic changes throughout Rule 5.5.01 by adding the phrase ''price interval.''

Lastly, the Exchange is making technical changes to Rule 5.5.01, *e.g.,* replacing the word ''security'' with the word ''stock.''

The Exchange represents that it has the necessary systems capacity to support the increase in new options series that will result from the proposed streamlining changes to the Program.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) [15] of the Act, in general, and furthers the objectives of Section 6(b)(5) [16] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market in a manner consistent with the protection of investors and the public interest. In particular, the proposed rule change seeks to reduce investor confusion and to simplify the provisions of the $1 Strike Price Interval Program.

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.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2011–040 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–2011–040. 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 CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2011–040 and should be submitted on or before August 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20172 Filed 8–8–11; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65025; File No. SR–FINRA–2011–027]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend FINRA Trade Reporting Rules Relating to OTC Transactions in Equity Securities That Are Part of a Distribution and Transfers of Equity Securities To Create or Redeem Instruments Such as ADRs and ETFs

August 3, 2011.

I. Introduction

On June 9, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rules 6282, 6380A, 6380B and 6622 relating to trade reporting of over-the-counter (''OTC'') transactions in equity securities. The proposed rule change was published for comment in the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Federal Register on June 27, 2011.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal and Discussion

A. Background

FINRA proposed to amend FINRA Rules 6282, 6380A, 6380B and 6622 (''trade reporting rules'') relating to trade reporting of OTC transactions in equity securities. Under FINRA trade reporting rules, members are required to report OTC transactions in equity securities to FINRA unless they fall within an express exception. As a general matter, when members report OTC trades, FINRA facilitates the public dissemination of the trade information and/or assesses regulatory transaction fees under Section 3 of Schedule A to the FINRA By-Laws (''Section 3'') and the Trading Activity Fee (''TAF''). Certain transactions and transfers of securities are not required to be reported to FINRA (*e.g.,* trades executed and reported through an exchange, transfers made pursuant to an asset purchase agreement that has been approved by a bankruptcy court), while other transactions must be reported to FINRA only for the purpose of assessing the regulatory transaction fee (*e.g.,* away from the market sales and transfers in connection with certain corporate control transactions).[4] Members must have policies and procedures and internal controls in place to enable them to determine whether a transaction qualifies for an exception under the rules.

B. Amended Rules

FINRA proposed to amend its trade reporting rules to: (1) Clarify the existing exception for transactions that are part of a distribution of securities and impose certain notice requirements on members relying on the exception for transactions that are part of an ''unregistered secondary distribution''; and (2) expressly exclude from the trade reporting requirements, transfers of equity securities for the purpose of creating or redeeming instruments such as American Depositary Receipts (''ADRs'') and exchange-traded funds (''ETFs'').

1. Transactions That Are Part of Securities Distribution

FINRA rules contain an exception from the trade reporting requirements for transactions that are effected in connection with a distribution of securities, specifically:

> Transactions that are part of a primary distribution by an issuer or of a registered secondary distribution (other than ''shelf distributions'') or of an unregistered secondary distribution.[5]

Thus, transactions that are part of a distribution (other than a secondary shelf distribution) are not reported to FINRA or publicly disseminated, and they are not assessed regulatory transaction fees under Section 3 or the TAF.[6]

FINRA proposed to amend its trade reporting rules to incorporate by reference the definition of ''distribution'' set forth in SEC Regulation M for purposes of this exception.[7] A ''distribution'' is defined under Rule 100 of Regulation M as ''an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.'' [8]

In addition, FINRA proposed to adopt Supplementary Material in its trade reporting rules that applies specifically to the trade reporting exception for transactions that are part of an ''unregistered secondary distribution'' which would require members to provide notice to FINRA that they are relying on this exception. Members also would be required to provide FINRA the security name and symbol, execution date, execution time, number of shares, trade price and parties to the trade, for each transaction that is part of the unregistered secondary distribution and not trade reported. Under the proposed rule, members must provide the notice and information no later than three business days following trade date. If the trade executions occur over multiple days, then the member would be required to provide initial notice and information available at that time to FINRA no later than three business days following the first trade date and final notice and information no later than three business days following the last trade date.

The proposed Supplementary Material also would require that the member retain records sufficient to document its basis for relying on this trade reporting exception, including but not limited to, the basis for determining that the transactions are part of an unregistered secondary distribution, as defined under Rule 100 of Regulation M. FINRA explained that members would be required to demonstrate that they have satisfied the ''magnitude of the offering'' and ''special selling efforts'' criteria under Regulation M, and stated that the mere assertion that the order was large-sized or a block or that execution of the order was ''worked'' by a member would usually not by itself be sufficient. FINRA also explained that members must be able to demonstrate that they have complied with the applicable notification requirements in FINRA Rule 5190.[9] The Commission notes that the proposed rule change imposes a notice requirement; it does not impose a trade reporting requirement. As is the case today, under the proposal, transactions that are part of a primary distribution by an issuer or of a registered secondary distribution (other than ''shelf distributions''), or of an unregistered secondary distribution, would not be trade reported nor would they be disseminated to the public. In addition, these transactions would not be assessed regulatory transaction fees under Section 3 or the TAF.

The Commission believes that this requirement, as well as the modification to provide a definition of ''distribution'' for use in connection with the exception, should ensure that members apply the trade reporting exception correctly and should help ensure that members report all transactions that are required to be reported. The Commission specifically notes that large block trades must be reported to FINRA for tape dissemination purposes and are assessed regulatory transaction fees under Section 3 and the TAF. The trade reporting exception does not apply to block trades, unless they otherwise meet the definition of distribution under Regulation M.

2. Transfers of Equity Securities To Create or Redeem Instruments Such as ADRs and ETFs

FINRA also proposed to amend its trade reporting rules to expressly

[3] *See* Securities Exchange Act Release No. 64706 (June 20, 2011), 76 FR 37382 (''Notice'').

[4] *See, e.g.,* Rules 6282(i), 6380A(e), 6380B(e) and 6622(e).

[5] *See* Rules 6282(i)(1)(A), 6380A(e)(1)(A), 6380B(e)(1)(A) and 6622(e)(1)(A).

[6] FINRA explained that this exception was adopted to align the FINRA trade reporting requirements with the Consolidated Tape Association and the Nasdaq Unlisted Trading Privileges plans, which expressly identify transactions that are not required to be reported to the tape. *See, e.g., Notice to Members* 75–42 (June 1975).

[7] 17 CFR 242.100–105.

[8] 17 CFR 242.100.

[9] Rule 5190 imposes certain notice requirements on members participating in distributions of listed and unlisted securities and is designed to ensure that FINRA receives pertinent distribution-related information from its members in a timely fashion in connection with its Regulation M compliance program.

exclude from the trade reporting requirements any transfer of equity securities for the sole purpose of creating or redeeming an instrument that evidences ownership of or otherwise tracks the underlying securities transferred. FINRA explained that such transfers are not considered transactions for purposes of the trade reporting rules and thus are not reportable events.[10] FINRA represented that the proposed rule change codifies current guidance and practice in this area. The Commission believes that this codification of current practice will help reduce confusion with regard to what is required to be reported under FINRA's trade reporting requirements and thus reduce reporting errors.

FINRA stated that the proposed rule change will be effective 90 days following the date of Commission approval.

III. Commission's Findings

After carefully considering the proposed rule change, the Commission finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. In particular, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.[12]

The Commission believes that the proposal is reasonably designed to clarify the interpretation and application of the current exception from the trade reporting requirements for transactions that are part of a distribution. The Commission believes that the proposal will: (1) Enhance market transparency by helping to ensure that transactions that are not part of an ''unregistered secondary distribution,'' such as large block trades, are properly reported; and (2) clarify members' obligations with respect to the reporting of transfers of equity securities to create or redeem instruments such as ADRs and ETFs under FINRA trade reporting rules.

In addition, FINRA will receive information regarding transactions that are part of an unregistered secondary distribution which will enhance FINRA's ability to monitor compliance with the securities laws and rules.

IV. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–FINRA–2011–027), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–20171 Filed 8–8–11; 8:45 am]

BILLING CODE 8011–01–P

[10] FINRA explained, however, that purchases and sales of the securities that are to be transferred for the purpose of creating or redeeming instruments such as ADRs and ETFs and subsequent purchases and sales of the instruments in the secondary market are OTC transactions and must be reported to FINRA in accordance with the trade reporting rules. FINRA also noted that purchases and sales of the underlying securities in order to track the performance of an instrument such as an ADR or ETF, without actually creating the instrument, are trade reportable and that such transactions are subject to regulatory transaction fees under Section 3 and the TAF.

[11] 15 U.S.C. 78o–3(b)(6).

[12] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12704 and #12705]

Tennessee Disaster Number TN–00058

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 Tennessee (FEMA–4005–DR), dated 07/20/2011.

Incident: Severe Storms, Straight-line Winds, Tornadoes, and Flooding.

Incident Period: 06/18/2011 through 06/24/2011.

Effective Date: 08/01/2011.

Physical Loan Application Deadline Date: 09/19/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 04/20/2012.

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 Tennessee, dated 07/20/2011, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Anderson.

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. 2011–20079 Filed 8–8–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 7544]

Announcement of Meeting of the International Telecommunication Advisory Committee

SUMMARY: This notice announces a meeting of the International Telecommunication Advisory Subcommittees (ITAC) on August 22, 2011, 10 a.m.–noon EDT, at the Department of State, 2201 C Street, NW., Washington, DC 20520, to seek advice from the telecommunications industry on: (a) The consultation of International Telecommunication Union, Telecommunication Standardization Sector Study Group 15, on whether draft Recommendation G.tp-oam (Operations, Administration and Maintenance mechanism for MPLS–TP in Packet Transport Network (PTN)) should be approved as a policy-level document; and (b) what policy position the United States should take at the December 2011 Study Group 15 meeting on this issue.

This meeting is open to the public as seating capacity allows. The public will have an opportunity to provide comments at this meeting. People desiring further information on this meeting or wishing to request reasonable accommodation may contact the Secretariat at *minardje@state.gov.*

Dated: August 3, 2011.

Marian R. Gordon,

International Communications & Information Policy, U.S. Department of State .

[FR Doc. 2011–20179 Filed 8–8–11; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2011–35]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 29, 2011.

ADDRESSES: You may send comments identified by Docket Number *FAA–2011–0626* using any of the following methods:

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

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

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

FOR FURTHER INFORMATION CONTACT: Frances Shaver, ARM–200, (202) 267–4059, FAA, Office of Rulemaking, 800 Independence Ave SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on August 2, 2011.

Dennis R. Pratte

Acting Director, Office of Rulemaking.

Petition For Exemption

Docket No.: FAA–2011–0626.

Petitioner: Joseph A. Jennings.

Section of 14 CFR Affected: § 21.197(a)(1).

Description of Relief Sought: The petitioner requests relief from § 21.197(a)(1) to enable the petitioner, as a Designated Airworthiness Representative, to issue functional check flight permits.

[FR Doc. 2011–20009 Filed 8–8–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Mendocino County, CA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Rescind Notice of Intent to Prepare an Environmental Impact Statement.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans) is issuing this notice to advise the public that the Notice of Intent (NOI) published on September 5, 2002 **Federal Register**, (*Federal Register*/Vol. 67, No. 172/Thursday, September 5, 2002/Notices (56872) to prepare an Environmental Impact Statement (EIS) for a proposed highway project on State Route 101 in Mendocino County is being rescinded.

FOR FURTHER INFORMATION CONTACT: Sandra E. Rosas, Chief, Office of Environmental Management, Caltrans, 703 B Street, Marysville, CA 95901 or call (530) 741–4017.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans, as the delegated National Environmental Policy Act (NEPA) agency, is rescinding the NOI to prepare an EIS for the Hopland Bypass Project in Mendocino County, California. The 8.8 mile project proposed to construct a four-lane freeway or expressway on State Route 101 in southern Mendocino County and bypass the community of Hopland. Since the NOI to prepare an EIS was published in the **Federal Register** on September 5, 2002, Caltrans conducted public involvement and agency coordination, developed a purpose and need for the project, and studied seven preliminary alternatives. The NOI is being rescinded due to a lack of funds being identified in this program type. Comments or questions concerning this proposed action should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: August 3, 2011.

Cesar E. Perez,

Senior Transportation Engineer, Federal Highway Administration, Sacramento, California.

[FR Doc. 2011–20135 Filed 8–8–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

TIME AND DATE: August 11, 2011, 12 noon to 3 p.m., Eastern Daylight Time.

PLACE: This meeting will take place telephonically. Any interested person may call 877.820.7831, passcode, 908048 to participate in this meeting.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: August 4, 2011.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. 2011–20294 Filed 8–5–11; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2011–0055]

Notification of Petition for Approval; Product Safety Plan

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated May 23, 2011, the Marquette Rail, LLC (Marquette) has petitioned the Federal Railroad Administration (FRA) approval of a Product Safety Plan (PSP) submitted pursuant to 49 CFR part 236, subpart H. FRA assigned the petition Docket Number FRA–2011–0055.

Marquette submitted a petition for approval of a PSP for the Railsoft TrackAccess System. The TrackAccess System is a processor-based dispatch system developed to be operated in the autonomous mode (without dispatcher intervention) for low density lines. The system provides a processor-based methodology of requesting and issuing track authority to either qualified train crewmembers or roadway workers, and to do so while significantly improving safety of train operations, roadway workers, and other railway equipment, while also increasing railroad productivity. Marquette asserts the PSP demonstrates that the TrackAccess System has been designed in a highly safe manner, and has been sufficiently tested to verify that fact. The PSP provides descriptions of the TrackAccess System itself.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *http://www.regulations.gov* and in person at the Department of Transportation's Docket Operations Facility, 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received by September 8, 2011 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (*Volume 65, Number 70; Pages 19477–78) or online at http://www.dot.gov/privacy.html.*

Issued in Washington, DC on August 2, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory & Legislative Operations.

[FR Doc. 2011–20194 Filed 8–8–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1073X]

Alabama & Florida Railway Co., Inc.—Abandonment Exemption—in Geneva, Coffee, and Covington Counties, Ala.

Alabama & Florida Railway Co., Inc. (A&F) has filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments* to abandon its line of railroad between milepost 581.3 at Andalusia, Ala., and milepost 624.2 at Geneva, Ala., a distance of 42.9 miles, in Geneva, Coffee and Covington Counties, Ala. The line constitutes A&F's entire rail system and traverses United States Postal Service Zip Codes 36340, 36420, 36421, 36453, 36467, and 36477.

A&F has certified that: (1) No local traffic has moved over the line for at least 2 years; [1] (2) there is no overhead traffic on the line that has been, or would need to be, rerouted as a result of the proposed abandonment; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

Where, as here, the carrier is abandoning a line that constitutes its entire rail system, the Board does not normally impose labor protection under 49 U.S.C. 10502(g), unless the evidence indicates the existence of: (1) A corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. *See Honey Creek R.R.—Aban. Exemption—in Henry Cnty., Ind.,* AB 865X (STB served Aug. 20, 2004); *Wellsville, Addison & Galeton R.R.—Aban. of Entire Line in Potter & Tioga Cntys., Pa.,* 354 I.C.C. 744 (1978); and *Northampton & Bath R.R.—Aban. Near Northampton & Bath Junction in Northampton Cnty, Pa.,* 354 I.C.C. 784 (1978). Because A&F does not appear to have a corporate affiliate or parent that will continue similar operations or that could benefit from the proposed abandonment, employee protection conditions will not be imposed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on September 8, 2011, unless stayed pending reconsideration. Petitions to stay that do not involve environmental

[1] A&F states that during the past 2 years, there has been no local common carrier service provided over the line nor have there been any requests for common carrier service during that period, but portions of the line have been used for purposes of freight car storage. A&F asserts that movement of its empty rail cars for storage does not disqualify A&F from the use of the notice of exemption process to obtain abandonment authority for the line. *See Ind. Sw. Ry.—Aban. Exemption—in Posey and Vanderburgh Cntys., Ind.,* AB 1065X, slip op. at 1 n. 1 (STB served Dec. 23, 2010).

issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by August 19, 2011. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by August 29, 2011,[4] with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to A&F's representatives: William A. Mullins and Robert A. Wimbish, Baker & Miller PLLC, 2401 Pennsylvania Avenue, NW., Suite 300, Washington, DC 20037.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

A&F has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by August 12, 2011. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA, at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), A&F shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by A&F's filing of a notice of consummation by August 9, 2012, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 4, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–20173 Filed 8–8–11; 8:45 am]

BILLING CODE 4915–01–P

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which currently is set at $1,500. *See* 49 CFR 1002.2(f)(25).

[4] A&F states that it does not own title to the real property comprising the line's right-of-way (ROW); rather, the title remains with CSX Transportation, Inc. (CSXT). According to A&F, when the line was sold in 1986 to an unaffiliated short line railroad predecessor of A&F (Alabama & Florida Railroad, Inc., or ''A&F Railroad''), CSXT's predecessor, Seaboard System Railroad, Inc., conveyed to A&F Railroad the common carrier obligation associated with the line but retained for itself an ownership interest in the underlying real estate and remained as a lessor of the lines's ROW. A&F states that it acquired the line from A&F Railroad subject to this arrangement with CSXT. Citing *Seminole Gulf Railway—Abandonment Exemption—in Lee County, Florida,* AB 400 (Sub-No. 2X) (ICC served Dec. 22, 1994), A&F states that it is now seeking abandonment authority on the understanding that it is the appropriate entity to do so and that CSXT does not need to file its own abandonment authority or otherwise join in this request. A&F states that it believes that the ROW might be suitable for other public purposes, if CSXT is amendable to such an arrangement.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, ''Fair Housing Home Loan Data System Regulation.'' The OCC is also giving notice that it has sent the collection to OMB for approval.

DATES: You should submit your comments by September 8, 2011.

ADDRESSES: You should direct all written comments to: Communications Division, Office of the Comptroller of the Currency, Mailstop 2–3, *Attention:* 1557–0159, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274, or by electronic mail to *regs.comments@occ.treas.gov.* You can inspect and photocopy the comments at the OCC, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–4700. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, please send a copy of your comments to OCC Desk Officer, 1557–0159, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information from Ira Mills or Mary H. Gottlieb, OCC Clearance Officers, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is proposing to revise the following information collection:

Title: Fair Housing Home Loan Data System Regulation.

OMB Control No.: 1557–0159.

Description: The Fair Housing Act (42 U.S.C. 3605) prohibits discrimination in the financing of housing on the basis of race, color, religion, sex, or national origin. The Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*) prohibits discrimination in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of income from public assistance, or exercise of any right under the Consumer Credit Protection Act. The OCC is responsible for ensuring that national banks comply with those laws. This information in collection 12 CFR part 27 is needed to promote national bank compliance and for OCC to fulfill its statutory responsibilities.

The information collection requirements in 12 CFR part 27 are as follows:

- Section 27.3(a) requires national banks that are required to collect data on home loans under 12 CFR part 203 to present the data on Federal Reserve Form FR HMDA–LAR,[1] or in automated format in accordance with the HMDA–LAR instructions, and to include one

[1] Loan Application Register, *http://www.ffiec.gov/hmda/doc/hmdalar2007.doc.*

additional item (the reason for denial) on the HMDA–LAR. Section 27.3(a) also lists exceptions to the HMDA–LAR recordkeeping requirements.

• Section 27.3(b) lists the information banks should obtain from an applicant as part of a home loan application, and states information that a bank must disclose to an applicant.

• Section 27.3(c) sets forth additional information required to be kept in the loan file.

• Section 27.4 states that the OCC may require a national bank to maintain a Fair Housing Inquiry/Application Log found in Appendix III to part 27 if there is reason to believe that the bank is engaging in discriminatory practices or if analysis of the data compiled by the bank under the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*) and 12 CFR part 203 indicates a pattern of significant variation in the number of home loans between census tracts with similar incomes and home ownership levels differentiated only by race or national origin.

• Section 27.5 requires a national bank to maintain the information required by § 27.3 for 25 months after the bank notifies the applicant of action taken on an application, or after withdrawal of an application.

• Section 27.7 requires a national bank to submit the information required by §§ 27.3(a) and 27.4 to the OCC upon its request, prior to a scheduled examination using the Monthly Home Loan Activity Format form in Appendix I to part 27 and the Home Loan Data Form in Appendix IV to part 27.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 625.

Estimated Total Annual Responses: 625.

Estimated Frequency of Response: On occasion.

Estimated Time Per Respondent: 5 hours.

Estimated Total Annual Burden: 3,125 hours.

The OCC issued a **Federal Register** notice for 60 days of comment. 76 FR 21798. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the information collection;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: July 29, 2011.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division.

[FR Doc. 2011–19784 Filed 8–8–11; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning its information collection titled ''Loans in Areas Having Special Flood Hazards.'' The OCC is also giving notice that it has submitted the collection to OMB for review.

DATES: You should submit written comments by: September 8, 2011.

ADDRESSES: Communications Division, Office of the Comptroller of the Currency, Mail Stop 2–3, Attention: 1557–0202, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–5274, or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0202, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information or a copy of the collection from Ira Mills or Mary H. Gottlieb, Clearance Officers, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is proposing to extend OMB approval of the following information collection:

Title: Loans in Areas Having Special Flood Hazards—12 CFR parts 22 and 172.

OMB Control Number: 1557–0202.

This collection of information is set forth in OCC regulations at 12 CFR Parts 22 and 172 and is required by section 303(a) [1] and title V of the Riegle Community Development and Regulatory Improvement Act,[2] the National Flood Insurance Reform Act of 1994 amendments to the National Flood Insurance Act of 1968,[3] and the Flood Disaster Protection Act of 1973.[4]

The collections of information pertain to loans secured by buildings and mobile homes located or to be located in areas determined by the director of the Federal Emergency Management Agency (FEMA) to have special flood hazards. Sections 22.6 and 172.6 apply to loans secured by buildings or mobile homes, regardless of location.

This collection of information, which previously applied only to national banks, has been merged with former OTS OMB Control No. 1550–0281. On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act) was enacted. As part of the comprehensive package of financial regulatory reform measures enacted, Title III of the Dodd-Frank Act transfers the powers, authorities, rights and duties of the Office of Thrift Supervision to other banking agencies, including the OCC, on the ''transfer date.'' The transfer date is July 21, 2011. As a result, the OCC now regulates both national banks and Federal savings associations.

Notices and Disclosure Requirements: 12 CFR 22.6, 172.6—Required Use of Standard Flood Hazard Determination

[1] 12 U.S.C. 4804.

[2] 42 U.S.C. 4104(a).

[3] 12 U.S.C. 4104(a) and 4104(b).

[4] 12 U.S.C. 4012(a) and 4106(b).

Form—A national bank or Federal savings association must use the Standard Flood Hazard Determination Form developed by FEMA and must maintain a copy of the completed form for the period the bank or savings association owns the loan.

12 CFR 22.7, 172.7—Notice of Forced Placement of Flood Insurance—If the borrower has not obtained required flood insurance or has purchased inadequate coverage, a national bank, Federal savings association, or its loan servicer must notify the borrower that the borrower should obtain adequate flood insurance coverage (forced placement notice). The forced placement notice informs the borrower of the amount of flood insurance to purchase. If the borrower fails to purchase insurance, the bank, savings association, or its servicer will purchase insurance on the borrower's behalf and may charge the borrower for the premiums and fees.

12 CFR 22.9, 172.9—Notice to Borrower and Servicer—A national bank or Federal savings association making, extending, increasing or renewing a loan secured by property located in a special flood hazard area must provide a notice to the borrower and loan servicer (borrower notice). The borrower notice advises the borrower that the property securing the loan is located in a special flood hazard area and that flood insurance on the property securing the loan is required. It includes a description of the flood insurance purchase requirements and provides the borrower with information regarding whether flood insurance is available under the National Flood Insurance Program and the availability of Federal assistance in the event of a declared Federal flood disaster. The notice is used by the borrower to make borrowing decisions, including the collateral to be used to secure the loan. The notice is used by the loan servicer to carry out its servicing responsibilities.

12 CFR 22.10, 172.10—Notices to FEMA—A national bank or Federal savings association making, increasing, extending, renewing, selling or transferring a loan secured by property located in a special flood hazard area must notify the Director of FEMA (or FEMA's designee) of the identity of the loan servicer (notice of servicer), and must notify the Director of FEMA of any change in the loan servicer (notice of servicer transfer) within 60 days of such change. FEMA uses the notice of servicer and notice of servicer transfer to maintain current information regarding to whom to direct notices or inquiries regarding flood insurance or to send notices of flood insurance policy renewals.

Recordkeeping Requirements

12 CFR 22.6(b), 172.6(b)—Retention of Standard Flood Hazard Determination Form—A national bank or Federal savings association must retain a copy of the completed Standard Flood Hazard Determination Form for the period of time the bank or savings association owns the loan. The OCC uses this record to verify regulatory compliance.

12 CFR 22.9 and 172.9, paragraphs (d) and (e)—Record of Borrower and Servicer Receipt of Notice and Alternate Method of Notice—A national bank or Federal savings association must retain a record of the receipt of the borrower notice by the borrower and the loan servicer for the period of time the bank or savings association owns the loan. In lieu of providing the borrower notice, a bank or savings association may obtain a satisfactory written assurance from a seller or lessor that, within a reasonable time before completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The bank or savings association must retain a record of the written assurance from the seller or lessor for the period of time the bank owns the loan. The OCC uses these records to verify regulatory compliance.

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

Solicitation of Comment

On January 14, 2011, the OCC published a notice in the **Federal Register** (76 FR 2753) soliciting comments for 60 days on the proposed extension of the information collection. One comment, from a trade association, was received.

The commenter asserted that the OCC's burden estimates were understated. They further stated that the accuracy of the estimates is essential to the reduction of regulatory burden and policy discussions regarding the future of the national flood insurance program.

The commenter cited to Executive Order 13563 (E.O.), which emphasizes the importance of reducing regulatory burdens and cost. The E.O. requires that agencies: Use the best, most innovative, and least burdensome tools to achieve regulatory goals; take into account quantitative and qualitative costs and benefits; ensure that regulations are accessible, consistent, written in plain language, and easy to understand; and measure and strive to improve the results of regulatory requirements. These requirements must be satisfied any time a regulation is changed. Because this information collection renewal involves no changes to the OCC's flood insurance regulations, the executive order does not apply.

The commenter also cited to OMB's Implementing Guidance for OMB Review of Agency Information Collection, which requires that the following be included in estimates of burden for covered information collections: Design, procurement, and operation of data collection, data management and data reporting systems; response to changes in the requirements of an existing information collection; training staff on how to comply with the collection; time and resources required to perform all required tasks and certifications; and time and resources required to transmit the collection to the OCC or a third party. The design, procurement, and operation of the systems required to conduct the information collection are regarded as one-time start up costs that are phased out over time. The estimates provided were intended to cover the time and resources required to perform all required tasks and certifications and transmit required information to the OCC or a third party. There have been no changes in the requirements of the collection, therefore no time has been allotted for this item in the burden estimates. Lastly, the burden estimates do not include time devoted to ongoing training as the regulations contain no training requirement. In this case, the training of staff is considered a usual and customary business practice, which does not require that PRA burden be taken.

The commenter indicated that the OCC's estimate of 15 minutes per loan could only include the time required to complete the administrative tasks involved and not the time spent on procedures, systems, and monitoring to ensure compliance. They reference the ''Interagency Questions and Answers Regarding Flood Insurance'' issued in 2009, which reflects the complexity of compliance with the mandatory purchase obligation of the flood insurance statutes and regulations. Their members reported to them that one hour per loan is a more accurate estimate.

The commenter set out the following recommendations for revised burden estimates:

- Determining whether a building or mobile home offered as collateral will be located in a special flood hazard area:

○ 5–30 minutes per file to order the determination and review the completed form.

○ Time expended for commercial loans may be considerably longer than that for a less complicated consumer loan—20–30 minutes or more per file.

• Providing the borrower and loan servicer with warning notice that the building securing the loan is located in a special flood hazard area:

○ 5 minutes per loan to prepare and send the notice to the borrower.

○ Most borrowers have questions about the determination and how to obtain insurance. The time required to assist borrowers may take from 5–10 minutes to several hours. If appropriate, the bank will make a joint request with the borrower to FEMA for a Letter of Determination Review.

• Ensuring that the borrower maintains flood insurance throughout the life of the loan; notify the borrower of the obligation and explain the force placement process:

○ The burden estimates should include the significant amounts of time required for the compliance structure necessary to ensure that lapses are discovered, notice is provided, and force placement occurs when necessary.

○ Banks have loan servicing review procedures to ensure continuous coverage, which require loan file reviews averaging 10 minutes. If a lapse is discovered, an additional 15–25 minutes is required to send the 45-day notice to the borrower, monitor whether the insurance is purchased, and purchase a force placed policy when necessary.

○ FEMA regularly updates flood insurance rate maps to address changing risks. In the case of remapping, banks must order new determinations, notify customers if the structure is in a special flood hazard area, review policy adequacy, and force place a policy if necessary. Remapping requires a minimum of 30 minutes per file.

○ Interagency Q&As urge banks to conduct file reviews for purchased loans, loan participations, or syndication agreements. Depending on complexity, conducting the reviews and sending necessary notices requires 10–30 minutes.

• Notifying FEMA in writing of the identity of the servicer and any change in servicer requires 2 minutes per loan.

• Compliance monitoring and auditing to ensure compliance requires 20 minutes per loan.

• Training for employees requires an average of 2 hours per employee each year.

• Revising procedures pursuant to the OCC's final Q&As [5] will require at least two hours.

In response to the commenter's recommendations for revised burden estimates, the OCC has the following responses and revised estimates. OCC has not taken any burden for Requests for Flood Zone Determination Review, as they are accomplished using FEMA forms approved under OMB Control No. 1660–0040. Assisting borrowers is a usual and customary business practice for which the OCC is not required to take burden under the PRA. There is no specific requirement for bank review of Flood Insurance Rate Maps and, therefore, the OCC has not taken burden for this procedure. In addition, the flood insurance regulation does not state that banks with loans in the affected area must undertake another loan file review. Lastly, there is no specific requirement in the Q&As for banks to conduct file reviews or for revision of policies and procedures to reflect the Q&As. Any such reviews or revisions would be usual and customary business practices and, therefore, the OCC is not required to take that PRA burden.

The OCC has considered the comment and has adjusted its revised estimates. The revised estimates are as follows:

• Retention of standard FEMA form: 2.5 minutes.

• Notice of special flood hazards to borrowers and servicers: 5 minutes.

• Notice to FEMA of servicer: 5 minutes.

• Notice to FEMA of change of servicer: 5 minutes.

• Notice to borrowers of lapsed mandated flood insurance: 5 minutes.

• Purchase of flood insurance on the borrower's behalf: 15 minutes.

• Notice to borrowers mandated flood insurance due to remapping: 5 minutes.

• Purchase flood insurance on the borrower's behalf due to remapping: 15 minutes.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information shall have practical utility;

(b) The accuracy of the OCC'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 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.

Type of Review: Regular review.

Affected Public: Businesses or other for-profit.

Burden Estimates:

The OCC estimates that there are 871 HMDA national bank reporters who make an average of 3,591 home loans and 517 HMDA savings association reporters who make an average of 1,438 loans. There are an additional 716 national banks and 147 savings associations that are not HMDA reporters making on average 20 home loans. Thus, there are 1,587 national banks and 664 Federal savings associations that make on average 1,980 and 1,124 home loans, respectively. Of these loans, 20% (396 and 225 loans, respectively) are estimated to be in a Special Flood Hazard Area and require a notice to FEMA or its designee of the identity of the servicer. Of that 20%, 50% (198 and 112 loans, respectively) are estimated to require an additional notice to FEMA or its designee of a change in the identity of the servicer. Of the 20% of loans that are estimated to be in a Special Flood Hazard Area, 20% (79 and 45 loans, respectively) are estimated to have a lapse or underinsured situation that would require a notice to the borrower. Of the 20% that had a lapse or inadequate coverage, 25% (20 and 11 loans, respectively) would require the bank to issue a force placed policy.

Two percent of the home loans made will require the national bank or Federal savings association to provide notice to the borrower of the mandatory purchase requirement due to a remapping issue (40 and 22 loans, respectively). Of that 2%, 50% would require the bank or savings association to issue a force placed policy (20 and 11 loans, respectively).

Recordkeeping:

Retention of Standard FEMA Form:

HMDA national banks:

871 respondents × 3,591 annual frequency × 2.5 minutes = 130,323 hours.

HMDA savings associations:

517 respondents × 1,438 annual frequency × 2.5 minutes = 30,977 hours.

Non-HMDA national banks:

716 × 20 annual frequency × 2.5 minutes = 597 hours.

Non-HMDA savings associations:

147 respondents × 20 annual frequency × 2.5 minutes = 123 hours.

Total Recordkeeping Burden: 162,020 hours.

[5] 74 FR 35914 (July 21, 2009).

Disclosures:

Notice of Special Flood Hazards to Borrowers and Servicers:

1,587 national banks × 396 responses × 5 minutes per response = 52,371 hours.

664 Federal savings associations × 225 responses × 5 minutes per response = 12,450 hours.

Notice to FEMA of Servicer:

1,587 national banks × 396 responses × 5 minutes per response = 52,371 hours.

664 Federal savings associations × 225 responses × 5 minutes per response = 12,450 hours.

Notice to FEMA of change of Servicer:

1,587 national banks × 198 responses × 5 minutes per response = 26,186 hours.

664 Federal savings associations × 112 responses × 5 minutes per response = 6,197 hours.

Notice to Borrowers of Lapsed Mandated Flood Insurance:

1,587 national banks × 79 responses × 5 minutes per response = 10,448 hours.

664 Federal savings associations × 45 responses × 5 minutes per response = 2,490 hours.

Purchase Flood Insurance on the Borrower's Behalf:

1,587 national banks × 20 responses × 15 minutes per response = 7,935 hours.

664 Federal savings associations × 11 responses × 15 minutes per response = 1,826 hours.

Notice to Borrowers of Mandated Flood Insurance due to Remapping:

1,587 national banks × 40 responses × 5 minutes per response = 5,290 hours.

664 Federal savings associations × 22 responses × 5 minutes per response = 1,217 hours.

Purchase Flood Insurance on the Borrower's Behalf due to Remapping:

1,587 national banks × 20 responses × 15 minutes per response = 7,935 hours.

664 Federal savings associations × 11 responses × 15 minutes per response = 1,826 hours.

Total Disclosure Burden: 200,992.

Total Burden: 363,012 hours.

Dated: July 29, 2011 .

Michele Meyer,

Assistant Director, Legislative & Regulatory Activities Division, Office of the Comptroller of the Currency.

[FR Doc. 2011–19785 Filed 8–8–11; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of seven individuals and nine entities whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, *Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers.*

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the seven individuals and nine entities identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on August 3, 2011.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.:* 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The foreign persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and the Secretary of State: (a) to play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On July 20, 2011, the Director of OFAC removed from the SDN List the seven individuals and nine entities listed below, whose property and interests in property were blocked pursuant to the Order:

Individuals

1. Alzate Jimenez, Diego Uriel, c/o Andinaenvios An En S.A., Quito, Ecuador; c/o CAMBIOS Y CAPITALES S.A., Bogota, Colombia; c/o Financiacion Y Empresa S.A., Cali, Colombia; c/o Fundacion Para La Educacion Y El Desarrollo Social, Cali, Colombia; c/o Inversiones Corporativas LTDA., Cali, Colombia; c/o Inversiones Sardi Alzate S.C.S., Cali, Colombia; c/o Outsourcing De Operaciones S.A., Bogota, Colombia; c/o Turismo Hansa S.A., San Andres, Colombia; DOB 13 Aug 1959; POB Colombia; Cedula No. 16658014 (Colombia); Passport 16658014 (Colombia) (individual) [SDNT]
2. Alzate Jimenez, Luis Holmes, c/o Andinaenvios An En S.A., Quito, Ecuador; c/o CAMBIOS Y CAPITALES S.A., Bogota, Colombia; c/o Fundacion Para La Educacion Y El Desarrollo Social, Cali, Colombia; c/o Turismo Hansa S.A., San Andres, Colombia; Calle 5E No. 47–57 apto. 302, Cali, Colombia; DOB 04 Jun 1958; POB Colombia; Cedula No. 16597861 (Colombia); Passport AF719920 (Colombia) (individual) [SDNT]
3. Alzate Jimenez, Tulio Hernando, c/o Andinaenvios An EN S.A.; Quito, Ecuador; c/o Cambios Y Capitales S.A., Bogota, Colombia; c/o Constructora E Inmobiliaria Andina S.A., Cali, Colombia; c/o Financiacion Y Empresa S.A., Cali, Colombia; c/o Fundacion Para La Educacion Y El Desarrollo Social, Cali, Colombia; c/o Inversiones Corporativas LTDA., Cali, Colombia; c/o T.H. Alzate Y CIA.

S.C.S., Cali, Colombia; c/o Turismo Hansa S.A., San Andres, Colombia; DOB 28 Mar 1961; POB Colombia; Cedula No. 16659731 (Colombia); Passport AF770530 (Colombia) (individual) [SDNT]

4. Caviedes Lopez, Gloria Ines, c/o Distribuciones Glomil LTDA., Cali, Colombia; DOB 20 Oct 1959; Cedula No. 42002286 (Colombia); Passport 42002286 (Colombia) (individual) [SDNT]
5. Cortes Quintero, Sandra, c/o Credisa S.A., Cali, Colombia; c/o Compania De Fomento Mercantil S.A., Cali, Colombia; c/o Construcciones Progreso Del Puerto S.A., Puerto Tejada, Colombia; c/o UNIDAS S.A., Cali, Colombia; DOB 21 Jun 1971; POB Cali, Valle, Colombia; Cedula No. 66827003 (Colombia); Passport 66827003 (Colombia) (individual) [SDNT]
6. Rengifo Valverde, Fabian Francisco, c/o APVA S.A., Cali, Colombia; c/o CECEP S.A., Cali, Colombia; c/o CECEP Editores S.A., Cali, Colombia; c/o Negocios Y Capitales S.A., Pereira, Colombia; c/o RFA Consultores Y Auditores LTDA., Cali, Colombia; c/o World Line System S.A., Palmira, Valle, Colombia; Cali, Colombia; DOB 18 Oct 1963; Cedula No. 16690994 (Colombia) (individual) [SDNT]
7. Rojas Becerra, Andres Felipe, c/o Comercializadora Intertel S.A., Cali, Colombia; c/o Contactel Comunicaciones S.A., Cali, Colombia; DOB 18 Feb 1978; Cedula No. 94520044 (Colombia); Passport 94520044 (Colombia) (individual) [SDNT]

Entities

1. Andinaenvios An En S.A., Avenida 10 de Agosto N37–288 y Villalengua, Quito, Ecuador; RUC # 1791769155001 (Ecuador) [SDNT]
2. Cambios Y Capitales S.A. (a.k.a. C & CAP S.A.), Calle 12N No. 3N–12, Cah, Colombia; Calle 19 No. 6–48 Local 314–315, Pereira, Colombia; Calle 27 No. 26–60 Local 105 D, Tulua, Valle, Colombia; Calle 29 No. 27–56 Local 102, Palmira, Valle, Colombia; Calle 99 No. 11A–4I, Bogota, Colombia; Carrera 4 No. 10–62 Local 15, Cartago, Valle, Colombia; Carrera 15 No. 93–60 Local 1–36, Bogota, Colombia; Carrera 43A No. 34–95 Local 268, Medellin, Colombia; Carrera 44 No. 6A–43 piso 2, Cali, Colombia; Centro Comercial New Point, Avenida Providencia No. 1–35 Local 106, San Andres, Colombia; Transversal 71 No. 26–94 Sur Local 4506, Bogota, Colombia; NIT # 805001015–5 (Colombia) [SDNT]
3. Constructora E Inmobiliaria Andina S.A., Calle 16 Norte No. 9N–41, Cah, Colombia; NIT # 800155233–7 (Colombia) [SDNT]
4. Financiacion Y Empresa S.A. (a.k.a. Finempresa S.A.), Calle 16 Norte No. 9N–4I, Cali, Colombia; NIT # 800153965–0 (Colombia) [SDNT]
5. Fundacion Para La Educacion Y el desarrollo social (a.k.a. Fundasocial), Calle 16 Norte No. 9N–41, Cali, Colombia; NIT # 800142875–9 (Colombia) [SDNT]
6. Inversiones Corporativas LTDA., Calle 16 Norte No. 9N–41, Cali, Colombia; NIT # 800203027–2 (Colombia) [SDNT]
7. INVERSIONES SARDI ALZATE S.C.S., Calle 16 Norte No. 9N–41, Cali, Colombia; NIT # 805009126–0 (Colombia) [SDNT]
8. Outsourcing De Operaciones S.A. (a.k.a. AFIAZACREDIT; a.k.a. AVANTECARD; a.k.a. Crediavante; f k.a. Servicios Y Remesas S.A.; a.k.a. TURISMO AVANTE), Calle 52A No. 9–86 piso 2 y piso 3, Bogota, Colombia; NIT # 805021157–8 (Colombia) [SDNT]
9. T.H. Alzate Y CIA. S.C.S., Calle 16 Norte No. 9N–41, Cali, Colombia; NIT # 805008972–0 (Colombia) [SDNT]

Dated: August 3, 2011.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2011–20228 Filed 8–8–11; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Parts 100, 108, 109, et al.

Office of Thrift Supervision Integration Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act; Interim Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 100, 108, 109, 112, 116, 128, 133, 136, 141, 143, 144, 145, 146, 150, 151, 152, 155, 157, 159, 160, 161, 162, 163, 164, 165, 167, 168, 169, 170, 171, 172, 174, 190, 191, 192, 193, 194, 195, 196, 197

[Docket ID OCC–2011–0016]

RIN 1557–AD47

Office of Thrift Supervision Integration Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Office of the Comptroller of the Currency (OCC).

ACTION: Interim final rule with request for comment.

SUMMARY: Pursuant to Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act, all functions of the Office of Thrift Supervision (OTS) relating to Federal savings associations and the rulemaking authority of the OTS relating to all savings associations are transferred to the Office of the Comptroller of the Currency (OCC) on July 21, 2011 (transfer date). In order to facilitate the OCC's enforcement and administration of former OTS rules and to make appropriate changes to these rules to reflect OCC supervision of Federal savings associations as of the transfer date, the OCC is republishing, with nomenclature and other technical changes, the OTS regulations currently found in Chapter V of Title 12 of the Code of Federal Regulations. The republished regulations will be recodified with the OCC's regulations in Chapter I at parts 100 through 197 (Republished Regulations), effective on July 21, 2011. The Republished Regulations will supersede the OTS regulations in Chapter V for purposes of OCC supervision and regulation of Federal savings associations, and certain of the Republished Rules will supersede the OTS regulations in Chapter V for purposes of the FDIC's supervision of state savings associations. Chapter V of Title 12 of the Code of Federal Regulations will be vacated at a later date.

DATES: This interim final rule is effective July 21, 2011. Comments must be received on or before October 11, 2011.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail, if possible. Please use the title ''Republication of Regulations in Connection with Office of Thrift Supervision Integration Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—''regulations.gov'':* Go to *http://www.regulations.gov.* Select ''Document Type'' of ''Rule,'' and in ''Enter Keyword or ID Box,'' enter Docket ID ''OCC–2011–0016'' and click ''Search.'' On ''View By Relevance'' tab at bottom of screen, in the ''Agency'' column, locate the Rule for OCC, in the ''Action'' column, click on ''Submit a Comment'' or ''Open Docket Folder'' to submit or view public comments and to view supporting and related materials for this rulemaking action.
- Click on the ''Help'' tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- E-mail: *regs.comments@occ.treas.gov.*
- Mail: Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.
- Fax: (202) 874–5274.
- Hand Delivery/Courier: 250 E Street, SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2011–0016'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this interim final rule by any of the following methods:

- Viewing Comments Electronically: Go to *http://www.regulations.gov.* Select ''Document Type'' of ''Public Submissions,'' in ''Enter Keyword or ID Box,'' enter Docket ID ''OCC–2011–0016,'' and click ''Search.'' Comments will be listed under ''View By Relevance'' tab at bottom of screen.
- Viewing Comments Personally: You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.
- Docket: You may also view or request available background documents and project summaries using the methods described above.

FOR FURTHER INFORMATION CONTACT: Andra Shuster, Senior Counsel, or Heidi Thomas, Special Counsel, Legislative and Regulatory Activities Division, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act).[1] Title III of the Dodd-Frank Act transfers the powers, authorities, rights, and duties of the OTS to other Federal banking agencies, including the OCC, on July 21, 2011, the transfer date. The OTS is abolished 90 days thereafter.

Under Title III of the Dodd-Frank Act, the OCC will assume all functions of the OTS and the Director of the OTS relating to Federal savings associations.[2] As a result, the OCC will have responsibility for the ongoing supervision, examination and regulation of Federal savings associations as of the transfer date. The Act also transfers to the OCC the rulemaking authority of the OTS relating to all savings associations, both state and Federal.[3] The legislation

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] Dodd-Frank Act section 312(b)(2)(B)(i) (*to be codified* 12 U.S.C. 5412(b)(2)(B)(i)). Title III transfers all supervisory functions of the OTS relating to state savings associations to the Federal Deposit Insurance Corporation (FDIC) and all functions relating to the supervision of any savings and loan holding company and non-depository institution subsidiaries of such holding companies, as well as rulemaking authority for savings and loan holding companies, to the Board of Governors of the Federal Reserve System (Board).

[3] *Id.* As discussed below, although this is the language in the Act, the FDIC has identified a number of independent bases for rulemaking authority for state savings associations. Where no such authority has been found, the FDIC will enforce applicable OCC regulations for state savings associations.

continues in effect all OTS orders, resolutions, determinations, agreements, regulations, interpretive rules, other interpretations, guidelines, procedures and other advisory materials in effect the day before the transfer date, and allows the OCC to enforce these materials with respect to Federal savings associations, until modified, terminated, set aside or superseded by the OCC, a court, or by operation of law.[4]

In an effort to ensure an orderly transfer of OTS regulations to the OCC as of the transfer date, the OCC has determined that it is appropriate to republish in 12 CFR Chapter I all OTS regulations from 12 CFR Chapter V that we have the authority to promulgate and enforce, with appropriate nomenclature and other technical changes. The Republished Regulations will supersede the OTS regulations found in Chapter V for purposes of the OCC's supervision and regulation of Federal savings associations, and, where applicable, for purposes of the FDIC's supervision and regulation of state savings associations.

OCC Regulatory Actions To Integrate OTS Functions

Since the adoption of the Dodd-Frank Act, the OCC, in collaboration with the OTS, has been reviewing its regulations, as well as those of the OTS, to determine what changes are needed to facilitate a smooth regulatory transition to OCC supervision of Federal savings associations. This review is being accomplished in several phases. On July 21, 2011, the OCC issued a final rule revising certain OCC rules that are central to internal agency functions and operations immediately upon the transfer of supervisory jurisdiction for Federal savings associations.[5] This final rule amends the OCC's rules at 12 CFR part 4 pertaining to its organization and functions, the availability of information from the OCC under the Freedom of Information Act, the release of non-public OCC information, and restrictions on the post-employment activities of senior examiners; and at 12 CFR part 8, pertaining to assessments. The final rule also amends 12 CFR parts 5 and 28 to implement sections 603 and 335 of the Dodd-Frank Act, respectively; and 12 CFR parts 5, 7, and 34, to implement sections 1044 through 1047 of the Act pertaining to preemption and visitorial powers.

This interim final rule is the next step of our review of OCC and OTS regulations. As described in more detail below, this interim final rule republishes those OTS regulations that the OCC has the authority to promulgate and will enforce as of the transfer date.[6]

Subsequent to the transfer date, the OCC will consider more comprehensive substantive amendments, as necessary, to the Republished Regulations. For example, we may propose to repeal or combine provisions in cases where OCC and former OTS rules are substantively identical or substantially overlap. In addition, we may propose to repeal or modify OCC or former OTS rules where differences in regulatory approach are not required by statute or warranted by features unique to either the national bank or Federal savings association charter. This substantive review also will provide an opportunity for the OCC to ask for comments suggesting revisions to the rules for both national banks and Federal savings associations that would remove provisions that are ''outmoded, ineffective, insufficient, or excessively burdensome,'' consistent with the goals outlined in an executive order recently issued by the President.[7]

II. Description of the Interim Final Rule

As noted above, the interim final rule republishes those OTS regulations the OCC has the authority to promulgate and, along with the FDIC in the case of state savings associations, will enforce as of the transfer date. The OTS regulations are currently set out in Chapter V of Title 12 as parts 500 through 591. In order to reduce confusion and to assist the thrift industry, we have preserved where possible the OTS's numbering system by republishing these regulations with OCC part numbers that correspond to the former OTS rules, specifically, by changing the ''5'' to a ''1''. For example, 12 CFR part 545 is republished as 12 CFR part 145. We note, however, that there were a number of instances where the OTS numbering system has been modified because it deviated from standard CFR numbering conventions. Therefore, for example, former parts 563b through 563g are being republished as parts 192 through 197 (with corresponding cross-reference changes). This preamble contains a redesignation table indicating how the newly issued parts in Chapter I correspond to the former parts in Chapter V.

We also have made nomenclature and other technical amendments to reflect OCC supervision of Federal savings associations and FDIC supervision of state savings associations, along with certain required Dodd-Frank Act changes. OTS regulations in Chapter V of Title 12 that will be unnecessary following the transfer date, or that are superseded by this rulemaking (or other rulemakings by the FDIC and the Board) or other provisions of the Dodd-Frank Act, will be repealed at a later date. We have added a new part 100 to clarify that the Republished Regulations supersede any rules applying to savings associations contained in Chapter V of Title 12.

In addition, part 100 provides that the Comptroller may, for good cause and to the extent permitted by statute, waive the applicability of any provision of parts 100 through 197. This provision transfers to the Comptroller authority provided to the OTS Director by 12 CFR 500.30(a).

The OCC has worked closely with the OTS, FDIC and the Board to coordinate the republication of OTS rules. Although section 312 of the Dodd-Frank Act transfers all OTS rulemaking authority for all savings associations to the OCC, where the FDIC has identified an independent basis for its rulemaking authority over state savings associations (either due to other amendments made by the Dodd-Frank Act or based on other statutory authority) the FDIC will promulgate regulations for state savings associations. Therefore, not all of the Republished Regulations apply to state savings associations.[8] The FDIC will publish a separate rulemaking amending its rules or republishing certain OTS rules under this authority.

We also have not republished those OTS rules relating exclusively to savings and loan holding companies (SLHCs), because the Dodd-Frank Act transferred the OTS's supervision and rulewriting authority for SLHCs to the Board.[9] Where OTS rules addressed both savings associations and SLHCs, we have republished only those parts of the rule pertaining to savings associations.

[4] Dodd-Frank Act, section 316(b) (*to be codified* at 12 U.S.C. 5414(b)).

[5] See the Rules and Regulations section of the July 21, 2011 issue of the **Federal Register**.

[6] Pursuant to section 316(c)(2) of the Dodd-Frank Act, the OCC (along with the FDIC) published a notice in the **Federal Register** identifying those OTS regulations that are continued under the Act that each agency will enforce beginning on the transfer date. 76 FR 39246 (July 6, 2011).

[7] Executive Order 13563, ''Improving Regulation and Regulatory Review'' 76 FR 3821 (Jan. 21, 2011).

[8] The following regulations apply to state savings associations: certain provisions in part 160 (Lending and Investment), part 161 (Definitions), certain provisions in part 163 (Savings Association Operations), part 169 (Proxies), part 190 (Preemption of State Usury Laws), part 191 (Preemption of State Due-on-Sale Laws), part 192 (Conversions from Mutual to Stock Form), and part 195 (Community Reinvestment).

[9] *See* section 312 of the Dodd-Frank Act, (*to be codified* at 12 U.S.C. 5412).

Similarly, under the Dodd-Frank Act, rulewriting authority for certain consumer rules is transferred to the Bureau of Consumer Financial Protection (Bureau). Therefore, although the OCC has the authority to enforce these rules for Federal savings associations and national banks with total assets of $10 billion or less, we have not republished these rules and they remain in Chapter V of the Code of Federal Regulations, until superseded by the Bureau.[10]

We also note that, in addition to parts 100 through 197, certain rules contained in parts 1 through 41 will also take into consideration the OCC's supervision of Federal savings associations, such as part 4 (regarding disclosure of information) and part 8 (regarding assessments).

A. General Nomenclature Changes

The OCC has made certain nomenclature and other non-substantive changes consistently throughout the Republished Regulations to replace references to the OTS and its administrative structure with appropriate references to the OCC and, in the case of rules also applicable to state savings associations, the FDIC. Specifically, these changes are as follows:

• References to ''the OTS,'' ''Office,'' and ''Secretary'' have been changed to ''the OCC'' or ''FDIC'' or to ''the appropriate Federal banking agency'' (AFBA), as defined in 12 U.S.C. 1813(q) and as amended by the Dodd-Frank Act. Because some of the Republished Regulations apply to both Federal and state savings associations, the term ''AFBA'' is used where a provision applies to both types of institutions. We have added the definition of AFBA to part 161.

• References to ''the Director of the OTS'' or ''Director'' have been changed to ''Comptroller'' or ''Board of Directors of the FDIC'' or ''FDIC,'' as appropriate. We have added the definition of ''Comptroller'' and ''OCC'' to part 161.

• In some cases, references to specific offices within the OTS have been removed and replaced with the names of the corresponding office within the OCC (for example, references to the OTS Office of Enforcement have been changed to reference the OCC's Enforcement and Compliance Division). However, some OTS rules include references to offices that do not correspond easily to the OCC's administrative structure. In those cases, the specific reference has been replaced with ''the OCC.'' Similar references have been made to the FDIC where appropriate. OCC and FDIC handbooks and other agency publications (which will be amended as appropriate after the transfer date), as well as OCC and FDIC Web sites will provide the specific filing locations.[11]

• In some cases, we have reduced the number of copies of filings to be submitted to the OCC.

• Some OTS regulations include agency addresses and contact information as well as addresses of third parties. Because office addresses frequently are subject to change as a result of moves and reassignments, the OCC generally has chosen not to include specific addresses in its regulations governing national banks, and has made similar changes in the Republished Regulations. Updated contact information for these entities will continue to be available on the OCC's Web site or in other agency publications, or by contacting the specified third parties.

• Cross-references in the Republished Rules have been changed to reference the new OCC CFR numbers in Chapter I. For example, a reference to 12 CFR 550.80 has been changed to reference the new section 12 CFR 150.80 in the Republished Regulations. Cross-references also have been updated to reference OCC rules, or relevant rules issued by the FDIC or the Board.

B. Specific Section Changes

In addition to the changes described above, the OCC has made other notable changes to sections of the Republished Regulations to implement provisions of the Dodd-Frank Act or to delete obsolete references.[12]

• *Deposit activities of savings associations—part 157.* Section 627 of the Dodd-Frank Act removed the prohibition of paying interest on demand accounts from the HOLA. Section 157.14 provided that savings associations could pay interest only on savings accounts. Therefore, in order to implement the Dodd-Frank Act change, we have removed the word ''savings'' from this section.

• *Preemption—parts 145, 150, 157, and 160.* The OTS regulations at 12 CFR parts 545, 550, 557 and 560 include certain ''occupation of the field'' statements on Federal preemption. Section 1046 of the Dodd-Frank Act provides that the Home Owners' Loan Act (HOLA) does not occupy the field in any area of state law. Therefore, these occupation of the field statements in the OTS regulations have been removed from the Republished Regulations in §§ 145.2, 150.136, 157.11 and 160.2 by this interim final rule. In addition, the current OTS regulations do not accurately characterize the preemption standards applicable to Federal savings associations after the Dodd-Frank Act. The Act changes the preemption standards applicable to Federal savings associations to conform to those applicable to national banks.[13] The Act specifically provides that, as of the transfer date, determinations by a court or by the OCC under the HOLA with respect to Federal savings associations must be made in accordance with the laws and legal standards applicable to national banks regarding the application of state law.[14] The OCC recently published a final rule hat implements this standard for Federal savings associations. To conform with the Dodd-Frank Act, this interim final rule adds references to the new preemption standards applicable to Federal savings associations in §§ 157.11 and 160.2 of the Republished Regulations and removes a now obsolete cross-reference in § 160.110.

• *Historical references.* We have removed a number of historical references contained in the OTS rules in Chapter V that are no longer relevant.

• *Alternative Mortgage Transactions Parity Act (AMTPA).* Section 1002 of the Dodd-Frank Act transfers rulemaking authority for the AMTPA to the Bureau. Therefore, we have not republished § 560.220, which implements AMTPA, as OCC rules.

[10] *See* section 1022 of the Dodd-Frank Act, (*to be codified* at 12 U.S.C. 5512). These rules include 12 CFR parts 563, subpart D (S.A.F.E. Act), 571 subparts A through E and § 571.82 in subpart I (Fair Credit Reporting) and 573 (Privacy).

[11] The OCC's Web site is found at www.occ.gov. The FDIC's Web site is found at *www.fdic.gov.*

[12] We note that section 939A of the Dodd-Frank Act requires the Federal banking agencies to amend their rules to provide alternatives for references to external credit ratings in there regulations. OTS rules include such references related to lending and investment in part 560, and regulatory capital requirements in part 567. The OTS issued an ANPR addressing lending and investment on October 14, 2010. (75 FR 63107), and it joined the other Federal banking agencies in issuing an ANPR addressing the regulatory capital requirements on August 25, 2010 (75 FR 52283). We have not amended these references in the Republished Regulations as the OCC is currently drafting separate proposals to address section 939A. We anticipate that the final OCC rules addressing section 939A will make any necessary amendments to parts 160 and 167 of the Republished Regulations, incorporating comments received including those in response to the OTS ANPRs.

[13] Dodd-Frank Act section 1046, 124 Stat. 2017 (*to be codified* at 12 U.S.C. 1465). In addition, the Act states that the provisions in section 1047(a) regarding visitorial powers shall apply to Federal savings associations and their subsidiaries to the same extent and in the same manner as if they were national banks or national bank subsidiaries. Dodd-Frank Act section 1047(b), 124 Stat. 2018 (*to be codified* at 12 U.S.C. 1465).

[14] *Id.*

• *Regulations relating to transactions with affiliates, extensions of credit to insiders and tying arrangements.* Section 312(b)(2)(A) transfers all OTS rulemaking authority relating to transactions with affiliates, extensions of credit to insiders and tying arrangements to the Board. Therefore, we have not republished §§ 563.36, 563.41 and 563.43, but rather refer Federal savings associations to the Board's regulations.

• *Savings associations—Operations:* In § 163.22(e)(1)(iv), we have removed the reference to the Board and FDIC, as 12 U.S.C. 1828(c) no longer requires the Federal banking agencies to seek competitive impact reports from the other Federal banking agencies before acting on a merger, consolidation, or assumption of liabilities. Instead, competitive impact reports are required only from the Attorney General. In addition, pursuant to the Dodd-Frank Act, savings associations that are part of a SLHC structure must now file a notice of a declaration of a dividend with the Board. We have amended § 163.143 to require that, in the case of cash dividends, Federal savings associations that are subsidiaries of a stock SLHC file an informational copy of that notice with the OCC at the same time it is filed with the Board. We note that under the regulation Federal savings associations that are subsidiaries of stock SLHCs must file notices of a declaration of a noncash dividend and other capital distributions with the OCC. In addition, pursuant to an amendment made to the HOLA by the Dodd-Frank Act,[15] Federal savings associations that are subsidiaries of mutual SLHCs are required to provide a notice of a declaration of dividends to both the Board and the OCC. Our amendment to § 163.143 accounts for this notice.

• *Change in bank control.* Part 574 of the OTS rules addressing change in control of savings associations referenced control as being ''more than 25%,'' however because the underlying statute (the Change in Bank Control Act, 12 U.S.C. 1817(j)) uses the phrase ''25% or more,'' we have replaced the former OTS phrase with the statutory language throughout part 174 in the Republished Regulations. We also have conformed § 574.7(d)(3) to better track the statutory language. Additionally, throughout this rule, we have removed those sections that apply only to SLHCs, and have added provisions from former part 574 in place of cross-references where the cross-referenced provision is now contained in a Board regulation.

• *References to Thrift Financial Report (TFR).* Where there were references to the TFR in Chapter V of the OTS rules, we have added ''Consolidated Reports of Condition or Income'' (Call Report) or ''Thrift Financial Report,'' as appropriate'' to account for the phase out of the TFR.[16]

• *Remaining Fair Credit Reporting regulations.* As noted above, under the Dodd-Frank Act, the Bureau assumes rulemaking authority for the majority of rules under the Fair Credit Reporting Act (FCRA). However, the OCC retains rulemaking authority for § 571.83 of subpart I and all of subpart J. All of the FCRA rules were originally published together in part 571 of the OTS rules and contained generally applicable provisions in subpart A. One such provision stated that examples given in the rules were not exclusive and that compliance with an example would constitute compliance with the rule. In part 171 of the Republished Regulations, we have included this provision to apply it to subpart J, which includes examples.

III. Notice and Comment

This interim final rule is effective on July 21, 2011. Pursuant to the Administrative Procedure Act (APA), at 5 U.S.C. 553(b)(B), notice and comment are not required prior to the issuance of a final rule if an agency, for good cause, finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.''

Section 316(b) of the Dodd-Frank Act provides that all OTS regulations in effect the day before the transfer date shall continue in effect until modified, terminated, set aside, or superseded by the OCC. The interim final rule makes non-substantive, technical changes to the OTS regulations, such as renumbering, changing internal cross-references, replacing appropriate nomenclature, and changing the address for filing applications and notices. The rule also makes a few changes to conform the rules for Federal savings associations to changes in the law affected by the Dodd-Frank Act. Because these regulations are nearly identical to the OTS's rules which savings associations are currently subject to, the new rules do not change or impose additional requirements that necessitate adjustments by these institutions. In addition, codifying former OTS regulations as OCC regulations with nomenclature changes and updated filing addresses will help reduce confusion in the industry. Moreover, the transferring rules in general were originally issued by the OTS following notice and comment rulemaking, as appropriate.

Therefore, the OCC has concluded that advance notice and comment under the APA is unnecessary and not in the public interest.

IV. Effective Date

This interim final rule is effective on July 21, 2011. A final rule may be published with an immediate effective date if an agency finds good cause and publishes such with the final rule.[17] The purpose of a delayed effective date is to permit regulated entities to adjust their behavior before the final rule takes effect. As described above, the interim final rule makes non-substantive, technical changes, which will not require savings associations to adjust their behavior in a substantive manner. In addition, the interim final rule provides guidance regarding certain required Dodd-Frank Act changes. It is important to have these regulations in place on July 21, 2011, the transfer date, to facilitate a seamless transition when the OCC and the FDIC assume responsibility for supervising savings associations on that day and to inform the industry what rules will apply as of the transfer date. For these reasons, the OCC finds good cause to dispense with a delayed effective date.

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4802) requires, subject to certain exceptions, that regulations imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of the calendar quarter after publication of the final rule. As a general matter this interim final rule does not impose additional reporting, disclosure, or other requirements. However, to the extent that there are any additional reporting, disclosure, or other requirements, because they impose minimal burden on savings associations and because of the need to have final rules in place on he transfer date, the OCC finds good cause not to delay the effectiveness of these rules.

V. Request for Comments

Although notice and comment are not required prior to the effective date of this interim final rule, the OCC invites comments on all aspects of the rule and will revise it if necessary or appropriate in light of the comments received.

[15] Dodd-Frank Act, section 625 (*to be codified* at 12 U.S.C. 1467a(o)(11)).

[16] *See* the joint Paperwork Reduction Act Notice published by the OTS, OCC, FDIC and the Board proposing to phase out of the TFR. 76 FR 39981 (July 7, 2011).

[17] 5 U.S.C. 553(d)(3).

VI. Regulatory Analysis

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (Pub. L. 96–354, Sept. 19, 1980) (RFA) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). Pursuant to the APA at 5 U.S.C. 553(b)(B), general notice and an opportunity for public comment are not required prior to the issuance of a final rule when an agency, for good cause, finds that ''notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' As discussed above, the OCC has determined for good cause that the APA does not require general notice and public comment on this interim final rule and, therefore, we are not publishing a general notice of proposed rulemaking. Thus, the RFA, pursuant 5 U.S.C. 601(2), does not apply to this interim final rule.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. The OCC has determined that there is no Federal mandate imposed by this rulemaking that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

Paperwork Reduction Act

The OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

This rule contains information collection requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB under the following OMB control numbers, and the PRA burden for which is unchanged by this rule: OMB Control Nos. 1550–0003; 1550–0005 through 1550–0007; 1550–0011 through 1550–0020; 1550–0021, 1550–0025; 1550–0030; 1550–0032; 1550–0035; 1550–0037; 1550–0041; 1550–0047; 1550–0051; 1550–0053; 1550–0056; 1550–0060; 1550–0062; 1550–0066; 1550–0072; 1550–0077 through 1550–0078; 1550–0081; 1550–0088; 1550–0092; 1550–0094 through 1550–0095; 1550–0103 through 1550–0106; 1550–0109 through 1550–0110; 1550–0112 through 1550–0113; 1550–0115; 1550–0117; 1557–0119; 1550–0122; and 1550–0127. The information collection approved under OMB Control No. 1550–0059 will be amended through a non-substantive change. There are no new information collection requirements in this interim final rule.

VII. Redesignation Table

The following redesignation table is provided for reader reference and shows the relationship of former section numbers within Chapter V to the new section numbers in Chapter I.

12 CFR Chapter V: Former part or section numbers	12 CFR Chapter I: New part or section numbers
Part 508	Part 108
Part 509	Part 109
Part 512	Part 112
Part 516	Part 116
Part 528	Part 128
Section 528.1	Section 128.1
Section 528.1a	Section 128.10
Section 528.2	Section 128.2
Section 528.2a	Section 128.11
Section 528.3	Section 128.3
Section 528.4	Section 128.4
Section 528.5	Section 128.5
Section 528.6	Section 128.6
Section 528.7	Section 128.7
Section 528.8	Section 128.8
Section 528.9	Section 128.9
Part 533	Part 133
Part 536	Part 136
Part 541	Part 141
Part 543	Part 143
Section 543.1	Section 143.1
Section 543.2	Section 143.2
Section 543.3	Section 143.3
Section 543.5	Section 143.4
Section 543.6	Section 143.5
Section 543.7	Section 143.6
Section 543.7–1	Section 143.7
Section 543.8	Section 143.8
Section 543.9	Section 143.9
Section 543.10	Section 143.10
Section 543.11	Section 143.11
Section 543.11–1	Section 143.12
Section 543.14	Section 143.14
Part 544	Part 144
Part 545	Part 145
Part 546	Part 146
Part 550	Part 150
Part 551	Part 151
Part 552	Part 152
Section 552.2–1	Section 152.1
Section 552.2–2	Section 152.2
Section 552.2–3	Section 152.17
Section 552.2–6	Section 152.18
Section 552.2–7	Section 152.19
Section 552.3	Section 152.3
Section 552.4	Section 152.4
Section 552.5	Section 152.5
Section 552.6	Section 152.6
Section 552.6–1	Section 152.7
Section 552.6–2	Section 152.8
Section 552.6–3	Section 152.9
Section 552.6–4	None
Section 552.9	None
Section 552.10	Section 152.10
Section 552.11	Section 152.11
Section 552.12	Section 152.12
Section 552.13	Section 152.13
Section 552.14	Section 152.14
Section 552.15	Section 152.15
Section 552.16	Section 152.16
Part 555	Part 155
Part 557	Part 157
Part 559	Part 159
Part 560	Part 160
Part 561	Part 161
Part 562	Part 162
Part 563	Part 163
Part 563b	Part 192
Part 563c	Part 193
Part 563c, Subpart A	Part 193, Subpart A
Part 563c, Subpart B	Part 193, Subpart B
Section 563c.101	Section 193.101
Section 563c.102	Section 193.102 and new Appendix A
Part 563d	Part 194
Section 563d.1	Section 194.1
Section 563d.2	Section 194.2
Section 563d.3b–6	Section 194.3
Section 563d.210	Section 194.210
Section 563d.801	Section 194.801
Section 563d.802	Section 194.802
Part 563e	Part 195
Part 563f	Part 196
Part 563g	Part 197
Section 563g.1	Section 197.1
Section 563g.2	Section 197.2
Section 563g.3	Section 197.3
Section 563g.4	Section 197.4
Section 563g.5	Section 197.5
Section 563g.6	Section 197.6
Section 563g.7	Section 197.7
Section 563g.8	Section 197.8
Section 563g.9	Section 197.9
Section 563g.10	Section 197.10
Section 563g.11	Section 197.11
Section 563g.12	Section 197.12
Section 563g.13	Section 197.13
Section 563g.14	Section 197.14
Section 563g.15	Section 197.15
Section 563g.16	Section 197.16
Section 563g.17	Section 197.17
Section 563g.18	Section 197.18
Section 563g.19	Section 197.19
Section 563g.20	Part 197, Appendix A
Section 563g.21	Section 197.21
Part 564	Part 164
Part 565	Part 165
Part 567	Part 167
Part 568	Part 168
Part 569	Part 169
Part 570	Part 170
Part 571	Part 171
Part 572	Part 172
Part 574	Part 174
Section 574.1	Section 174.1
Section 574.2	Section 174.2
Section 574.3	Section 174.3
Section 574.4	Section 174.4
Section 574.5	Section 174.5
Section 574.6	Section 174.6
Section 574.7	Section 174.7
Section 574.8	Section 174.8
Section 574.100	Part 174, Appendix A
Part 590	Part 190
Part 591	Part 191

List of Subjects

12 CFR Part 100

Savings associations.

12 CFR Part 108

Administrative practice and procedure, Crime, Savings associations.

12 CFR Part 109

Administrative practice and procedure, Penalties.

12 CFR Part 112

Administrative practice and procedure, Investigations.

12 CFR Part 116

Administrative practice and procedure, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 128

Advertising, Aged, Civil rights, Credit, Equal employment opportunity, Fair housing, Individuals with disabilities, Marital status discrimination, Mortgages, Religious discrimination, Reporting and recordkeeping requirements, Savings associations, Sex discrimination, Signs and symbols.

12 CFR Part 133

Confidential business information, Freedom of information, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 136

Consumer protection, Insurance, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 141

Savings associations.

12 CFR Part 143

Reporting and recordkeeping requirements; Savings associations.

12 CFR Part 144

Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 145

Consumer protection, Credit, Electronic funds transfers, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 146

Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 150

Administrative practice and procedure, Reporting and recordkeeping requirements, Savings associations, Trusts and trustees.

12 CFR Part 151

Reporting and recordkeeping requirements, Savings associations, Securities, Trusts and trustees.

12 CFR Part 152

Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 155

Accounting, Consumer protection, Electronic funds transfers, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 157

Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 159

Reporting and recordkeeping requirements, Savings associations, Subsidiaries.

12 CFR Part 160

Consumer protection, Investments, Manufactured homes, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 161

Administrative practice and procedure, Savings associations.

12 CFR Part 162

Accounting, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 163

Accounting, Administrative practice and procedure, Advertising, Conflict of interests, Crime, Currency, Investments, Mortgages, Reporting and recordkeeping requirements, Savings associations, Securities, Surety bonds.

12 CFR Part 164

Appraisals, Mortgages, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 165

Administrative practice and procedure, Savings associations.

12 CFR Part 167

Capital, Reporting and recordkeeping requirements, Risk, Savings associations.

12 CFR Part 168

Consumer protection, Privacy, Reporting and recordkeeping requirements, Savings associations, Security measures.

12 CFR Part 169

Savings associations, Securities.

12 CFR Part 170

Accounting, Administrative practice and procedure, Bank deposit insurance, Reporting and recordkeeping requirements, Safety and soundness, Savings associations.

12 CFR Part 171

Consumer protection, Credit, Fair Credit Reporting Act, Privacy, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 172

Flood insurance, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 174

Administrative practice and procedure, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 190

Banks, banking, Loan programs-housing and community development, Manufactured homes, Mortgages.

12 CFR Part 191

Banks, banking, Loan programs-housing and community development, Mortgages.

12 CFR Part 192

Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 193

Accounting, Savings associations, Securities.

12 CFR Part 194

Authority delegations (Government agencies), Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 195

Community development, Credit, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 196

Antitrust, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 197

Reporting and recordkeeping requirements, Savings associations, Securities.

■ For the reasons set forth in the preamble, Chapter I of Title 12 of the

Code of Federal Regulations is amended by adding parts 100, 108, 109, 112, 116, 128, 133, 136, 141, 143, 144, 145, 146, 150, 151, 152, 155, 157, 159, 160, 161, 162, 163, 164, 165, 167, 168, 169, 170, 171, 172, 174, 190, 191, 192, 193, 194, 195, 196, 197, respectively, to read as follows:

PART 100—RULES APPLICABLE TO SAVINGS ASSOCIATIONS

Authority: 12 U.S.C. 1462a, 1463, 5412(b)(2)(B), 5414(b)(2).

§ 100.1 Certain regulations superseded.

Effective on July 21, 2011, section 312(b)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376 (2010)) (12 U.S.C. 5412(b)(2)(B)) transferred rulemaking authority of the Office of Thrift Supervision (OTS) relating to all savings associations, both state and Federal to the OCC. The regulations set forth in parts 100 through 197 of this Chapter I applying to Federal savings associations and state savings associations, as those terms are defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)), supersede corresponding regulations set forth in parts 500 through 591 of Chapter V of the Code of Federal Regulations that were applicable to such entities prior to July 21, 2011.

§ 100.2 Waiver authority.

The Comptroller of the Currency may, for good cause and to the extent permitted by statute, waive the applicability of any provision of parts 100 through 197.

PART 108—REMOVALS, SUSPENSIONS, AND PROHIBITIONS WHERE A CRIME IS CHARGED OR PROVEN

Sec.

108.1 Scope.
108.2 Definitions.
108.3 Issuance of Notice or Order.
108.4 Contents and service of the Notice or Order.
108.5 Petition for hearing.
108.6 Initiation of hearing.
108.7 Conduct of hearings.
108.8 Default.
108.9 Rules of evidence.
108.10 Burden of persuasion.
108.11 Relevant considerations.
108.12 Proposed findings and conclusions and recommended decision.
108.13 Decision of the OCC.
108.14 Miscellaneous.

Authority: 12 U.S.C. 1464, 1818, 5412(b)(2)(B).

§ 108.1 Scope.

The rules in this part apply to hearings, which are exempt from the adjudicative provisions of the Administrative Procedure Act, afforded to any officer, director, or other person participating in the conduct of the affairs of a Federal savings association, Federal savings association subsidiary, or affiliate service corporation, where such person has been suspended or removed from office or prohibited from further participation in the conduct of the affairs of one of the aforementioned entities by a Notice or Order served by the OCC upon the grounds set forth in section 8(g) of the Federal Deposit Insurance Act, (12 U.S.C. 1818(g)).

§ 108.2 Definitions.

As used in this part—

(a) The term *OCC* means the Office of the Comptroller of the Currency.

(b) [Reserved]

(c) The term *Notice* means a Notice of Suspension or Notice of Prohibition issued by the OCC pursuant to section 8(g) of the Federal Deposit Insurance Act.

(d) The term *Order* means an Order of Removal or Order of Prohibition issued by the OCC pursuant to section 8(g) of the Federal Deposit Insurance Act.

(e) The term *association* means a Federal savings association within the meaning of section 2(5) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1462(5) (''HOLA''), Federal savings association subsidiary and an affiliate service corporation within the meaning of section 8(b)(8) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818(b)(8) (''FDIA'').

(f) The term *subject individual* means a person served with a Notice or Order.

(g) The term *petitioner* means a subject individual who has filed a petition for informal hearing under this part.

§ 108.3 Issuance of Notice or Order.

(a) The OCC may issue and serve a Notice upon an officer, director, or other person participating in the conduct of the affairs of an association, where the individual is charged in any information, indictment, or complaint with the commission of or participation in a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under state or Federal law, if the OCC, upon due deliberation, determines that continued service or participation by the individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association. The Notice shall remain in effect until the information, indictment, or complaint is finally disposed of or until terminated by the OCC.

(b) The OCC may issue and serve an Order upon a subject individual against whom a judgment of conviction, or an agreement to enter a pretrial diversion or other similar program has been rendered, where such judgment is not subject to further appellate review, and the OCC, upon the deliberation, has determined that continued service or participation by the subject individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association.

§ 108.4 Contents and service of the Notice or Order.

(a) The Notice or Order shall set forth the basis and facts in support of the OCC's issuance of such Notice or Order, and shall inform the subject individual of his right to a hearing, in accordance with this part, for the purpose of determining whether the Notice or Order should be continued, terminated, or otherwise modified.

(b) The OCC shall serve a copy of the Notice or Order upon the subject individual and the related association in the manner set forth in § 109.11 of this chapter.

(c) Upon receipt of the Notice or Order, the subject individual shall immediately comply with the requirements thereof.

§ 108.5 Petition for hearing.

(a) To obtain a hearing, the subject individual must file two copies of a petition with the OCC within 30 days of being served with the Notice or Order.

(b) The petition filed under this section shall admit or deny specifically each allegation in the Notice or Order, unless the petitioner is without knowledge or information, in which case the petition shall so state and the statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When a petitioner intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder.

(c) The petition shall state whether the petitioner is requesting termination or modification of the Notice or Order, and shall state with particularity how the petitioner intends to show that his continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or to impair public confidence in the association.

§ 108.6 Initiation of hearing.

(a) Within 10 days of the filing of a petition for hearing, the OCC shall notify the petitioner of the time and place fixed for hearing, and it shall designate one or more OCC employees to serve as presiding officer.

(b) The hearing shall be scheduled to be held no later than 30 days from the date the petition was filed, unless the time is extended at the request of the petitioner.

(c) A petitioner may appear personally or through counsel, but if represented by counsel, said counsel is required to comply with § 109.6 of this chapter.

(d) A representative(s) of the OCC's Enforcement and Compliance Division also may attend the hearing and participate therein as a party.

§ 108.7 Conduct of hearings.

(a) Hearings provided by this section are not subject to the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557). The presiding officer is, however, authorized to exercise all of the powers enumerated in § 109.5 of this chapter.

(b) Witnesses may be presented, within time limits specified by the presiding officer, provided that at least 10 days prior to the hearing date, the party presenting the witnesses furnishes the presiding officer and the opposing party with a list of such witnesses and a summary of the proposed testimony. However, the requirement for furnishing such a witness list and summary of testimony shall not apply to the presentation of rebuttal witnesses. The presiding officer may ask questions of any witness, and each party shall have an opportunity to cross-examine any witness presented by an opposing party.

(c) Upon the request of either the petitioner or a representative of the Enforcement and Compliance Division, the record shall remain open for a period of 5 business days following the hearing, during which time the parties may make any additional submissions for the record. Thereafter, the record shall be closed.

(d) Following the introduction of all evidence, the petitioner and the representative of the Enforcement and Compliance Division shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

(e) All oral testimony and oral argument shall be recorded, and transcripts made available to the petitioner upon payment of the cost thereof. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record *sua sponte* or upon the motion of any party.

(f) The parties may, in writing, jointly waive an oral hearing and instead elect a hearing upon a written record in which all evidence and argument would be submitted to the presiding officer in documentary form and statements of individuals would be made by affidavit.

§ 108.8 Default.

If the subject individual fails to file a petition for a hearing, or fails to appear at a hearing, either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 108.7(d) or (f) of this part, the Notice shall remain in effect until the information, indictment, or complaint is finally disposed of and the Order shall remain in effect until terminated by the OCC.

§ 108.9 Rules of evidence.

(a) Formal rules of evidence shall not apply to a hearing, but the presiding officer may limit the introduction of irrelevant, immaterial, or unduly repetitious evidence.

(b) All matters officially noticed by the presiding officer shall appear on the record.

§ 108.10 Burden of persuasion.

The petitioner has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of the association does not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association.

§ 108.11 Relevant considerations.

(a) In determining whether the petitioner has shown that his or her continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association, in order to decide whether the Notice or Order should be continued, terminated, or otherwise modified, the OCC will consider:

(1) The nature and extent of the petitioner's participation in the affairs of the association;

(2) The nature of the offense with which the petitioner has been charged;

(3) The extent of the publicity accorded the indictment and trial; and

(4) Such other relevant factors as may be entered on the record.

(b) When considering a request for the termination or modification of a Notice, the OCC will not consider the ultimate guilt or innocence of the petitioner with respect to the criminal charge that is outstanding.

(c) When considering a request for the termination or modification of an Order which has been issued following a final judgment of conviction against a subject individual, the OCC will not collaterally review such final judgment of conviction.

§ 108.12 Proposed findings and conclusions and recommended decision.

(a) Within 30 days after completion of oral argument or the submission of written argument where oral argument has been waived, the presiding officer shall file with and certify to the OCC for decision the entire record of the hearing, which shall include a recommended decision, the Notice or Order, and all other documents filed in connection with the hearing.

(b) The recommended decision shall contain:

(1) A statement of the issue(s) presented,

(2) A statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and

(3) An appropriate recommendation as to whether the suspension, removal, or prohibition should be continued, modified, or terminated.

§ 108.13 Decision of the OCC.

(a) Within 30 days after the recommended decision has been certified to the OCC, the OCC shall issue a final decision.

(b) The OCC's final decision shall contain a statement of the basis therefor. The OCC may satisfy this requirement where it adopts the recommended decision of the presiding officer upon finding that the recommended decision satisfies the requirements of § 109.38 of this chapter.

(c) The OCC shall serve upon the petitioner and the representative of the Enforcement and Compliance Division a copy of the OCC's final decision and the related recommended decision.

§ 108.14 Miscellaneous.

The provisions of §§ 109.10, 109.11, and 109.12 of this chapter shall apply to proceedings under this part.

PART 109—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

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Subpart C [Reserved]

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Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817(j), 1818, 1820(k), 1829(e), 3349, 4717, 5412(b)(2)(B); 15 U.S.C. 78*l*, 78o–5, 78u–2; 28 U.S.C. 2461 note; 31 U.S.C. 5321; 42 U.S.C. 4012a.

Subpart A—Uniform Rules of Practice and Procedure

§ 109.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure with regard to Federal savings associations applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the OCC should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency.

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(2) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(3) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(4) Any provisions of the Change in Bank Control Act, any regulation or order issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Sections 22(h) and 23 of the Federal Reserve Act, or any regulation issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1468;

(6) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(7) Section 1120 of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(8) The terms of any final or temporary order issued or enforceable pursuant to section 8 of the FDIA or of any written agreement executed by the OCC, the terms of any conditions imposed in writing by the OCC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(9) Any provision of law referenced in section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(10) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties on senior examiners for violation of post-employment prohibitions; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

(i) [Reserved]

§ 109.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 109.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the OCC's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the OCC or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Comptroller* means the Comptroller of the Currency or his or her designee.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(f) *Final order* means an order issued by the OCC with or without the consent of the affected institution or the institution-affiliated party that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any Federal savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)).

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules found in subpart B of this part.

(j) *OCC* means the Office of the Comptroller of the Currency.

(k) *Office of Financial Institution Adjudication* (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

(l) *Party* means the OCC and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the OCC.

(o) *Uniform Rules* means those rules in subpart A of this part.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 109.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 109.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 109.31 of this subpart;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 109.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the OCC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Comptroller, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 109.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 109.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 109.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 109.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues the final decision pursuant to § 109.40(c) of this subpart:

(1) No interested person outside the OCC shall make or knowingly cause to be made an *ex parte* communication to the Comptroller, the administrative law judge, or a decisional employee; and

(2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Comptroller or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation-of-functions.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 109.40 of this subpart, except as witness or counsel in public proceedings.

§ 109.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 109.25 and 109.26 of this subpart, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Comptroller or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section as to form.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ x 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 109.7 of this subpart.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Comptroller, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 109.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 109.10(c) of this subpart as to form.

(c) *By the Comptroller or the administrative law judge.* (1) All papers required to be served by the Comptroller or the administrative law judge upon a party who has appeared in the proceeding through a counsel of record, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 109.6 of this subpart, the Comptroller or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 109.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Comptroller or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 109.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 109.38 of this subpart, the Comptroller may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or on the Comptroller's or the administrative law judge's own motion after notice and opportunity to respond is afforded all non-moving parties.

§ 109.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or deposition shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena. The OCC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

§ 109.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any OCC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is

admissible as evidence in any proceeding.

§ 109.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 109.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 109.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by the Comptroller upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) The answer and/or request for a hearing shall be filed with OFIA.

§ 109.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 109.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 109.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 109.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 109.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, but upon the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Comptroller, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 109.29 and 109.30 of this subpart.

§ 109.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by § 109.102 of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 109.25 of this subpart.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 109.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed under 12 CFR 4.17 for requests under the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 109.23 of this subpart to revoke or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 109.23 of this subpart are waived.

(2) The party who served the request that is the subject of a motion to revoke or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process,

attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 109.23 of this subpart for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 109.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 109.24(d) of this subpart. The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 109.25(d) of this subpart, and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 109.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all

parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with or procures a failure to comply with, a subpoena issued under this section.

§ 109.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the administrative law judge prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 109.23 of this subpart.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the administrative law judge if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 109.23 of this subpart. Any party may file a response to a request for interlocutory review in accordance with § 109.23(d) of this subpart. Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller.

§ 109.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Comptroller. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 109.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to

summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 109.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at its expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 109.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 109.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 109.23 of this subpart. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 109.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 109.26(c) of this subpart.

§ 109.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 109.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the APA and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Comptroller shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the appropriate Federal banking agency, as defined in section 3(q) of the FDIA (12 U.S.C. 1813(q)), or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 109.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate

document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 109.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 109.37(b) of this subpart, the administrative law judge shall file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Comptroller for final determination the record of the proceeding, the administrative law judge shall furnish to the Comptroller a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 109.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 109.38 of this subpart, a party may file with the Comptroller written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 109.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller shall serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.* (1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Comptroller shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate state or Federal supervisory authority.

§ 109.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the OCC may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of the order.

Subpart B—Local Rules

§ 109.100 Scope.

The rules and procedures in this subpart B shall apply to those proceedings covered by subpart A of this part. In addition, subpart A of this part and this subpart shall apply to adjudicatory proceedings for which hearings on the record are provided for by the following statutory provisions:

(a) Proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine whether any person directly or indirectly exercises a controlling influence over the management or policies of a savings association or any other company; and

(b) [Reserved]

(c) Proceedings under section 15(c)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(c)(4)) (Exchange Act) to determine whether any Federal savings association or person subject to the jurisdiction of the OCC pursuant to section 12(i) of the Exchange Act (15 U.S.C. 78 *l* (i)) has failed to comply with the provisions of sections 12, 13, 14(a), 14(c), 14(d) or 14(f) of the Exchange Act.

§ 109.101 Appointment of Office of Financial Institution Adjudication.

Unless otherwise directed by the OCC, all hearings under subpart A of this part and this subpart shall be conducted by administrative law judges under the direction of the Office of Financial Institution Adjudication.

§ 109.102 Discovery.

(a) *In general.* A party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant and material to the proceeding and where there is a need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party shall have the right to examine the witness with respect to all non-privileged, relevant and material matters of which the witness has factual, direct and personal knowledge. Objections to questions or exhibits shall be in short form, stating the grounds for objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The court reporter shall transcribe or otherwise record the witness's testimony, as agreed among the parties.

(e) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, investigative, trial preparation, irrelevant or immaterial matters; or

(3) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent.

(f) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States Government is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

(g) *Deposition subpoenas*—(1) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(2) *Service.* The party requesting the subpoena must serve it on the person named therein or upon that person's counsel, by any of the methods identified in § 109.11(d) of this part. The party serving the subpoena must file proof of service with the administrative law judge.

(3) *Motion to quash.* A person named in the subpoena or a party may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(4) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 109.27(d) of this part.

§ 109.103 Civil money penalties.

(a) *Assessment.* In the event of consent, or if upon the record developed at the hearing the OCC finds that any of the grounds specified in the notice issued pursuant to § 109.18 of this part have been established, the OCC may serve an order of assessment of civil money penalty upon the party concerned. The assessment order shall be effective immediately upon service or upon such other date as may be specified therein and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by the OCC or by a reviewing court.

(b) *Payment.* (1) Civil penalties assessed pursuant to subpart A of this part and this subpart B are payable and to be collected within 60 days after the issuance of the notice of assessment, unless the OCC fixes a different time for payment where it determines that the purpose of the civil money penalty would be better served thereby; however, if a party has made a timely request for a hearing to challenge the assessment of the penalty, the party may not be required to pay such penalty until the OCC has issued a final order of assessment following the hearing. In such instances, the penalty shall be paid within 60 days of service of such order unless the OCC fixes a different time for payment. Notwithstanding the foregoing, the OCC may seek to attach the party's assets or to have a receiver appointed to secure payment of the potential civil money penalty or other obligation in advance of the hearing in accordance with section 8(i)(4) of the FDIA (12 U.S.C. 1818(i)(4)).

(2) Checks in payment of civil penalties shall be made payable to the Treasurer of the United States and sent to the OCC. Upon receipt, the OCC shall forward the check to the Treasury of the United States.

(c) *Inflation adjustment.* Under the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note), the OCC must adjust for inflation the civil money penalties in statutes that it administers. The following chart displays the adjusted civil money penalties. The amounts in this chart apply to violations that occur after October 27, 2008:

U.S. Code citation	CMP description	New maximum amount
12 U.S.C. 1464(v)(4)	Reports of Condition—1st Tier	$2,200
12 U.S.C. 1464(v)(5)	Reports of Condition—2nd Tier	32,500

U.S. Code citation	CMP description	New maximum amount
12 U.S.C. 1464(v)(6)	Reports of Condition—3rd Tier	1,375,000
12 U.S.C. 1467(d)	Refusal to Cooperate in Exam	7,500
12 U.S.C. 1467a(r)(1)	Late/Inaccurate Reports—1st Tier	2,200
12 U.S.C. 1467a(r)(2)	Late/Inaccurate Reports—2nd Tier	32,500
12 U.S.C. 1467a(r)(3)	Late/Inaccurate Reports—3rd Tier	1,375,000
12 U.S.C. 1817(j)(16)(A)	Change in Control—1st Tier	7,500
12 U.S.C. 1817(j)(16)(B)	Change in Control—2nd Tier	37,500
12 U.S.C. 1817(j)(16)(C)	Change in Control—3rd Tier	1,375,000
12 U.S.C. 1818(i)(2)(A)	Violation of Law or Unsafe or Unsound Practice—1st Tier	7,500
12 U.S.C. 1818(i)(2)(B)	Violation of Law or Unsafe or Unsound Practice—2nd Tier	37,500
12 U.S.C. 1818(i)(2)(C)	Violation of Law or Unsafe or Unsound Practice—3rd Tier	1,375,000
12 U.S.C. 1820(k)(6)(A)(ii)	Violation of Post Employment Restrictions	275,000
12 U.S.C. 1884	Violation of Security Rules	110
12 U.S.C. 3349(b)	Appraisals Violation—1st Tier	7,500
12 U.S.C. 3349(b)	Appraisals Violation—2nd Tier	37,500
12 U.S.C. 3349(b)	Appraisals Violation—3rd Tier	1,375,000
42 U.S.C. 4012a(f)	Flood Insurance	[1] 385 [2] 135,000

[1] Per day.
[2] Per year.

§ 109.104 Additional procedures.

(a) *Replies to exceptions.* Replies to written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order pursuant to § 109.39 of this part shall be filed within 10-days of the date such written exceptions were required to be filed.

(b) *Motions.* All motions shall be filed with the administrative law judge and an additional copy shall be filed with the OCC Hearing Clerk who receives adjudicatory filings; provided, however, that once the administrative law judge has certified the record to the Comptroller pursuant to § 109.38 of this part, all motions must be filed with the Comptroller to the attention of the Hearing Clerk within the 10-day period following the filing of exceptions allowed for the filing of replies to exceptions. Responses to such motions filed in a timely manner with the Comptroller, other than motions for oral argument before the Comptroller, shall be allowed pursuant to the procedures at § 109.23(d) of this part. No response is required for the Comptroller to make a determination on a motion for oral argument.

(c) *Authority of administrative law judge.* In addition to the powers listed in § 109.5 of this part, the administrative law judge shall have the authority to deny any dispositive motion and shall follow the procedures set forth for motions for summary disposition at § 109.29 of this part and partial summary disposition at § 109.30 of this part in making determinations on such motions.

(d) *Notification of submission of proceeding to the Comptroller.* Upon the expiration of the time for filing any exceptions, any replies to such exceptions or any motions and any ruling thereon, and after receipt of certified record, the OCC shall notify the parties within ten days of the submission of the proceeding to the Comptroller for final determination.

(e) *Extensions of time for final determination.* The Comptroller may, *sua sponte,* extend the time for final determination by signing an order of extension of time within the 90-day time period and notifying the parties of such extension thereafter.

(f) *Service upon the OCC.* Service of any document upon the OCC shall be made by filing with the Hearing Clerk, in addition to the individuals and/or offices designated by the OCC in its Notice issued pursuant to § 109.18 of this part, or such other means reasonably suited to provide notice of the person and/or offices designated to receive filings.

(g) *Filings with the Comptroller.* An additional copy of all materials required or permitted to be filed with or referred to the administrative law judge pursuant to subpart A and B of this part shall be filed with the Hearing Clerk. This rule shall not apply to the transcript of testimony and exhibits adduced at the hearing or to proposed exhibits submitted in advance of the hearing pursuant to an order of the administrative law judge under § 109.32 of this part. Materials required or permitted to be filed with or referred to the Comptroller pursuant to subparts A and B of this part shall be filed with the Comptroller, to the attention of the Hearing Clerk.

(h) *Presence of cameras and other recording devices.* The use of cameras and other recording devices, other than those used by the court reporter, shall be prohibited and excluded from the proceedings.

Subpart C [Reserved]

Subpart D [Reserved]

PART 112—RULES FOR INVESTIGATIVE PROCEEDINGS AND FORMAL EXAMINATION PROCEEDINGS

Sec.
112.1 Scope of part.
112.2 Definitions.
112.3 Confidentiality of proceedings.
112.4 Transcripts.
112.5 Rights of witnesses.
112.6 Obstruction of the proceedings.
112.7 Subpoenas.

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467, 1467a, 1813, 1817(j), 1818(n), 1820(c), 5412(b)(2)(B); 15 U.S.C. 78*l*.

§ 112.1 Scope of part.

This part prescribes rules of practice and procedure applicable to the conduct of formal examination proceedings with respect to Federal savings associations and their affiliates under section 5(d)(1)(B) of the HOLA, as amended, 12 U.S.C. 1464(d)(1)(B) or section 7(j)(15) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(j)(15) (''FDIA''), section 8(n) of the FDIA, 12 U.S.C. 1818(n), or section 10(c) of the FDIA, 12 U.S.C. 1820(c). This part does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 109 of this chapter.

§ 112.2 Definitions.

As used in this part:

(a) *OCC* means the Office of the Comptroller of the Currency;

(b) [Reserved]

(c) *Formal examination proceeding* means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence, memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of savings associations and their affiliates conducted pursuant to section 5(d)(1)(B) of the HOLA, section 7(j)(15) of the FDIA, section 8(n) of the FDIA or section 10(c) of the FDIA; and

(d) *Designated representative* means the person or persons empowered by the OCC to conduct an investigative proceeding or a formal examination proceeding.

§ 112.3 Confidentiality of proceedings.

All formal examination proceedings shall be private and, unless otherwise ordered by the OCC, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the OCC, or required by law, and except as provided in §§ 112.4 and 112.5, the entire record of any investigative proceeding or formal examination proceeding, including the resolution of the OCC or its delegate(s) authorizing the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

§ 112.4 Transcripts.

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or transcript of his own testimony upon payment of the cost thereof; *provided,* that a person seeking a transcript of his own testimony must file a written request with the OCC's Director for Enforcement and Compliance stating the reason he desires to procure such transcript, and said persons may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

§ 112.5 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or give testimony at an investigative proceeding or formal examination proceeding shall have the right to examine, upon request, the OCC resolution authorizing such proceeding. Copies of such resolution shall be furnished, for their retention, to such persons only with the written approval of the OCC.

(b) Any witness at an investigative proceeding or formal examination proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the OCC in accordance with the provisions of part 19 of this chapter and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s) for the association(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

(3) The OCC, for good cause, may exclude a particular attorney from further participation in any investigation in which the OCC has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous or contumacious conduct. The person conducting an investigation may report to the OCC instances of apparently dilatory, obstructionist, egregious, contemptuous or contumacious conduct on the part of an attorney. After due notice to the attorney, the OCC may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the OCC may permit or direct.

§ 112.6 Obstruction of the proceedings.

The designated representative shall report to the Comptroller any instances where any witness or counsel has engaged in dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigative proceeding or formal examination proceeding; and the OCC may take such action as the circumstances warrant, including the exclusion of counsel from further participation in such proceeding.

§ 112.7 Subpoenas.

(a) *Service.* Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be effected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the Deputy Chief Counsel or his designee to quash or modify such subpoena, accompanying such application with a statement of the reasons therefor. The Deputy Chief Counsel or his designee, as appropriate, may:

(1) Deny the application;

(2) Quash or revoke the subpoena;

(3) Modify the subpoena; or

(4) Condition the granting of the application on such terms as the Deputy

Chief Counsel or his designee determines to be just, reasonable, and proper.

(c) *Attendance of witnesses.* Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any state or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage.* Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the OCC by any of its designated representatives.

PART 116—APPLICATION PROCESSING PROCEDURES

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Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462a, 1463, 1464, 2901 *et seq.,* 5412(b)(2)(B).

§ 116.1 What does this part do?

(a) This part explains OCC procedures for processing applications, notices, or filings (applications) for Federal savings associations. Except as provided in paragraph (b) of this section, subparts A and E of this part apply whenever an OCC regulation requires any person (you) to file an application pertaining to a Federal savings association with the OCC. Subparts B, C, and D, however, only apply when an OCC regulation incorporates the procedures in the subpart or where otherwise required by the OCC.

(b) This part does not apply to any of the following:

(1) An application related to a transaction under section 13(c) or (k) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(c) or (k).

(2) A request for reconsideration, modification, or appeal of a final OCC or OTS action.

(3) A request related to litigation, an enforcement proceeding, a supervisory directive or supervisory agreement. Such requests include a request seeking approval under, modification of, or termination of an order issued under part 108 or 109 of this chapter, a supervisory agreement, a supervisory directive, a consent merger agreement or a document negotiated in settlement of an enforcement matter or other litigation, unless an applicable OCC regulation specifically requires an application under this part.

(4) An application filed under an OCC regulation that prescribes other application processing procedures and time frames for the approval of applications.

(c) If an OCC regulation for a specific type of application prescribes some application processing procedures, or time frames, the OCC will apply this part to the extent necessary to process the application. For example, if an OCC regulation for a specific type of application does not identify time periods for the processing of an application, the time periods in this part apply.

§ 116.5 Do the same procedures apply to all applications under this part?

The OCC processes applications under this part using two procedures, expedited treatment and standard treatment. To determine which treatment applies, you may use the following chart:

If . . .	Then the OCC will process your application under . . .
(a) The applicable regulation does not specifically state that expedited treatment is available	Standard treatment.
(b) [Reserved]	

If . . .	Then the OCC will process your application under . . .
(c) Your composite rating is 3, 4, or 5. The composite rating is the composite numeric rating that the OCC or the other Federal banking regulator assigned to you under the Uniform Financial Institutions Rating System [1] or under a comparable rating system. The composite rating refers to the rating assigned and provided to you, in writing, as a result of the most recent examination.	Standard treatment.
(d) Your Community Reinvestment Act (CRA) rating is Needs to Improve or Substantial Noncompliance. The CRA rating is the Community Reinvestment Act performance rating that the OCC or the other Federal banking regulator assigned and provided to you, in writing, as a result of the most recent compliance examination. *See,* for example, § 195.28 of this chapter.	Standard treatment.
(e) Your compliance rating is 3, 4, or 5. The compliance rating is the numeric rating that the OCC or the other Federal banking regulator assigned to you under the OCC compliance rating system, or a comparable rating system used by the other Federal banking regulator. The compliance rating refers to the rating assigned and provided to you, in writing, as a result of the most recent compliance examination.	Standard treatment.
(f) You fail any one of your capital requirements under part 167 of this chapter	Standard treatment.
(g) The OCC or OTS has notified you that you are an association in troubled condition	Standard treatment.
(h) Neither the OCC nor any other Federal banking regulator has assigned you a composite rating, a CRA rating or a compliance rating.	Standard treatment.
(i) You do not meet any of the criteria listed in paragraphs (a) through (h) of this section	Expedited treatment.

[1] A savings association may obtain a copy of its composite rating from the appropriate Federal banking agency.

§ 116.10 How does the OCC compute time periods under this part?

In computing time periods under this part, the OCC does not include the day of the act or event that commences the time period. When the last day of a time period is a Saturday, Sunday, or Federal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

Subpart A—Pre-Filing and Filing Procedures

Pre-Filing Procedures

§ 116.15 Must I meet with the OCC before I file my application?

(a) *Chart.* To determine whether you must attend a pre-filing meeting before you file an application, please consult the following chart:

If you file . . .	Then . . .
(1) An application for permission to organize a *de novo* Federal savings association.	You must meet with the OCC before filing your application. You must submit a draft business plan before this meeting.
(2) An application to convert an existing insured depository institution (other than a state-chartered savings association or a state-chartered savings bank) or a credit union to a Federal savings association.	You must meet with the OCC before filing your application. The OCC may require you to submit a draft business plan or other relevant information before this meeting.
(3) An application to acquire control of a Federal savings association	The OCC may require you to meet with the OCC before filing your application and may require you to submit a draft business plan or other relevant information before this meeting.

(b) *Contacting the OCC.* (1) You must contact the appropriate OCC licensing office a reasonable time before you file an application described in paragraph (a) of this section. Unless paragraph (a) already requires a pre-filing meeting or a draft business plan, the appropriate OCC licensing office will determine whether it will require a pre-filing meeting, and whether you must submit a business plan or other relevant information before the meeting. The appropriate OCC licensing office will also establish a schedule for any meeting and the submission of any information.

(2) All other applicants are encouraged to contact the appropriate OCC licensing office to determine whether a pre-filing meeting or the submission of a draft business plan or other relevant information would expedite the application review process.

§ 116.20 What information must I include in my draft business plan?

If you must submit a draft business plan under § 116.15, your plan must:

(a) Clearly and completely describe the savings association's projected operations and activities;

(b) Describe the risks associated with the transaction and the impact of this transaction on any existing activities and operations of the savings association, including financial projections for a minimum of three years;

(c) Identify the majority of the proposed board of directors and the key senior executive officers (as defined in § 163.555 of this chapter) of the savings association and demonstrate that these individuals have the expertise to prudently manage the activities and operations described in the savings association's draft business plan; and

(d) Demonstrate how applicable requirements regarding serving the credit and lending needs in the market areas served by the savings association will be met.

Filing Procedures

§ 116.25 What type of application must I file?

(a) *Expedited treatment.* If you are eligible for expedited treatment under § 116.5, you may file your application in the form of a notice that includes all information required by the applicable substantive regulation. If the OCC has designated a form for your notice, you must file that form. Your notice is an application for the purposes of all statutory and regulatory references to ''applications.''

(b) *Standard treatment.* If you are subject to standard treatment under § 116.5, you must file your application following all applicable substantive

regulations and guidelines governing the filing of applications. If the OCC has a designated form for your application, you must file that form.

(c) *Waiver requests.* If you want the OCC to waive a requirement that you provide certain information with the notice or application, you must include a written waiver request:

(1) Describing the requirement to be waived and

(2) Explaining why the information is not needed to enable the OCC to evaluate your notice or application under applicable standards.

§ 116.30 What information must I provide with my application?

(a) *Required information.* You may obtain information about required certifications, other regulations and guidelines affecting particular notices and applications, appropriate forms, and instructions from any OCC office. You may also obtain forms and instructions on the OCC's web page at *www.occ.gov.*

(b) *Captions and exhibits.* You must caption the original application and required copies with the type of filing, and must include all exhibits and other pertinent documents with the original application and all required copies. You are not required to include original signatures on copies if you include a copy of the signed signature page or the copy otherwise indicates that the original was signed.

§ 116.35 May I keep portions of my application confidential?

(a) *Confidentiality.* The OCC makes submissions under this part available to the public, but may keep portions of your application confidential based on the rules in this section.

(b) *Confidentiality request.* (1) You may request the OCC to keep portions of your application confidential. You must submit your request in writing with your application and must explain in detail how your request is consistent with the standards under the Freedom of Information Act (5 U.S.C. 552) and part 4 of this chapter. For example, you should explain how you will be substantially harmed by public disclosure of the information. You must separately bind and mark the portions of the application you consider confidential and the portions you consider non-confidential.

(2) The OCC will not treat as confidential the portion of your application describing how you plan to meet your Community Reinvestment Act (CRA) objectives. The OCC will make information in your CRA plan, including any information incorporated by reference from other parts of your application, available to the public upon request.

(c) *OCC determination on confidentiality.* The OCC will determine whether information that you designate as confidential may be withheld from the public under the Freedom of Information Act (5 U.S.C. 552) and part 54 of this chapter. The OCC will advise you before it makes information you designate as confidential available to the public.

§ 116.40 Where do I file my application?

(a) *OCC Office.* (1) You must file the original application and the number of copies indicated on the applicable form to the attention of the Director for Licensing at the appropriate OCC licensing office listed in paragraph (a)(2) of this section or with the OCC licensing office at OCC headquarters. If the form does not indicate the number of copies you must file or if the OCC has not prescribed a form for your application, you must file the original application and two copies.

(2) The addresses of appropriate OCC licensing offices and the states covered by each office are listed in 12 CFR 4.5.

(b) *Additional filings with OCC headquarters.* (1) In addition to filing in the appropriate OCC licensing office, if your application involves a significant issue of law or policy or if an applicable regulation or form directs you to file with OCC headquarters, you must also file copies of your application at the OCC licensing office at headquarters. You must file the number of copies indicated on the applicable form. If the form does not indicate the number of copies you must file or if the OCC has not prescribed a form for your application, you must file three copies.

(2)(i) You may obtain a list of applications involving significant issues of law or policy at the OCC website at *www.occ.gov* or by contacting the OCC.

(ii) The OCC reserves the right to identify significant issues of law or policy in a particular application. The OCC will advise you, in writing, if it makes this determination.

§ 116.45 What is the filing date of my application?

(a) Your application's filing date is the date that you complete all of the following requirements.

(1) You attend a pre-filing meeting and submit a draft business plan or relevant information, if the OCC requires you to do so under § 116.15.

(2) You file your application and all required copies with the OCC, as described under § 116.40.

(i) If you are required to file with an OCC licensing office and with OCC headquarters, you have not filed with the OCC until you file with both offices.

(ii) You have not filed with an OCC licensing office or with OCC headquarters until you file the application and the required number of copies with that office.

(iii) If you file after the close of business established by an OCC licensing office or OCC headquarters, you have filed with that office on the next business day.

(3) You pay the applicable fee. You have not paid the fee until you submit the fee to the appropriate OCC licensing office, or the OCC waives the fee. You may pay by check, money order, cashier's check or wire transfer payable to the OCC.

(b) The OCC may notify you that it has adjusted your application filing date if you fail to meet any applicable publication requirements.

(c) If, after you properly file your application with the appropriate OCC licensing office, the OCC determines that a significant issue of law or policy exists under § 116.40(b)(2)(ii), the filing date of your application is the day you filed with the appropriate OCC licensing office. The 30-day review period under §§ 116.200 or 116.210 of this part will restart in its entirety when the OCC licensing office forwards the appropriate number of copies of your application to OCC headquarters.

§ 116.47 How do I amend or supplement my application?

To amend or supplement your application, you must file the amendment or supplemental information at the appropriate OCC office(s) along with the number of copies required under § 116.40. Your amendment or supplemental information also must meet the caption and exhibit requirements at § 116.30(b).

Subpart B—Publication Requirements

§ 116.50 Who must publish a public notice of an application?

This subpart applies whenever an OCC regulation requires an applicant (''you'') to follow the public notice procedures in this subpart.

§ 116.55 What information must I include in my public notice?

Your public notice must include the following:

(a) Your name and address.

(b) The type of application.

(c) The name of the depository institution(s) that is the subject matter of the application.

(d) A statement indicating that the public may submit comments to the appropriate OCC licensing office(s).

(e) The address of the appropriate OCC offices where the public may submit comments.

(f) The date that the comment period closes.

(g) A statement indicating that the nonconfidential portions of the application are on file with the OCC, and are available for public inspection during regular business hours.

(h) Any other information that the OCC requires you to publish.

§ 116.60 When must I publish the public notice?

You must publish a public notice of the application no earlier than seven days before and no later than the date of filing of the application.

§ 116.70 Where must I publish the public notice?

You must publish the notice in a newspaper having a general circulation in the communities indicated in the following chart:

If you file . . .	You must publish in the following communities . . .
(a) An application for permission to organize under § 143.2 of this chapter, a Bank Merger Act application under § 163.22(a) of this chapter, an application to convert to a Federal charter under § 143.8 or § 152.18 of this chapter, or an application for a mutual to stock conversion under part 192 of this chapter * * *.	The community in which your home office is located.
(b) An application to establish a branch office under § 145.95 of this chapter * * *.	The community to be served by the branch office.
(c) An application for the change of permanent location of a home or branch office under § 145.95 of this chapter * * *.	The community in which the existing office is located and the community to be served by the new office.
(d) A change of control notice under part 174 of this chapter * * *	The community in which the home office of the savings association whose stock is to be acquired is located and, if applicable, the community in which the home office of the acquiror's largest subsidiary savings association is located.

§ 116.80 What language must I use in my publication?

(a) *English.* You must publish the notice in a newspaper printed in the English language.

(b) *Other than English.* If the OCC determines that the primary language of a significant number of adult residents of the community is a language other than English, the OCC may require that you simultaneously publish additional notice(s) in the community in the appropriate language(s).

Subpart C—Comment Procedures

§ 116.100 What does this subpart do?

This subpart contains the procedures governing the submission of public comments on certain types of applications or notices (''applications'') pending before the OCC. It applies whenever a regulation incorporates the procedures in this subpart, or where otherwise required by the OCC.

§ 116.110 Who may submit a written comment?

Any person may submit a written comment supporting or opposing an application.

§ 116.120 What information should a comment include?

(a) A comment should recite relevant facts, including any demographic, economic, or financial data, supporting the commenter's position. A comment opposing an application should also:

(1) Address at least one of the reasons why the OCC may deny the application under the relevant statute or regulation;

(2) Recite any relevant facts and supporting data addressing these reasons; and

(3) Address how the approval of the application could harm the commenter or any community.

(b) A commenter must include any request for a meeting under § 116.170 in its comment. The commenter must describe the nature of the issues or facts to be discussed and the reasons why written submissions are insufficient to adequately address these facts or issues.

§ 116.130 Where are comments filed?

A commenter must file with the appropriate OCC licensing office (*see* § 116.40(a)(2)). The commenter must simultaneously send a copy of the comment to the applicant.

§ 116.140 How long is the comment period?

(a) *General.* Except as provided in paragraph (b) of this section, a commenter must file a written comment with the OCC within 30 calendar days after the date of publication of the initial public notice.

(b) *Late-filed comments.* The OCC may consider late-filed comments if the OCC determines that the comment will assist in the disposition of the application.

Subpart D—Meeting Procedures

§ 116.160 What does this subpart do?

This subpart contains meeting procedures. It applies whenever a regulation incorporates the procedures in this subpart, or when otherwise required by the OCC.

§ 116.170 When will the OCC conduct a meeting on an application?

(a) The OCC will grant a meeting request or conduct a meeting on its own initiative, if it finds that written submissions are insufficient to address facts or issues raised in an application, or otherwise determines that a meeting will benefit the decision-making process. The OCC may limit the issues considered at the meeting to issues that the OCC decides are relevant or material.

(b) The OCC will inform the applicant and all commenters requesting a meeting of its decision to grant or deny a meeting request, or of its decision to conduct a meeting on its own initiative.

(c) If the OCC decides to conduct a meeting, the OCC will invite the applicant and any commenters requesting a meeting and raising an issue that the OCC intends to consider at the meeting. The OCC may also invite other interested persons to attend. The OCC will inform the participants of the date, time, location, issues to be considered, and format for the meeting a reasonable time before the meeting.

§ 116.180 What procedures govern the conduct of the meeting?

(a) The OCC may conduct meetings in any format including, but not limited to, a telephone conference, a face-to-face meeting, or a more formal meeting.

(b) The Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Federal Rules of Evidence (28 U.S.C. Appendix), the Federal Rules of Civil Procedure (28 U.S.C. Rule 1 *et seq.*), the OCC Rules of Practice and Procedure in Adjudicatory Proceedings (12 CFR parts 19 and part

109) do not apply to meetings under this section.

§ 116.185 Will the OCC approve or disapprove an application at a meeting?

The OCC will not approve or deny an application at a meeting under this subpart.

§ 116.190 Will a meeting affect application processing time frames?

If the OCC decides to conduct a meeting, it may suspend applicable application processing time frames, including the time frames for deeming an application complete and the applicable approval time frames in subpart E of this part. If the OCC suspends applicable application processing time frames, the time period will resume when the OCC determines that a record has been developed that sufficiently supports a determination on the issues considered at the meeting.

Subpart E—OCC Review

Expedited Treatment

§ 116.200 If I file a notice under expedited treatment, when may I engage in the proposed activities?

If you are eligible for expedited treatment and you have appropriately filed your notice with the OCC, you may engage in the proposed activities upon the expiration of 30 days after the filing date of your notice, unless the OCC takes one of the following actions before the expiration of that time period:

(a) The OCC notifies you in writing that you must file additional information supplementing your notice. If you are required to file additional information, you may engage in the proposed activities upon the expiration of 30 calendar days after the date you file the additional information, unless the OCC takes one of the actions described in paragraphs (b) through (d) of this section before the expiration of that time period;

(b) The OCC notifies you in writing that your notice is subject to standard treatment under this subpart. The OCC will subject your notice to standard treatment if it raises a supervisory concern, raises a significant issue of law or policy, or requires significant additional information;

(c) The OCC notifies you in writing that it is suspending the applicable time frames under § 116.190; or

(d) The OCC notifies you that it disapproves your notice.

Standard Treatment

§ 116.210 What will the OCC do after I file my application?

(a) *OCC action.* Within 30 calendar days after the filing date of your application, the OCC will take one of the following actions:

If the OCC . . .	Then . . .
(1) Notifies you, in writing, that your application is complete * * *	The applicable review period will begin on the date that the OCC deems your application complete.
(2) Notifies you, in writing, that you must submit additional information to complete your application * * *.	You must submit the required additional information under § 116.220.
(3) Notifies you, in writing, that your application is materially deficient * * *.	The OCC will not process your application.
(4) Takes no action * * *	Your application is deemed complete. The applicable review period will begin on the day the 30-day time period expires.

(b) *Waiver requests.* If your application includes a request for waiver of an information requirement under § 116.25(b), and the OCC has not notified you that you must submit additional information under paragraph (a)(2) of this section, your request for waiver is granted.

§ 116.220 If the OCC requests additional information to complete my application, how will it process my application?

(a) You may use the following chart to determine the procedure that applies to your submission of additional information under § 116.210(a)(1):

If, within 30 calendar days after the date of the OCC's request for additional information . . .	Then, the OCC may . . .	And . . .
(1) You file a response to all information requests * * *.	(i) Notify you in writing within 15 days after the filing date of your response that your application is complete* * *.	The applicable review period will begin on the date that the OCC deems your application complete.
	(ii) Notify you in writing within 15 calendar days after the filing date of your response that you must submit additional information regarding matters derived from or prompted by information already furnished or any additional information necessary to resolve the issues presented in your application * * *.	You must respond to the additional information request within the time period required by the OCC. The OCC will review your response under the procedures described in this section.
	(iii) Notify you in writing within 15 calendar days after the filing date of your response that your application is materially deficient * * *.	The OCC will not process your application.
	(iv) Take no action within 15 calendar days after the filing date of your response * * *.	Your application is deemed complete. The applicable review period will begin on the day that the 15-day time period expires.
(2) You request an extension of time to file additional information * * *.	(i) Grant an extension, in writing, specifying the number of days for the extension * * *.	You must fully respond within the extended time period specified by the OCC. The OCC will review your response under the procedures described under this section.

If, within 30 calendar days after the date of the OCC's request for additional information . . .	Then, the OCC may . . .	And . . .
	(ii) Notify you in writing that your extension request is disapproved * * *.	The OCC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation.
(3) You fail to respond completely * * *	(i) Notify you in writing that your application is deemed withdrawn * * *.	The OCC will not process your application further. You may resubmit the application for processing as a new filing under the applicable regulation.
	(ii) Notify you, in writing, that your response is incomplete and extend the response period, specifying the number of days for the respond extension * * *.	You must fully respond within the extended time period specified by the OCC. The OCC will review your response under the procedures described under this section.

(b) The OCC may extend the 15-day period referenced in paragraph (a)(1) of this section by up to 15 calendar days, if the OCC requires the additional time to review your response. The OCC will notify you that it has extended the period before the end of the initial 15-day period and will briefly explain why the extension is necessary.

(c) If your response filed under paragraph (a)(1) of this section includes a request for a waiver of an informational requirement, your request for a waiver is granted if the OCC fails to act on it within 15 calendar days after the filing of your response, unless the OCC extends the review period under paragraph (b). If the OCC extends the review period under paragraph (b), your request is granted if the OCC fails to act on it by the end of the extended review period.

§ 116.230 Will the OCC conduct an eligibility examination?

(a) *Eligibility examination.* The OCC may notify you at any time before it deems your application complete that it will conduct an eligibility examination. If the OCC decides to conduct an eligibility examination, it will not deem your application complete until it concludes the examination.

(b) *Additional information.* The OCC may, as a result of the eligibility examination, notify you that you must submit additional information to complete your application. If so, you must respond to the additional information request within the time period required by the OCC. The OCC will review your response under the procedures described in § 116.220.

§ 116.240 What may the OCC require me to do after my application is deemed complete?

After your application is deemed complete, but before the end of the applicable review period,

(a) The OCC may require you to provide additional information if the information is necessary to resolve or clarify the issues presented by your application.

(b) The OCC may determine that a major issue of law or a change in circumstances arose after you filed your application, and that the issue or changed circumstances will substantially effect your application. If the OCC identifies such an issue or changed circumstances, it may:

(1) Notify you, in writing, that your application is now incomplete and require you to submit additional information to complete the application under the procedures described at § 116.220; and

(2) Require you to publish a new public notice of your application under § 116.250.

§ 116.250 Will the OCC require me to publish a new public notice?

(a) If your application was subject to a publication requirement, the OCC may require you to publish a new public notice of your application if:

(1) You submitted a revision to the application, you submitted new or additional information, or a major issue of law or a change in circumstances arose after the filing of your application; and

(2) The OCC determines that additional comment on these matters is appropriate because of the significance of the new information or circumstances.

(b) The OCC will notify you in writing if you must publish a new public notice of your revised application.

(c) If you are required to publish a new public notice of your revised application, you must notify the OCC after you publish the new public notice.

§ 116.260 May the OCC suspend processing of my application?

(a) *Suspension.* The OCC may, at any time, indefinitely suspend processing of your application if:

(1) The OCC, another governmental entity, or a self-regulatory trade or professional organization initiates an investigation, examination, or administrative proceeding that is relevant to the OCC's evaluation of your application;

(2) You request the suspension or there are other extraordinary circumstances that have a significant impact on the processing of your application.

(b) *Notice.* The OCC will promptly notify you, in writing, if it suspends your application.

§ 116.270 How long is the OCC review period?

(a) *General.* The applicable OCC review period is 60 calendar days after the date that your application is deemed complete, unless an applicable OCC regulation specifies a different review period.

(b) *Multiple applications.* If you submit more than one application in connection with a proposed action or if two or more applicants submit related applications, the applicable review period for all applications is the review period for the application with the longest review period, subject to statutory review periods.

(c) *Extensions.* (1) The OCC may extend the review period for up to 30 calendar days beyond the period described in paragraph (a) or (b) of this section. The OCC must notify you in writing of the extension and the duration of the extension. The OCC must issue the written extension before the end of the review period.

(2) The OCC may also extend the review period as needed until it acts on the application, if the application presents a significant issue of law or policy that requires additional time to resolve. The OCC must notify you in writing of the extension and the general reasons for the extension. The OCC must issue the written extension before the end of the review period, including any extension of that period under paragraph (c)(1) of this section. This section applies to notices filed under § 174 of this chapter.

§ 116.280 How will I know if my application has been approved?

(a) *OCC approval or denial.* (1) The OCC will approve or deny your application before the expiration of the applicable review period, including any extensions of the review period.

(2) The OCC will promptly notify you in writing of its decision to approve or deny your application.

(b) *No OCC action.* If the OCC fails to act under paragraph (a)(1) of this section, your application is approved.

§ 116.290 What will happen if the OCC does not approve or disapprove my application within two calendar years after the filing date?

If the OCC has not approved or denied your pending application within two calendar years after the filing date under § 116.45, the OCC will notify you, in writing, that your application is deemed withdrawn unless the OCC determines that you are actively pursuing a final OCC determination on your application. You are not actively pursuing a final OCC determination if you have failed to timely take an action required under this part, including filing required additional information, or the OCC has suspended processing of your application under § 116.260 based on circumstances that are, in whole or in part, within your control and you have failed to take reasonable steps to resolve these circumstances.

PART 128—NONDISCRIMINATION REQUIREMENTS

Sec.

128.1 Definitions.
128.2 Nondiscrimination in lending and other services.
128.3 Nondiscrimination in applications.
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128.11 Nondiscriminatory appraisal and underwriting.

Authority: 12 U.S.C. 1464, 5412(b)(2)(B).

§ 128.1 Definitions.

As used in this part 128—

(a) *Application.* For purposes of this part, an application for a loan or other service is as defined in Regulation C, 12 CFR 203.2(b).

(b) *Savings association.* The term ''savings association'' means any Federal savings association as defined in 12 U.S.C. 1813(b)(2).

(c) *Dwelling.* The term ''dwelling'' means a residential structure (whether or not it is attached to real property) located in a state of the United States of America, the District of Columbia, or the Commonwealth of Puerto Rico. The term includes an individual condominium unit, cooperative unit, or mobile or manufactured home.

§ 128.2 Nondiscrimination in lending and other services.

(a) No savings association may deny a loan or other service, or discriminate in the purchase of loans or securities or discriminate in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of such loan or other service on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract) or national origin of:

(1) An applicant or joint applicant;

(2) Any person associated with an applicant or joint applicant regarding such loan or other service, or with the purposes of such loan or other service;

(3) The present or prospective owners, lessees, tenants, or occupants of the dwelling(s) for which such loan or other service is to be made or given;

(4) The present or prospective owners, lessees, tenants, or occupants of other dwellings in the vicinity of the dwelling(s) for which such loan or other service is to be made or given.

(b) A savings association shall consider without prejudice the combined income of joint applicants for a loan or other service.

(c) No savings association may discriminate against an applicant for a loan or other service on any prohibited basis (as defined in 12 CFR 202.2(z) and 24 CFR part 100).

Note to § 128.2: *See also,* § 128.9(b) and (c).

§ 128.3 Nondiscrimination in applications.

(a) No savings association may discourage, or refuse to allow, receive, or consider, any application, request, or inquiry regarding a loan or other service, or discriminate in imposing conditions upon, or in processing, any such application, request, or inquiry on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), national origin, or other characteristics prohibited from consideration in § 128.2(c) of this part, of the prospective borrower or other person, who:

(1) Makes application for any such loan or other service;

(2) Requests forms or papers to be used to make application for any such loan or other service; or

(3) Inquires about the availability of such loan or other service.

(b) A savings association shall inform each inquirer of his or her right to file a written loan application, and to receive a copy of the association's underwriting standards.

Note § 128.3: *See also,* § 128.9(a) through (d).

§ 128.4 Nondiscriminatory advertising.

No savings association may directly or indirectly engage in any form of advertising that implies or suggests a policy of discrimination or exclusion in violation of title VIII of the Civil Rights Acts of 1968, the Equal Credit Opportunity Act, or this part 128. Advertisements for any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall include a facsimile of the following logotype and legend:

§ 128.5 Equal Housing Lender Poster.

(a) Each savings association shall post and maintain one or more Equal Housing Lender Posters, the text of which is prescribed in paragraph (b) of this section, in the lobby of each of its offices in a prominent place or places readily apparent to all persons seeking loans. The poster shall be at least 11 by 14 inches in size, and the text shall be easily legible. It is recommended that savings associations post a Spanish language version of the poster in offices serving areas with a substantial Spanish-speaking population.

(b) The text of the Equal Housing Lender Poster shall be as follows:

We Do Business In Accordance With Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

[____] Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or

[____] Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD:

SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410.

For processing under the Federal Fair Housing Act

AND TO:

[Insert contact information for appropriate Federal regulator]

For processing under applicable Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

[ ] On the basis of race, color, national origin, religion, sex, marital status, or age;

[ ] Because income is from public assistance; or

[ ] Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

[Insert contact information for appropriate Federal regulator]

§ 128.6 Loan application register.

Savings associations and other lenders required to file Home Mortgage Disclosure Act Loan Application Registers with the OCC in accordance with 12 CFR part 203 must enter the reason for denial, using the codes provided in 12 CFR part 203, with respect to all loan denials.

§ 128.7 Nondiscrimination in employment.

(a) No savings association shall, because of an individual's race, color, religion, sex, or national origin:

(1) Fail or refuse to hire such individual;

(2) Discharge such individual;

(3) Otherwise discriminate against such individual with respect to such individual's compensation, promotion, or the terms, conditions, or privileges of such individual's employment; or

(4) Discriminate in admission to, or employment in, any program of apprenticeship, training, or retraining, including on-the-job training.

(b) No savings association shall limit, segregate, or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of such individual's race, color, religion, sex, or national origin.

(c) No savings association shall discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, state, or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing of such practice by any lawfully constituted authority.

(d) No savings association shall print or publish or cause to be printed or published any notice or advertisement relating to employment by such savings association indicating any preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin.

(e) This regulation shall not apply in any case in which the Federal Equal Employment Opportunities law is made inapplicable by the provisions of section 2000e–1 or sections 2000e–2(e) through (j) of title 42, United States Code.

(f) Any violation of the following laws or regulations by a savings association shall be deemed to be a violation of this part 128:

(1) The Equal Employment Opportunity Act, as amended, 42 U.S.C. 2000e–2000h–2, and Equal Employment Opportunity Commission (EEOC) regulations at 29 CFR part 1600;

(2) The Age Discrimination in Employment Act, 29 U.S.C. 621–633, and EEOC and Department of Labor regulations;

(3) Office of Federal Contract Compliance Programs (OFCCP) regulations at 41 CFR part 60;

(4) The Veterans Employment and Readjustment Act of 1972, 38 U.S.C. 2011–2012, and the Vietnam Era Veterans Readjustment Adjustment Assistance Act of 1974, 38 U.S.C. 2021–2026;

(5) The Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.;* and

(6) The Immigration and Nationality Act, 8 U.S.C. 1324b, and INS regulations at 8 CFR part 274a.

§ 128.8 Complaints.

Complaints alleging violations of the Fair Housing Act by a savings association shall be referred to the Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Washington, DC 20410 for processing under the Fair Housing Act, and to the appropriate Federal regulator for processing under applicable regulations. Complaints regarding discrimination in employment by a savings association should be referred to the Equal Employment Opportunity Commission, Washington, DC 20506 and a copy, for information only, sent to the appropriate Federal regulator.

§ 128.9 Guidelines relating to nondiscrimination in lending.

(a) *General.* Fair housing and equal opportunity in home financing is a policy of the United States established by Federal statutes and Presidential orders and proclamations. In furtherance of the Federal civil rights laws and the economical home financing purposes of the statutes administered by the OCC, the OCC has adopted, in part 128 of this chapter, nondiscrimination regulations that, among other things, prohibit arbitrary refusals to consider loan applications on the basis of the age or location of a dwelling, and prohibit discrimination based on race, color, religion, sex, handicap, familial status (having one or more children under the age of 18), marital status, age (provided the person has the capacity to contract), or national origin in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures, or other terms or conditions of housing related loans. Such discrimination is also prohibited in the purchase of loans and securities. This section provides supplementary guidelines to aid savings associations in developing and implementing nondiscriminatory lending policies. Each savings association should reexamine its underwriting standards at least annually in order to ensure equal opportunity.

(b) *Loan underwriting standards.* The basic purpose of the nondiscrimination regulations is to require that every applicant be given an equal opportunity to obtain a loan. Each loan applicant's creditworthiness should be evaluated on an individual basis without reference to presumed characteristics of a group. The use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory

effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.

(c) *Discriminatory practices—(1) Discrimination on the basis of sex or marital status.* The Civil Rights Act of 1968 and the National Housing Act prohibit discrimination in lending on the basis of sex. The Equal Credit Opportunity Act, in addition to this prohibition, forbids discrimination on the basis of marital status. Refusing to lend to, requiring higher standards of creditworthiness of, or imposing different requirements on, members of one sex or individuals of one marital status, is discrimination based on sex or marital status. Loan underwriting decisions must be based on an applicant's credit history and present and reasonably foreseeable economic prospects, rather than on the basis of assumptions regarding comparative differences in creditworthiness between married and unmarried individuals, or between men and women.

(2) *Discrimination on the basis of language.* Requiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin.

(3) *Income of husbands and wives.* A practice of discounting all or part of either spouse's income where spouses apply jointly is a violation of section 527 of the National Housing Act. As with other income, when spouses apply jointly for a loan, the determination as to whether a spouse's income qualifies for credit purposes should depend upon a reasonable evaluation of his or her past, present, and reasonably foreseeable economic circumstances. Information relating to child-bearing intentions of a couple or an individual may not be requested.

(4) *Supplementary income.* Lending standards which consider as effective only the non-overtime income of the primary wage-earner may result in discrimination because they do not take account of variations in employment patterns among individuals and families. The favored method of loan underwriting reasonably evaluates the credit worthiness of each applicant based on a realistic appraisal of his or her own past, present, and foreseeable economic circumstances. The determination as to whether primary income or additional income qualifies as effective for credit purposes should depend upon whether such income may reasonably be expected to continue through the early period of the mortgage risk. Automatically discounting other income from bonuses, overtime, or part-time employment, will cause some applicants to be denied financing without a realistic analysis of their credit worthiness. Since statistics show that minority group members and low- and moderate-income families rely more often on such supplemental income, the practice may be racially discriminatory in effect, as well as artificially restrictive of opportunities for home financing.

(5) *Applicant's prior history.* Loan decisions should be based upon a realistic evaluation of all pertinent factors respecting an individual's creditworthiness, without giving undue weight to any one factor. The savings association should, among other things, take into consideration that:

(i) In some instances, past credit difficulties may have resulted from discriminatory practices;

(ii) A policy favoring applicants who previously owned homes may perpetuate prior discrimination;

(iii) A current, stable earnings record may be the most reliable indicator of credit-worthiness, and entitled to more weight than factors such as educational level attained;

(iv) Job or residential changes may indicate upward mobility; and

(v) Preferring applicants who have done business with the lender can perpetuate previous discriminatory policies.

(6) *Income level or racial composition of area.* Refusing to lend or lending on less favorable terms in particular areas because of their racial composition is unlawful. Refusing to lend, or offering less favorable terms (such as interest rate, downpayment, or maturity) to applicants because of the income level in an area can discriminate against minority group persons.

(7) *Age and location factors.* Sections 128.2, 128.11, and 128.3 of this chapter prohibit loan denials based upon the age or location of a dwelling. These restrictions are intended to prohibit use of unfounded or unsubstantiated assumptions regarding the effect upon loan risk of the age of a dwelling or the physical or economic characteristics of an area. Loan decisions should be based on the present market value of the property offered as security (including consideration of specific improvements to be made by the borrower) and the likelihood that the property will retain an adequate value over the term of the loan. Specific factors which may negatively affect its short-range future value (up to 3–5 years) should be clearly documented. Factors which in some cases may cause the market value of a property to decline are recent zoning changes or a significant number of abandoned homes in the immediate vicinity of the property. However, not all zoning changes will cause a decline in property values, and proximity to abandoned buildings may not affect the market value of a property because of rehabilitation programs or affirmative lending programs, or because the cause of abandonment is unrelated to high risk. Proper underwriting considerations include the condition and utility of the improvements, and various physical factors such as street conditions, amenities such as parks and recreation areas, availability of public utilities and municipal services, and exposure to flooding and land faults. However, arbitrary decisions based on age or location are prohibited, since many older, soundly constructed homes provide housing opportunities which may be precluded by an arbitrary lending policy.

(8) *Fair Housing Act (title VIII, Civil Rights Act of 1968, as amended).* Savings associations must comply with all regulations promulgated by the Department of Housing and Urban Development to implement the Fair Housing Act, found at 24 CFR parts 100 through 125, except that they shall use the Equal Housing Lender logo and poster prescribed by OCC regulations at 12 CFR 128.4 and 128.5 rather than the Equal Housing Opportunity logo and poster required by 24 CFR part 110.

(d) *Marketing practices.* Savings associations should review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. Discrimination in lending is not limited to loan decisions and underwriting standards; a savings association does not meet its obligations to the community or implement its equal lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to segments of the community. A review of marketing practices could begin with an examination of an association's loan portfolio and applications to ascertain whether, in view of the demographic characteristics and credit demands of the community in which the institution is located, it is adequately serving the community on a nondiscriminatory basis. The OCC will systematically review marketing practices where evidence of discrimination in lending is discovered.

§ 128.10 Supplementary guidelines.

The policy statement found at 12 CFR 128.9 supplements this part and should be read together with this part. Refer

also to the HUD Fair Housing regulations at 24 CFR parts 100 through 125, Federal Reserve Regulation B at 12 CFR part 202, and Federal Reserve Regulation C at 12 CFR part 203.

§ 128.11 Nondiscriminatory appraisal and underwriting.

(a) *Appraisal.* No savings association may use or rely upon an appraisal of a dwelling which the savings association knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory per se or in effect under the Fair Housing Act of 1968 or the Equal Credit Opportunity Act.

(b) *Underwriting.* Each savings association shall have clearly written, non-discriminatory loan underwriting standards, available to the public upon request, at each of its offices. Each association shall, at least annually, review its standards, and business practices implementing them, to ensure equal opportunity in lending.

Note to § 128.11: *See also,* § 128.9(b), (c)(6), and (c)(7).

PART 133—DISCLOSURE AND REPORTING OF CRA-RELATED AGREEMENTS

Sec.

133.1 Purpose and scope of this part.
133.2 Definition of covered agreement.
133.3 CRA communications.
133.4 Fulfillment of the CRA.
133.5 Related agreements considered a single agreement.
133.6 Disclosure of covered agreements.
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133.9 Compliance provisions.
133.10 [Reserved]
133.11 Other definitions and rules of construction used in this part.

Authority: 12 U.S.C. 1462a, 1463, 1464, 1831y and 5412(b)(2)(B).

§ 133.1 Purpose and scope of this part.

(a) *General.* This part implements section 711 of the Gramm-Leach-Bliley Act (12 U.S.C. 1831y). That section requires any nongovernmental entity or person (NGEP), insured depository institution, or affiliate of an insured depository institution that enters into a covered agreement to—

(1) Make the covered agreement available to the public and the appropriate Federal banking agency; and

(2) File an annual report with the appropriate Federal banking agency concerning the covered agreement.

(b) *Scope of this part.* The provisions of this part apply to—

(1) Federal savings associations and their subsidiaries;

(2) [Reserved]

(3) Affiliates of Federal savings associations; and

(4) NGEPs that enter into covered agreements with any company listed in paragraphs (b)(1) and (b)(2) of this section.

(c) *Relation to Community Reinvestment Act.* This part does not affect in any way the Community Reinvestment Act of 1977 (CRA) (12 U.S.C. 2901 *et seq.*), the OCC's Community Reinvestment rule at 12 CFR part 195, or the OCC's interpretations or administration of the CRA or Community Reinvestment rule.

(d) *Examples.* (1) The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

(2) Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issues that may arise in this part.

§ 133.2 Definition of covered agreement.

(a) *General definition of covered agreement.* A covered agreement is any contract, arrangement, or understanding that meets all of the following criteria—

(1) The agreement is in writing.

(2) The parties to the agreement include—

(i) One or more insured depository institutions or affiliates of an insured depository institution; and

(ii) One or more NGEPs.

(3) The agreement provides for the insured depository institution or any affiliate to—

(i) Provide to one or more individuals or entities (whether or not parties to the agreement) cash payments, grants, or other consideration (except loans) that have an aggregate value of more than $10,000 in any calendar year; or

(ii) Make to one or more individuals or entities (whether or not parties to the agreement) loans that have an aggregate principal amount of more than $50,000 in any calendar year.

(4) The agreement is made pursuant to, or in connection with, the fulfillment of the CRA, as defined in § 133.4 of this part.

(5) The agreement is with a NGEP that has had a CRA communication as described in § 133.3 of this part prior to entering into the agreement.

(b) *Examples concerning written arrangements or understandings*—(1) *Example 1.* A NGEP meets with an insured depository institution and states that the institution needs to make more community development investments in the NGEP's community. The NGEP and insured depository institution do not reach an agreement concerning the community development investments the institution should make in the community, and the parties do not reach any mutual arrangement or understanding. Two weeks later, the institution unilaterally issues a press release announcing that it has established a general goal of making $100 million of community development grants in low- and moderate-income neighborhoods served by the insured depository institution over the next 5 years. The NGEP is not identified in the press release. The press release is not a written arrangement or understanding.

(2) *Example 2.* A NGEP meets with an insured depository institution and states that the institution needs to offer new loan programs in the NGEP's community. The NGEP and the insured depository institution reach a mutual arrangement or understanding that the institution will provide additional loans in the NGEP's community. The institution tells the NGEP that it will issue a press release announcing the program. Later, the insured depository institution issues a press release announcing the loan program. The press release incorporates the key terms of the understanding reached between the NGEP and the insured depository institution. The written press release reflects the mutual arrangement or understanding of the NGEP and the insured depository institution and is, therefore, a written arrangement or understanding.

(3) *Example 3.* An NGEP sends a letter to an insured depository institution requesting that the institution provide a $15,000 grant to the NGEP. The insured depository institution responds in writing and agrees to provide the grant in connection with its annual grant program. The exchange of letters constitutes a written arrangement or understanding.

(c) *Loan agreements that are not covered agreements.* A covered agreement does not include—

(1) Any individual loan that is secured by real estate; or

(2) Any specific contract or commitment for a loan or extension of credit to an individual, business, farm, or other entity, or group of such individuals or entities, if—

(i) The funds are loaned at rates that are not substantially below market rates; and

(ii) The loan application or other loan documentation does not indicate that the borrower intends or is authorized to use the borrowed funds to make a loan or extension of credit to one or more third parties.

(d) *Examples concerning loan agreements*—(1) *Example 1.* An insured depository institution provides an organization with a $1 million loan that is documented in writing and is secured by real estate owned or to-be-acquired by the organization. The agreement is an individual mortgage loan and is exempt from coverage under paragraph (c)(1) of this section, regardless of the interest rate on the loan or whether the organization intends or is authorized to re-loan the funds to a third party.

(2) *Example 2.* An insured depository institution commits to provide a $500,000 line of credit to a small business that is documented by a written agreement. The loan is made at rates that are within the range of rates offered by the institution to similarly situated small businesses in the market and the loan documentation does not indicate that the small business intends or is authorized to re-lend the borrowed funds. The agreement is exempt from coverage under paragraph (c)(2) of this section.

(3) *Example 3.* An insured depository institution offers small business loans that are guaranteed by the Small Business Administration (SBA). A small business obtains a $75,000 loan, documented in writing, from the institution under the institution's SBA loan program. The loan documentation does not indicate that the borrower intends or is authorized to re-lend the funds. Although the rate charged on the loan is well below that charged by the institution on commercial loans, the rate is within the range of rates that the institution would charge a similarly situated small business for a similar loan under the SBA loan program. Accordingly, the loan is not made at substantially below market rates and is exempt from coverage under paragraph (c)(2) of this section.

(4) *Example 4.* A bank holding company enters into a written agreement with a community development organization that provides that insured depository institutions owned by the bank holding company will make $250 million in small business loans in the community over the next 5 years. The written agreement is not a specific contract or commitment for a loan or an extension of credit and, thus, is not exempt from coverage under paragraph (c)(2) of this section. Each small business loan made by the insured depository institution pursuant to this general commitment would, however, be exempt from coverage if the loan is made at rates that are not substantially below market rates and the loan documentation does not indicate that the borrower intended or was authorized to re-lend the funds.

(e) *Agreements that include exempt loan agreements.* If an agreement includes a loan, extension of credit or loan commitment that, if documented separately, would be exempt under paragraph (c) of this section, the exempt loan, extension of credit or loan commitment may be excluded for purposes of determining whether the agreement is a covered agreement.

(f) *Determining annual value of agreements that lack schedule of disbursements.* For purposes of paragraph (a)(3) of this section, a multi-year agreement that does not include a schedule for the disbursement of payments, grants, loans or other consideration by the insured depository institution or affiliate, is considered to have a value in the first year of the agreement equal to all payments, grants, loans and other consideration to be provided at any time under the agreement.

§ 133.3 CRA communications.

(a) *Definition of CRA communication.* A CRA communication is any of the following—

(1) Any written or oral comment or testimony provided to a Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(2) Any written comment submitted to the insured depository institution that discusses the adequacy of the performance under the CRA of the institution and must be included in the institution's CRA public file.

(3) Any discussion or other contact with the insured depository institution or any affiliate about—

(i) Providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate;

(ii) Providing (or refraining from providing) written comments to the insured depository institution that concern the adequacy of the institution's performance under the CRA and must be included in the institution's CRA public file; or

(iii) The adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

(b) *Discussions or contacts that are not CRA communications*—(1) *Timing of contacts with a Federal banking agency.* An oral or written communication with a Federal banking agency is not a CRA communication if it occurred more than 3 years before the parties entered into the agreement.

(2) *Timing of contacts with insured depository institutions and affiliates.* A communication with an insured depository institution or affiliate is not a CRA communication if the communication occurred—

(i) More than 3 years before the parties entered into the agreement, in the case of any written communication;

(ii) More than 3 years before the parties entered into the agreement, in the case of any oral communication in which the NGEP discusses providing (or refraining from providing) comments or testimony to a Federal banking agency or written comments that must be included in the institution's CRA public file in connection with a request to, or agreement by, the institution or affiliate to take (or refrain from taking) any action that is in fulfillment of the CRA; or

(iii) More than 1 year before the parties entered into the agreement, in the case of any other oral communication not described in paragraph (b)(2)(ii).

(3) *Knowledge of communication by insured depository institution or affiliate.* (i) A communication is only a CRA communication under paragraph (a) of this section if the insured depository institution or its affiliate has knowledge of the communication under paragraph (b)(3)(ii) or (b)(3)(iii) of this section.

(ii) *Communication with insured depository institution or affiliate.* An insured depository institution or affiliate has knowledge of a communication by the NGEP to the institution or its affiliate under this paragraph only if one of the following representatives of the insured depository institution or any affiliate has knowledge of the communication—

(A) An employee who approves, directs, authorizes, or negotiates the agreement with the NGEP; or

(B) An employee designated with responsibility for compliance with the CRA or executive officer if the employee or executive officer knows that the institution or affiliate is negotiating, intends to negotiate, or has been informed by the NGEP that it expects to request that the institution or affiliate negotiate an agreement with the NGEP.

(iii) *Other communications.* An insured depository institution or affiliate is deemed to have knowledge of—

(A) Any testimony provided to a Federal banking agency at a public meeting or hearing;

(B) Any comment submitted to a Federal banking agency that is conveyed in writing by the agency to the insured depository institution or affiliate; and

(C) Any written comment submitted to the insured depository institution that must be and is included in the institution's CRA public file.

(4) *Communication where NGEP has knowledge.* A NGEP has a CRA communication with an insured depository institution or affiliate only if any of the following individuals has knowledge of the communication—

(i) A director, employee, or member of the NGEP who approves, directs, authorizes, or negotiates the agreement with the insured depository institution or affiliate;

(ii) A person who functions as an executive officer of the NGEP and who knows that the NGEP is negotiating or intends to negotiate an agreement with the insured depository institution or affiliate; or

(iii) Where the NGEP is an individual, the NGEP.

(c) *Examples of CRA communications*—(1) *Examples of actions that are CRA communications.* The following are examples of CRA communications. These examples are not exclusive and assume that the communication occurs within the relevant time period as described in paragraph (b)(1) or (b)(2) of this section and the appropriate representatives have knowledge of the communication as specified in paragraphs (b)(3) and (b)(4) of this section.

(i) *Example 1.* A NGEP files a written comment with a Federal banking agency that states than an insured depository institution successfully addresses the credit needs of its community. The written comment is in response to a general request from the agency for comments on an application of the insured depository institution to open a new branch and a copy of the comment is provided to the institution.

(ii) *Example 2.* A NGEP meets with an executive officer of an insured depository institution and states that the institution must improve its CRA performance.

(iii) *Example 3.* A NGEP meets with an executive officer of an insured depository institution and states that the institution needs to make more mortgage loans in low- and moderate-income neighborhoods in its community.

(iv) *Example 4.* A bank holding company files an application with a Federal banking agency to acquire an insured depository institution. Two weeks later, the NGEP meets with an executive officer of the bank holding company to discuss the adequacy of the performance under the CRA of the target insured depository institution. The insured depository institution was an affiliate of the bank holding company at the time the NGEP met with the target institution. (*see* § 133.11(a) of this part.) Accordingly, the NGEP had a CRA communication with an affiliate of the bank holding company.

(2) *Examples of actions that are not CRA communications.* The following are examples of actions that are not by themselves CRA communications. These examples are not exclusive.

(i) *Example 1.* A NGEP provides to a Federal banking agency comments or testimony concerning an insured depository institution or affiliate in response to a direct request by the agency for comments or testimony from that NGEP. Direct requests for comments or testimony do not include a general invitation by a Federal banking agency for comments or testimony from the public in connection with a CRA performance evaluation of, or application for a deposit facility (as defined in section 803 of the CRA (12 U.S.C. 2902(3)) by, an insured depository institution or an application by a company to acquire an insured depository institution.

(ii) *Example 2.* A NGEP makes a statement concerning an insured depository institution or affiliate at a widely attended conference or seminar regarding a general topic. A public or private meeting, public hearing, or other meeting regarding one or more specific institutions, affiliates or transactions involving an application for a deposit facility is not considered a widely attended conference or seminar.

(iii) *Example 3.* A NGEP, such as a civil rights group, community group providing housing and other services in low- and moderate-income neighborhoods, veterans organization, community theater group, or youth organization, sends a fundraising letter to insured depository institutions and to other businesses in its community. The letter encourages all businesses in the community to meet their obligation to assist in making the local community a better place to live and work by supporting the fundraising efforts of the NGEP.

(iv) *Example 4.* A NGEP discusses with an insured depository institution or affiliate whether particular loans, services, investments, community development activities, or other activities are generally eligible for consideration by a Federal banking agency under the CRA. The NGEP and insured depository institution or affiliate do not discuss the adequacy of the CRA performance of the insured depository institution or affiliate.

(v) *Example 5.* A NGEP engaged in the sale or purchase of loans in the secondary market sends a general offering circular to financial institutions offering to sell or purchase a portfolio of loans. An insured depository institution that receives the offering circular discusses with the NGEP the types of loans included in the loan pool, whether such loans are generally eligible for consideration under the CRA, and which loans are made to borrowers in the institution's local community. The NGEP and insured depository institution do not discuss the adequacy of the institution's CRA performance.

(d) *Multiparty covered agreements.* (1) A NGEP that is a party to a covered agreement that involves multiple NGEPs is not required to comply with the requirements of this part if—

(i) The NGEP has not had a CRA communication; and

(ii) No representative of the NGEP identified in paragraph (b)(4) of this section has knowledge at the time of the agreement that another NGEP that is a party to the agreement has had a CRA communication.

(2) An insured depository institution or affiliate that is a party to a covered agreement that involves multiple insured depository institutions or affiliates is not required to comply with the requirements in §§ 133.6 and 133.7 if—

(i) No NGEP that is a party to the agreement has had a CRA communication concerning the insured depository institution or any affiliate; and

(ii) No representative of the insured depository institution or any affiliate identified in paragraph (b)(3) of this section has knowledge at the time of the agreement that an NGEP that is a party to the agreement has had a CRA communication concerning any other insured depository institution or affiliate that is a party to the agreement.

§ 133.4 Fulfillment of the CRA.

(a) *List of factors that are in fulfillment of the CRA.* Fulfillment of the CRA, for purposes of this part, means the following list of factors—

(1) *Comments to a Federal banking agency or included in CRA public file.* Providing or refraining from providing written or oral comments or testimony to any Federal banking agency concerning the performance under the CRA of an insured depository

institution or CRA affiliate that is a party to the agreement or an affiliate of a party to the agreement or written comments that are required to be included in the CRA public file of any such insured depository institution; or

(2) *Activities given favorable CRA consideration.* Performing any of the following activities if the activity is of the type that is likely to receive favorable consideration by a Federal banking agency in evaluating the performance under the CRA of the insured depository institution that is a party to the agreement or an affiliate of a party to the agreement—

(i) Home-purchase, home-improvement, small business, small farm, community development, and consumer lending, as described in § 195.22 of this chapter, including loan purchases, loan commitments, and letters of credit;

(ii) Making investments, deposits, or grants, or acquiring membership shares, that have as their primary purpose community development, as described in § 195.23 of this chapter;

(iii) Delivering retail banking services, as described in § 195.24(d) of this chapter;

(iv) Providing community development services, as described in § 195.24(e) of this chapter;

(v) In the case of a wholesale or limited-purpose insured depository institution, community development lending, including originating and purchasing loans and making loan commitments and letters of credit, making qualified investments, or providing community development services, as described in § 195.25(c) of this chapter;

(vi) In the case of a small insured depository institution, any lending or other activity described in § 195.26(a) of this chapter; or

(vii) In the case of an insured depository institution that is evaluated on the basis of a strategic plan, any element of the strategic plan, as described in § 195.27(f) of this chapter.

(b) *Agreements relating to activities of CRA affiliates.* An insured depository institution or affiliate that is a party to a covered agreement that concerns any activity described in paragraph (a) of this section of a CRA affiliate must, prior to the time the agreement is entered into, notify each NGEP that is a party to the agreement that the agreement concerns a CRA affiliate.

§ 133.5 Related agreements considered a single agreement.

The following rules must be applied in determining whether an agreement is a covered agreement under § 133.2 of this part.

(a) *Agreements entered into by same parties.* All written agreements to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement if the agreements—

(1) Are entered into with the same NGEP;

(2) Were entered into within the same 12-month period; and

(3) Are each in fulfillment of the CRA.

(b) *Substantively related contracts.* All written contracts to which an insured depository institution or an affiliate of the insured depository institution is a party shall be considered to be a single agreement, without regard to whether the other parties to the contracts are the same or whether each such contract is in fulfillment of the CRA, if the contracts were negotiated in a coordinated fashion and a NGEP is a party to each contract.

§ 133.6 Disclosure of covered agreements.

(a) *Applicability date.* This section applies only to covered agreements entered into after November 12, 1999.

(b) *Disclosure of covered agreements to the public*—(1) *Disclosure required.* Each NGEP and each insured depository institution or affiliate that enters into a covered agreement must make a copy of the covered agreement available to any individual or entity upon request.

(2) *Nondisclosure of confidential and proprietary information permitted.* In responding to a request for a covered agreement from any individual or entity under paragraph (b)(1) of this section, a NGEP, insured depository institution, or affiliate may withhold from public disclosure confidential or proprietary information that the party believes the relevant supervisory agency could withhold from disclosure under the Freedom of Information Act (5 U.S.C. 552 *et seq.*) (FOIA).

(3) *Information that must be disclosed.* Notwithstanding paragraph (b)(2) of this section, a party must disclose any of the following information that is contained in a covered agreement—

(i) The names and addresses of the parties to the agreement;

(ii) The amount of any payments, fees, loans, or other consideration to be made or provided by any party to the agreement;

(iii) Any description of how the funds or other resources provided under the agreement are to be used;

(iv) The term of the agreement (if the agreement establishes a term); and

(v) Any other information that the relevant supervisory agency determines is not properly exempt from public disclosure.

(4) *Request for review of withheld information.* Any individual or entity may request that the relevant supervisory agency review whether any information in a covered agreement withheld by a party must be disclosed. Any requests for agency review of withheld information must be filed, and will be processed in accordance with, the relevant supervisory agency's rules concerning the availability of information (*see* subpart B of part 4 of this chapter).

(5) *Duration of obligation.* The obligation to disclose a covered agreement to the public terminates 12 months after the end of the term of the agreement.

(6) *Reasonable copy and mailing fees.* Each NGEP and each insured depository institution or affiliate may charge an individual or entity that requests a copy of a covered agreement a reasonable fee not to exceed the cost of copying and mailing the agreement.

(7) *Use of CRA public file by insured depository institution or affiliate.* An insured depository institution and any affiliate of an insured depository institution may fulfill its obligation under this paragraph (b) by placing a copy of the covered agreement in the insured depository institution's CRA public file if the institution makes the agreement available in accordance with the procedures set forth in § 195.43 of this chapter.

(c) *Disclosure by NGEPs of covered agreements to the relevant supervisory agency.* (1) Each NGEP that is a party to a covered agreement must provide the following within 30 days of receiving a request from the relevant supervisory agency—

(i) A complete copy of the agreement; and

(ii) In the event the NGEP proposes the withholding of any information contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information and an explanation justifying the exclusions. Any public version must include the information described in paragraph (b)(3) of this section.

(2) The obligation to provide a covered agreement to the relevant supervisory agency terminates 12 months after the end of the term of the covered agreement.

(d) *Disclosure by insured depository institution or affiliate of covered agreements to the relevant supervisory agency—(1) In general.* Within 60 days of the end of each calendar quarter, each

insured depository institution and affiliate must provide each relevant supervisory agency with—

(i)(A) A complete copy of each covered agreement entered into by the insured depository institution or affiliate during the calendar quarter; and

(B) In the event the institution or affiliate proposes the withholding of any information contained in the agreement in accordance with paragraph (b)(2) of this section, a public version of the agreement that excludes such information (other than any information described in paragraph (b)(3) of this section) and an explanation justifying the exclusions; or

(ii) A list of all covered agreements entered into by the insured depository institution or affiliate during the calendar quarter that contains—

(A) The name and address of each insured depository institution or affiliate that is a party to the agreement;

(B) The name and address of each NGEP that is a party to the agreement;

(C) The date the agreement was entered into;

(D) The estimated total value of all payments, fees, loans and other consideration to be provided by the institution or any affiliate of the institution under the agreement; and

(E) The date the agreement terminates.

(2) *Prompt filing of covered agreements contained in list required.* (i) If an insured depository institution or affiliate files a list of the covered agreements entered into by the institution or affiliate pursuant to paragraph (d)(1)(ii) of this section, the institution or affiliate must provide any relevant supervisory agency a complete copy and public version of any covered agreement referenced in the list within 7 calendar days of receiving a request from the agency for a copy of the agreement.

(ii) The obligation of an insured depository institution or affiliate to provide a covered agreement to the relevant supervisory agency under this paragraph (d)(2) terminates 36 months after the end of the term of the covered agreement.

(3) *Joint filings.* In the event that 2 or more insured depository institutions or affiliates are parties to a covered agreement, the insured depository institution(s) and affiliate(s) may jointly file the documents required by this paragraph (d) of this section. Any joint filing must identify the insured depository institution(s) and affiliate(s) for whom the filings are being made.

§ 133.7 Annual reports.

(a) *Applicability date.* This section applies only to covered agreements entered into on or after May 12, 2000.

(b) *Annual report required.* Each NGEP and each insured depository institution or affiliate that is a party to a covered agreement must file an annual report with each relevant supervisory agency concerning the disbursement, receipt, and uses of funds or other resources under the covered agreement.

(c) *Duration of reporting requirement*—(1) *NGEPs.* A NGEP must file an annual report for a covered agreement for any fiscal year in which the NGEP receives or uses funds or other resources under the agreement.

(2) *Insured depository institutions and affiliates.* An insured depository institution or affiliate must file an annual report for a covered agreement for any fiscal year in which the institution or affiliate—

(i) Provides or receives any payments, fees, or loans under the covered agreement that must be reported under paragraphs (e)(1)(iii) and (e)(1)(iv) of this section; or

(ii) Has data to report on loans, investments, and services provided by a party to the covered agreement under the covered agreement under paragraph (e)(1)(vi) of this section.

(d) *Annual reports filed by NGEP*—(1) *Contents of report.* The annual report filed by a NGEP under this section must include the following—

(i) The name and mailing address of the NGEP filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The amount of funds or resources received under the covered agreement during the fiscal year; and

(iv) A detailed, itemized list of how the funds or resources received by the NGEP under the covered agreement were used during the fiscal year, including the total amount used for—

(A) Compensation of officers, directors, and employees;

(B) Administrative expenses;

(C) Travel expenses;

(D) Entertainment expenses;

(E) Payment of consulting and professional fees; and

(F) Other expenses and uses (specify expense or use).

(2) *More detailed reporting of uses of funds or resources permitted*—(i) *In general.* If a NGEP allocated and used funds received under a covered agreement for a specific purpose, the NGEP may fulfill the requirements of paragraph (d)(1)(iv) of this section with respect to such funds by providing—

(A) A brief description of each specific purpose for which the funds or other resources were used; and

(B) The amount of funds or resources used during the fiscal year for each specific purpose.

(ii) *Specific purpose defined.* A NGEP allocates and uses funds for a specific purpose if the NGEP receives and uses the funds for a purpose that is more specific and limited than the categories listed in paragraph (d)(1)(iv) of this section.

(3) *Use of other reports.* The annual report filed by a NGEP may consist of or incorporate a report prepared for any other purpose, such as the Internal Revenue Service Return of Organization Exempt From Income Tax on Form 990, or any other Internal Revenue Service form, state tax form, report to members or shareholders, audited or unaudited financial statements, audit report, or other report, so long as the annual report filed by the NGEP contains all of the information required by this paragraph (d).

(4) *Consolidated reports permitted.* A NGEP that is a party to 2 or more covered agreements may file with each relevant supervisory agency a single consolidated annual report covering all the covered agreements. Any consolidated report must contain all the information required by this paragraph (d). The information reported under paragraphs (d)(1)(iv) and (d)(2) of this section may be reported on an aggregate basis for all covered agreements.

(5) *Examples of annual report requirements for NGEPs*—(i) *Example 1.* A NGEP receives an unrestricted grant of $15,000 under a covered agreement, includes the funds in its general operating budget and uses the funds during its fiscal year. The NGEP's annual report for the fiscal year must provide the name and mailing address of the NGEP, information sufficient to identify the covered agreement, and state that the NGEP received $15,000 during the fiscal year. The report must also indicate the total expenditures made by the NGEP during the fiscal year for compensation, administrative expenses, travel expenses, entertainment expenses, consulting and professional fees, and other expenses and uses. The NGEP's annual report may provide this information by submitting an Internal Revenue Service Form 990 that includes the required information. If the Internal Revenue Service Form does not include information for all of the required categories listed in this part, the NGEP

must report the total expenditures in the remaining categories either by providing that information directly or by providing another form or report that includes the required information.

(ii) *Example 2.* An organization receives $15,000 from an insured depository institution under a covered agreement and allocates and uses the $15,000 during the fiscal year to purchase computer equipment to support its functions. The organization's annual report must include the name and address of the organization, information sufficient to identify the agreement, and a statement that the organization received $15,000 during the year. In addition, since the organization allocated and used the funds for a specific purpose that is more narrow and limited than the categories of expenses included in the detailed, itemized list of expenses, the organization would have the option of providing either the total amount it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section, or a statement that it used the $15,000 to purchase computer equipment and a brief description of the equipment purchased.

(iii) *Example 3.* A community group receives $50,000 from an insured depository institution under a covered agreement. During its fiscal year, the community group specifically allocates and uses $5,000 of the funds to pay for a particular business trip and uses the remaining $45,000 for general operating expenses. The group's annual report for the fiscal year must include the name and address of the group, information sufficient to identify the agreement, and a statement that the group received $50,000. Because the group did not allocate and use all of the funds for a specific purpose, the group's annual report must provide the total amount of funds it used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section. The group's annual report also could state that it used $5,000 for a particular business trip and include a brief description of the trip.

(iv) *Example 4.* A community development organization is a party to two separate covered agreements with two unaffiliated insured depository institutions. Under each agreement, the organization receives $15,000 during its fiscal year and uses the funds to support its activities during that year. If the organization elects to file a consolidated annual report, the consolidated report must identify the organization and the two covered agreements, state that the organization received $15,000 during the fiscal year under each agreement, and provide the total amount that the organization used during the year for each category of expenses included in paragraph (d)(1)(iv) of this section.

(e) *Annual report filed by insured depository institution or affiliate*—(1) *General.* The annual report filed by an insured depository institution or affiliate must include the following—

(i) The name and principal place of business of the insured depository institution or affiliate filing the report;

(ii) Information sufficient to identify the covered agreement for which the annual report is being filed, such as by providing the names of the parties to the agreement and the date the agreement was entered into or by providing a copy of the agreement;

(iii) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans provided by the insured depository institution or affiliate under the covered agreement to any other party to the agreement during the fiscal year;

(iv) The aggregate amount of payments, aggregate amount of fees, and aggregate amount of loans received by the insured depository institution or affiliate under the covered agreement from any other party to the agreement during the fiscal year;

(v) A general description of the terms and conditions of any payments, fees, or loans reported under paragraphs (e)(1)(iii) and (e)(1)(iv) of this section, or, in the event such terms and conditions are set forth—

(A) In the covered agreement, a statement identifying the covered agreement and the date the agreement (or a list identifying the agreement) was filed with the relevant supervisory agency; or

(B) In a previous annual report filed by the insured depository institution or affiliate, a statement identifying the date the report was filed with the relevant supervisory agency; and

(vi) The aggregate amount and number of loans, aggregate amount and number of investments, and aggregate amount of services provided under the covered agreement to any individual or entity not a party to the agreement—

(A) By the insured depository institution or affiliate during its fiscal year; and

(B) By any other party to the agreement, unless such information is not known to the insured depository institution or affiliate filing the report or such information is or will be contained in the annual report filed by another party under this section.

(2) *Consolidated reports permitted*—(i) *Party to multiple agreements.* An insured depository institution or affiliate that is a party to 2 or more covered agreements may file a single consolidated annual report with each relevant supervisory agency concerning all the covered agreements.

(ii) *Affiliated entities party to the same agreement.* An insured depository institution and its affiliates that are parties to the same covered agreement may file a single consolidated annual report relating to the agreement with each relevant supervisory agency for the covered agreement.

(iii) *Content of report.* Any consolidated annual report must contain all the information required by this paragraph (e). The amounts and data required to be reported under paragraphs (e)(1)(iv) and (e)(1)(vi) of this section may be reported on an aggregate basis for all covered agreements.

(f) *Time and place of filing*—(1) *General.* Each party must file its annual report with each relevant supervisory agency for the covered agreement no later than six months following the end of the fiscal year covered by the report.

(2) *Alternative method of fulfilling annual reporting requirement for a NGEP.* (i) A NGEP may fulfill the filing requirements of this section by providing the following materials to an insured depository institution or affiliate that is a party to the agreement no later than six months following the end of the NGEP's fiscal year—

(A) A copy of the NGEP's annual report required under paragraph (d) of this section for the fiscal year; and

(B) Written instructions that the insured depository institution or affiliate promptly forward the annual report to the relevant supervisory agency or agencies on behalf of the NGEP.

(ii) An insured depository institution or affiliate that receives an annual report from a NGEP pursuant to paragraph (f)(2)(i) of this section must file the report with the relevant supervisory agency or agencies on behalf of the NGEP within 30 days.

§ 133.8 Release of information under FOIA.

The OCC will make covered agreements and annual reports available to the public in accordance with the Freedom of Information Act (5 U.S.C. 552 *et seq.*), subpart B of part 4 of this chapter. A party to a covered agreement may request confidential treatment of proprietary and confidential information in a covered agreement or an annual report under those procedures.

§ 133.9 Compliance provisions.

(a) *Willful failure to comply with disclosure and reporting obligations.* (1)

If the OCC determines that a NGEP has willfully failed to comply in a material way with §§ 133.6 or 133.7 of this part, the OCC will notify the NGEP in writing of that determination and provide the NGEP a period of 90 days (or such longer period as the OCC finds to be reasonable under the circumstances) to comply.

(2) If the NGEP does not comply within the time period established by the OCC, the agreement shall thereafter be unenforceable by that NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y).

(3) The OCC may assist any insured depository institution or affiliate that is a party to a covered agreement that is unenforceable by a NGEP by operation of section 48 of the Federal Deposit Insurance Act (12 U.S.C. 1831y) in identifying a successor to assume the NGEP's responsibilities under the agreement.

(b) *Diversion of funds.* If a court or other body of competent jurisdiction determines that funds or resources received under a covered agreement have been diverted contrary to the purposes of the covered agreement for an individual's personal financial gain, the OCC may take either or both of the following actions—

(1) Order the individual to disgorge the diverted funds or resources received under the agreement;

(2) Prohibit the individual from being a party to any covered agreement for a period not to exceed 10 years.

(c) *Notice and opportunity to respond.* Before making a determination under paragraph (a)(1) of this section, or taking any action under paragraph (b) of this section, the OCC will provide written notice and an opportunity to present information to the OCC concerning any relevant facts or circumstances relating to the matter.

(d) *Inadvertent or de minimis errors.* Inadvertent or de minimis errors in annual reports or other documents filed with the OCC under §§ 133.6 or 133.7 of this part will not subject the reporting party to any penalty.

(e) *Enforcement of provisions in covered agreements.* No provision of this part shall be construed as authorizing the OCC to enforce the provisions of any covered agreement.

§ 133.10 [Reserved]

§ 133.11 Other definitions and rules of construction used in this part.

(a) *Affiliate. Affiliate* means—

(1) Any company that controls, is controlled by, or is under common control with another company; and

(2) For the purpose of determining whether an agreement is a covered agreement under § 133.2, an *affiliate* includes any company that would be under common control or merged with another company on consummation of any transaction pending before a Federal banking agency at the time—

(i) The parties enter into the agreement; and

(ii) The NGEP that is a party to the agreement makes a CRA communication, as described in § 133.3 of this part.

(b) *Control. Control* is defined in section 2(a) of the Bank Holding Company Act (12 U.S.C. 1841(a)).

(c) *CRA affiliate.* A *CRA affiliate* of an insured depository institution is any company that is an affiliate of an insured depository institution to the extent, and only to the extent, that the activities of the affiliate were considered by the appropriate Federal banking agency when evaluating the CRA performance of the institution at its most recent CRA examination prior to the agreement. An insured depository institution or affiliate also may designate any company as a CRA affiliate at any time prior to the time a covered agreement is entered into by informing the NGEP that is a party to the agreement of such designation.

(d) *CRA public file. CRA public file* means the public file maintained by an insured depository institution and described in § 195.43 of this chapter.

(e) *Executive officer.* The term *executive officer* has the same meaning as in § 215.2(e)(1) of the Board of Governors of the Federal Reserve's Regulation O (12 CFR 215.2(e)(1)). In applying this definition under this part, the term *savings association* shall be used in place of the term *bank.*

(f) *Federal banking agency; appropriate Federal banking agency.* The terms *Federal banking agency* and *appropriate Federal banking agency* have the same meanings as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(g) *Fiscal year.* (1) The fiscal year for a NGEP that does not have a fiscal year shall be the calendar year.

(2) Any NGEP, insured depository institution, or affiliate that has a fiscal year may elect to have the calendar year be its fiscal year for purposes of this part.

(h) *Insured depository institution. Insured depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(i) *Nongovernmental entity or person* or *NGEP*—(1) *General.* A *nongovernmental entity or person* or *NGEP* is any partnership, association, trust, joint venture, joint stock company, corporation, limited liability corporation, company, firm, society, other organization, or individual.

(2) *Exclusions.* A nongovernmental entity or person does not include—

(i) The United States government, a state government, a unit of local government (including a county, city, town, township, parish, village, or other general-purpose subdivision of a state) or an Indian tribe or tribal organization established under Federal, state or Indian tribal law (including the Department of Hawaiian Home Lands), or a department, agency, or instrumentality of any such entity;

(ii) A Federally-chartered public corporation that receives Federal funds appropriated specifically for that corporation;

(iii) An insured depository institution or affiliate of an insured depository institution; or

(iv) An officer, director, employee, or representative (acting in his or her capacity as an officer, director, employee, or representative) of an entity listed in paragraphs (i)(2)(i), (i)(2)(ii), or (i)(2)(iii) of this section.

(j) *Party.* The term *party* with respect to a covered agreement means each NGEP and each insured depository institution or affiliate that entered into the agreement.

(k) *Relevant supervisory agency.* The *relevant supervisory agency* for a covered agreement means the appropriate Federal banking agency for—

(1) Each insured depository institution (or subsidiary thereof) that is a party to the covered agreement;

(2) Each insured depository institution (or subsidiary thereof) or CRA affiliate that makes payments or loans or provides services that are subject to the covered agreement; and

(3) Any company (other than an insured depository institution or subsidiary thereof) that is a party to the covered agreement.

(l) *Term of agreement.* An agreement that does not have a fixed termination date is considered to terminate on the last date on which any party to the agreement makes any payment or provides any loan or other resources under the agreement, unless the relevant supervisory agency for the agreement otherwise notifies each party in writing.

PART 136—CONSUMER PROTECTION IN SALES OF INSURANCE

Sec.

136.10 Purpose and scope.
136.20 Definitions.

136.30 Prohibited practices.
136.40 What you must disclose.
136.50 Where insurance activities may take place.
136.60 Qualification and licensing requirements for insurance sales personnel.
Appendix A to Part 136—Consumer Grievance Process

Authority: 12 U.S.C. 1462a, 1463, 1464, 1831x, and 5412(b)(2)(B).

§ 136.10 Purpose and scope.

(a) *General rule.* This part establishes consumer protections in connection with retail sales practices, solicitations, advertising, or offers of any insurance product or annuity to a consumer by:

(1) Any Federal savings association; or

(2) Any other person that is engaged in such activities at an office of a Federal savings association or on behalf of a Federal savings association.

(b) *Application to operating subsidiaries.* For purposes of § 159.3(h) of this chapter, an operating subsidiary is subject to this part only to the extent that it sells, solicits, advertises, or offers insurance products or annuities at an office of a Federal savings association or on behalf of a Federal savings association.

§ 136.20 Definitions.

As used in this part:

Affiliate means a company that controls, is controlled by, or is under common control with another company.

Company means any corporation, partnership, business trust, association or similar organization, or any other trust (unless by its terms the trust must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust). It does not include any corporation the majority of the shares of which are owned by the United States or by any state, or a qualified family partnership, as defined in section 2(o)(10) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841(o)(10)).

Consumer means an individual who purchases, applies to purchase, or is solicited to purchase from a covered person insurance products or annuities primarily for personal, family, or household purposes.

Control of a company has the same meaning as in section 3(w)(5) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(5)).

Domestic violence means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

(1) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault;

(2) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;

(3) Subjecting another person to false imprisonment; or

(4) Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

Electronic media includes any means for transmitting messages electronically between a covered person and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

Office means the premises of a Federal savings association where retail deposits are accepted from the public.

Subsidiary has the same meaning as in section 3(w)(4) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(4)).

You means:

(1) A Federal savings association, as defined in § 141.11 of this chapter; or

(2) Any other person only when the person sells, solicits, advertises, or offers an insurance product or annuity to a consumer at an office of a Federal savings association, or on behalf of a Federal savings association. For purposes of this definition, activities on behalf of a Federal savings association include activities where a person, whether at an office of the savings association or at another location, sells, solicits, advertises, or offers an insurance product or annuity and at least one of the following applies:

(i) The person represents to a consumer that the sale, solicitation, advertisement, or offer of any insurance product or annuity is by or on behalf of the savings association;

(ii) The savings association refers a consumer to a seller of insurance products and annuities and the savings association has a contractual arrangement to receive commissions or fees derived from a sale of an insurance product or annuity resulting from that referral; or

(iii) Documents evidencing the sale, solicitation, advertising, or offer of an insurance product or annuity identify or refer to the savings association.

§ 136.30 Prohibited practices.

(a) *Anticoercion and antitying rules.* You may not engage in any practice that would lead a consumer to believe that an extension of credit, in violation of section 5(q) of the Home Owners' Loan Act (12 U.S.C. 1464(q)), is conditional upon either:

(1) The purchase of an insurance product or annuity from a Federal savings association or any of its affiliates; or

(2) An agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(b) *Prohibition on misrepresentations generally.* You may not engage in any practice or use any advertisement at any office of, or on behalf of, a Federal savings association or a subsidiary of a Federal savings association that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to:

(1) The fact that an insurance product or annuity you or any subsidiary of a Federal savings association sell or offer for sale is not backed by the Federal government or a Federal savings association, or the fact that the insurance product or annuity is not insured by the Federal Deposit Insurance Corporation;

(2) In the case of an insurance product or annuity that involves investment risk, the fact that there is an investment risk, including the potential that principal may be lost and that the product may decline in value; or

(3) In the case of a Federal savings association or subsidiary of a Federal savings association at which insurance products or annuities are sold or offered for sale, the fact that:

(i) The approval of an extension of credit to a consumer by the savings association or subsidiary may not be conditioned on the purchase of an insurance product or annuity by the consumer from the savings association or a subsidiary of a savings association; and

(ii) The consumer is free to purchase the insurance product or annuity from another source.

(c) *Prohibition on domestic violence discrimination.* You may not sell or offer for sale, as principal, agent, or broker, any life or health insurance product if the status of the applicant or insured as a victim of domestic violence or as a provider of services to victims of domestic violence is considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of such product, or with regard to the payment of insurance claims on such product, except as required or expressly permitted under state law.

§ 136.40 What you must disclose.

(a) *Insurance disclosures.* In connection with the initial purchase of an insurance product or annuity by a consumer from you, you must disclose to the consumer, except to the extent the disclosure would not be accurate, that:

(1) The insurance product or annuity is not a deposit or other obligation of, or guaranteed by, a Federal savings association or an affiliate of a Federal savings association;

(2) The insurance product or annuity is not insured by the Federal Deposit Insurance Corporation (FDIC) or any other agency of the United States, a Federal savings association, or (if applicable) an affiliate of a Federal savings association; and

(3) In the case of an insurance product or annuity that involves an investment risk, there is investment risk associated with the product, including the possible loss of value.

(b) *Credit disclosures.* In the case of an application for credit in connection with which an insurance product or annuity is solicited, offered, or sold, you must disclose that a Federal savings association may not condition an extension of credit on either:

(1) The consumer's purchase of an insurance product or annuity from the savings association or any of its affiliates; or

(2) The consumer's agreement not to obtain, or a prohibition on the consumer from obtaining, an insurance product or annuity from an unaffiliated entity.

(c) *Timing and method of disclosures*—(1) In general. The disclosures required by paragraph (a) of this section must be provided orally and in writing before the completion of the initial sale of an insurance product or annuity to a consumer. The disclosure required by paragraph (b) of this section must be made orally and in writing at the time the consumer applies for an extension of credit in connection with which an insurance product or annuity is solicited, offered, or sold.

(2) *Exception for transactions by mail.* If you conduct an insurance product or annuity sale by mail, you are not required to make the oral disclosures required by paragraph (a) of this section. If you take an application for credit by mail, you are not required to make the oral disclosure required by paragraph (b) of this section.

(3) *Exception for transactions by telephone.* If a sale of an insurance product or annuity is conducted by telephone, you may provide the written disclosures required by paragraph (a) of this section by mail within 3 business days beginning on the first business day after the sale, solicitation, or offer, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a). If you take an application for credit by telephone, you may provide the written disclosure required by paragraph (b) of this section by mail, provided you mail it to the consumer within three days beginning the first business day after the application is taken, excluding Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).

(4) *Electronic form of disclosures.* (i) Subject to the requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001(c)), you may provide the written disclosures required by paragraph (a) and (b) of this section through electronic media instead of on paper, if the consumer affirmatively consents to receiving the disclosures electronically and if the disclosures are provided in a format that the consumer may retain or obtain later, for example, by printing or storing electronically (such as by downloading).

(ii) You are not required to provide orally any disclosures required by paragraphs (a) or (b) of this section that you provide by electronic media.

(5) *Disclosures must be readily understandable.* The disclosures provided shall be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided. For instance, you may use the following disclosures in visual media, such as television broadcasting, ATM screens, billboards, signs, posters and written advertisements and promotional materials, as appropriate and consistent with paragraphs (a) and (b) of this section:

- NOT A DEPOSIT
- NOT FDIC-INSURED
- NOT INSURED BY ANY FEDERAL GOVERNMENT AGENCY
- NOT GUARANTEED BY THE FEDERAL SAVINGS ASSOCIATION
- MAY GO DOWN IN VALUE

(6) *Disclosures must be meaningful.* (i) You must provide the disclosures required by paragraphs (a) and (b) of this section in a meaningful form. Examples of the types of methods that could call attention to the nature and significance of the information provided include:

(A) A plain-language heading to call attention to the disclosures;

(B) A typeface and type size that are easy to read;

(C) Wide margins and ample line spacing;

(D) Boldface or italics for key words; and

(E) Distinctive type size, style, and graphic devices, such as shading or sidebars, when the disclosures are combined with other information.

(ii) You have not provided the disclosures in a meaningful form if you merely state to the consumer that the required disclosures are available in printed material, but do not provide the printed material when required and do not orally disclose the information to the consumer when required.

(iii) With respect to those disclosures made through electronic media for which paper or oral disclosures are not required, the disclosures are not meaningfully provided if the consumer may bypass the visual text of the disclosures before purchasing an insurance product or annuity.

(7) *Consumer acknowledgment.* You must obtain from the consumer, at the time a consumer receives the disclosures required under paragraphs (a) or (b) of this section, or at the time of the initial purchase by the consumer of an insurance product or annuity, a written acknowledgment by the consumer that the consumer received the disclosures. You may permit a consumer to acknowledge receipt of the disclosures electronically or in paper form. If the disclosures required under paragraphs (a) or (b) of this section are provided in connection with a transaction that is conducted by telephone, you must:

(i) Obtain an oral acknowledgment of receipt of the disclosures and maintain sufficient documentation to show that the acknowledgment was given; and

(ii) Make reasonable efforts to obtain a written acknowledgment from the consumer.

(d) *Advertisements and other promotional material for insurance products or annuities.* The disclosures described in paragraph (a) of this section are required in advertisements and promotional material for insurance products or annuities unless the advertisements and promotional material are of a general nature describing or listing the services or products offered by a Federal savings association.

§ 136.50 Where insurance activities may take place.

(a) *General rule.* A Federal savings association must, to the extent practicable:

(1) Keep the area where the savings association conducts transactions involving insurance products or annuities physically segregated from areas where retail deposits are routinely accepted from the general public;

(2) Identify the areas where insurance product or annuity sales activities occur; and

(3) Clearly delineate and distinguish those areas from the areas where the savings association's retail deposit-taking activities occur.

(b) *Referrals.* Any person who accepts deposits from the public in an area where such transactions are routinely conducted in a Federal savings association may refer a consumer who seeks to purchase an insurance product or annuity to a qualified person who sells that product only if the person making the referral receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

§ 136.60 Qualification and licensing requirements for insurance sales personnel.

A Federal savings association may not permit any person to sell or offer for sale any insurance product or annuity in any part of the savings association's office or on its behalf, unless the person is at all times appropriately qualified and licensed under applicable state insurance licensing standards with regard to the specific products being sold or recommended.

Appendix A to Part 136—Consumer Grievance Process

Any consumer who believes that any Federal savings association or any other person selling, soliciting, advertising, or offering insurance products or annuities to the consumer at an office of the savings association or on behalf of the savings association has violated the requirements of this part should contact the Customer Assistance Group, Office of the Comptroller of the Currency, (800) 613–6743, 1301 McKinney Street, Suite 3710, Houston, Texas 77010–3031.

PART 141—DEFINITIONS FOR REGULATIONS AFFECTING FEDERAL SAVINGS ASSOCIATIONS

Sec.

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Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 141.1 When do the definitions in this part apply?

The definitions in this part and in 12 CFR part 161 apply throughout parts 100 through 199 of this chapter, unless another definition is specifically provided.

§ 141.2 Act.

The term *Act* means the Home Owners' Loan Act of 1933, as amended.

§ 141.5 Commercial paper.

The term *commercial paper* means any note, draft, or bill of exchange which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

§ 141.7 Corporate debt security.

The term *corporate debt security* means a marketable obligation, evidencing the indebtedness of any corporation in the form of a bond, note and/or debenture which is commonly regarded as a debt security and is not predominantly speculative in nature. A security is marketable if it may be sold with reasonable promptness at a price which corresponds reasonably to its fair value.

§ 141.8 Debit card.

The term *debit card* means a card that enables an accountholder to obtain access to a savings account for the purpose of making withdrawals or of transferring funds to a third party by non-transferable order or authorization.

§ 141.10 Dwelling unit.

The term *dwelling unit* means the unified combination of rooms designed for residential use by one family, other than a single-family dwelling.

§ 141.11 Federal savings association.

The term *Federal savings association* means a Federal savings association or Federal savings bank chartered under section 5 of the Act.

§ 141.14 Home.

The term *home* means real estate comprising a single-family dwelling(s) or a dwelling unit(s) for four or fewer families in the aggregate.

§ 141.15 Improved nonresidential real estate.

The term *improved nonresidential real estate* means nonresidential real estate:

(a) Containing a permanent structure(s) constituting at least 25 percent of its value; or

(b) Containing improvements which make it usable by a business or industrial enterprise; or

(c) Used, or to be used within a reasonable time, for commercial farming, excluding hobby and vacation property.

§ 141.16 Improved residential real estate.

The term *improved residential real estate* means residential real estate containing offsite or other improvements sufficient to make the property ready for primarily residential construction, and real estate in the process of being improved by a building or buildings to be constructed or in the process of construction for primarily residential use.

§ 141.18 Interim Federal savings association.

The term *interim Federal savings association* means a Federal savings association chartered by the OCC or the OTS under section 5 of the Act to facilitate the acquisition of 100 percent of the voting shares of an existing Federal stock savings association or other insured stock savings association by a newly formed company or an existing savings and loan holding company or to facilitate any other transaction the OCC may approve.

§ 141.19 Interim state savings association.

The term *interim state savings association* means a savings association, other than a Federal savings association, the accounts of which are insured by the FDIC to facilitate the acquisition of 100 percent of the voting shares of an existing Federal stock savings association or other insured stock savings association by a newly formed company or an existing savings and loan holding company or to facilitate any other transaction the OCC may approve.

§ 141.20 Loans.

The term *loans* means obligations and extensions or advances of credit; and any reference to a loan or investment includes an interest in such a loan or investment.

§ 141.21 Nonresidential real estate.

The terms *nonresidential real estate or nonresidential real property* mean real estate that is not *residential real estate,* as that term is defined in § 141.23 of this part.

§ 141.22 [Reserved]

§ 141.23 Residential real estate.

The terms *residential real estate or residential real property* mean:

(a) Homes (including a dwelling unit in a multi-family residential property such as a condominium or a cooperative);

(b) Combinations of homes and business property (*i.e.,* a home used in part for business);

(c) Other real estate used for primarily residential purposes other than a home (but which may include homes);

(d) Combinations of such real estate and business property involving only minor business use (*i.e.,* where no more than 20 percent of the total appraised value of the real estate is attributable to the business use);

(e) Farm residences and combinations of farm residences and commercial farm real estate;

(f) Property to be improved by the construction of such structures; or

(g) Leasehold interests in the above real estate.

§ 141.25 Single-family dwelling.

The term *single-family dwelling* means a structure designed for residential use by one family, or a unit so designed, whose owner owns, directly or through a non-profit cooperative housing organization, an undivided interest in the underling real estate, including property owned in common with others which contributes to the use and enjoyment of the structure or unit.

§ 141.26 Surplus.

The term *surplus* means undistributed earnings held as unallocated reserves for general corporate use.

§ 141.27 Unimproved real estate.

The term *unimproved real estate* means real estate that will be improved, as defined in § 141.15 or § 141.16 of this part.

§ 141.28 Withdrawal value of a savings account.

The term *withdrawal value of a savings account* means the amount invested in a savings account plus earnings credited thereto, less lawful deductions therefrom.

PART 143—FEDERAL MUTUAL SAVINGS ASSOCIATIONS—INCORPORATION, ORGANIZATION, AND CONVERSION

Sec.

143.1 Corporate title.

Organization

143.2 Application for permission to organize.

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143.12 Grandfathered authority.

143.14 Continuity of existence.

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901 *et seq.,* 5412(b)(2)(B).

§ 143.1 Corporate title.

(a) *General.* A Federal savings association shall not adopt a title that misrepresents the nature of the institution or the services it offers.

(b) *Title change.* Prior to changing its corporate title, an association must file with the appropriate OCC licensing office a written notice indicating the intended change. The OCC shall provide to the association a timely written acknowledgment stating when the notice was received. If, within 30 days of receipt of notice, the OCC does not notify the association of its objection on the grounds set forth in paragraph (a) of this section, the association may change its title by amending its charter in accordance with § 144.2(b) or § 152.4 of this chapter and the amendment provisions of its charter, except that an association chartered as a Federal Savings and Loan Association may change its title to indicate that it is a Federal Savings Bank, and an association chartered as a Federal Savings Bank may change its title to indicate that it is a Federal Savings and Loan Association.

Organization

§ 143.2 Application for permission to organize.

(a) *General.* Recommendations by employees of the OCC regarding applications for permission to organize a Federal savings association are privileged, confidential, and subject to part 4, subpart C of this chapter.

(b) [Reserved]

(c) [Reserved]

(d) *Public notice and inspection.* (1) The applicant must publish a public notice of the application to organize in accordance with the procedures specified in subpart B of part 116 of this chapter.

(2) Promptly after publication, the applicant(s) shall transmit copies of each notice and publisher's affidavit of publication in the same manner as the original filing.

(3) The OCC shall give notice of the application to the state official who supervises savings associations in the state in which the new association is to be located.

(4) Any person may inspect the application and all related communications at the address specified in 12 CFR 4.14(c) during regular business hours, unless such information is exempt from public disclosure.

(e) *Submission of comments.* Commenters may submit comments on the application in accordance with the procedures specified in subpart C of part 116 of this chapter.

(f) *Meetings.* The OCC may arrange a meeting in accordance with the procedures in subpart D of part 116 of this chapter.

(g) *Approval.* (1) Factors that will be considered are:

(i) Whether the applicants are persons of good character and responsibility;

(ii) Whether a necessity exists for such association in the community to be served;

(iii) Whether there is a reasonable probability of the association's usefulness and success;

(iv) Whether the association can be established without undue injury to properly conducted existing local thrift and home financing institutions;

(v) Whether the association will perform a role of providing credit for housing consistent with safe and sound operation of a Federal savings association; and

(vi) Whether the factors set forth in § 143.3 are met, in the case of an application that would result in the formation of a *de novo* association, as defined in § 143.3(a).

(2) Approvals of applications will be conditioned on the following:

(i) Receipt by the OCC of written confirmation from the Federal Deposit Insurance Corporation that the accounts of the Federal savings association will be insured by the Federal Deposit Insurance Corporation;

(ii) A minimum amount of capital to be paid into the association's accounts prior to commencing business;

(iii) The submission of a statement that—

(A) The applicants have complied in all respects with the Act and these rules and regulations regarding organization of a Federal savings association;

(B) The applicants have incurred no expense in forming the association

which is chargeable to it, and no such expense will be incurred;

(C) No funds have been collected on account of the association before the OCC's approval;

(D) An organization committee has been created (naming the committee and its officers);

(E) The committee will organize the association and serve as temporary officers of the association until officers are elected by the association's board of directors under § 143.5 of this part; and

(F) No funds will be accepted for deposit by the association until organization has been completed; and

(iv) The satisfaction of any other requirement the OCC may impose.

(h) *Alternative procedures for interim Federal savings associations.* (1) Applications for permission to organize an interim Federal savings association are not subject to paragraphs (d), (e), (f) or (g)(2) of this section.

(2) Approval of an application for permission to organize an interim Federal savings association shall be conditioned on approval by the OCC of an application to merge the interim Federal savings association and an existing insured stock association or on approval by the OCC of such other transaction which the interim was chartered to facilitate. In evaluating the application, the OCC will consider the purpose for which the association will be organized, the form of any proposed transactions involving the organizing association, the effect of the transactions on existing associations involved in the transactions, and the factors specified in § 143.2(g)(1) to the extent relevant.

§ 143.3 ''*De novo*'' applications for a Federal savings association charter.

(a) *Definitions.* For purposes of this section, the term ''*de novo* association'' means any Federal savings association chartered by the OTS prior to July 21, 2011 or by the OCC, the business of which has not been conducted previously under any charter or conducted in the previous three years in substantially the same form as is proposed by the *de novo* association. A ''*de novo* applicant'' means any person or persons who apply to establish a *de novo* association.

(b) *Minimum initial capitalization.* (1) A *de novo* association must have at least two million dollars in initial capital stock (stock institutions) or initial pledged savings or cash (mutual institutions), except as provided in paragraph (b)(2) of this section. The minimum initial capitalization is the amount of proceeds net of all incurred and anticipated securities issuance expenses, organization expenses, pre-opening expenses, or any expenses paid (or funds advanced) by organizers that are to be reimbursed from the proceeds of a securities offering. In securities offerings for a *de novo* association, all securities of a particular class in the initial offering shall be sold at the same price.

(2) On a case by case basis, the OCC may, for good cause, approve a *de novo* association that has less than two million dollars in initial capital or may require a *de novo* association to have more than two million dollars in initial capital.

(c) *Business and investment plans of de novo associations.* (1) To assist the OCC in making the determinations required under section 5(e) of the Home Owners' Loan Act, a *de novo* applicant shall submit a business plan describing, for the first three years of operation of the *de novo* association, the major areas of operation, including:

(i) Lending, leasing and investment activity, including plans for meeting Qualified Thrift Lender requirements;

(ii) Deposit, savings and borrowing activity;

(iii) Interest-rate risk management;

(iv) Internal controls and procedures;

(v) Plans for meeting the credit needs of the proposed *de novo* association's community (including low- and moderate-income neighborhoods);

(vi) Projected statements of condition;

(vii) Projected statements of operations; and

(viii) Any other information requested by the OCC.

(2) The business plan shall:

(i) Provide for the continuation or succession of competent management subject to the approval of the OCC;

(ii) Provide that any material change in, or deviation from, the business plan must receive the prior approval of the OCC;

(iii) Demonstrate the *de novo* association's ability to maintain required minimum regulatory capital under 12 CFR parts 165 and 167 for the duration of the plan.

(d) *Composition of the board of directors.* (1) A majority of a *de novo* association's board of directors must be representative of the state in which the savings association is located. The OCC generally will consider a director to be representative of the state if the director resides, works or maintains a place of business in the state in which the savings association is located. If the association is located in a Metropolitan Statistical Area (MSA), Primary Metropolitan Statistical Area (PMSA) or Consolidated Metropolitan Statistical Area (CMSA) that incorporates portions of more than one state, a director will be considered representative of the association's state if he or she resides, works or maintains a place of business in the MSA, PMSA or CMSA in which the association is located.

(2) The *de novo* association's board of directors must be diversified and composed of individuals with varied business and professional experience. In addition, except in the case of a *de novo* association that is wholly-owned by a holding company, no more than one-third of a board of directors may be in closely related businesses. The background of each director must reflect a history of responsibility and personal integrity, and must show a level of competence and experience sufficient to demonstrate that such individual has the ability to direct the policies of the association in a safe and sound manner. Where a *de novo* association is owned by a holding company that does not have substantial independent economic substance, the board of directors of the holding company must satisfy the foregoing standards.

(e) *Management Officials.* Proposed stockholders of ten percent or more of the stock of a *de novo* association will be considered management officials of the association for the purpose of the OCC's evaluation of the character and qualifications of the management of the association. In connection with the OCC's consideration of an application for permission to organize and subsequent to issuance of a Federal savings association charter to the association by the OCC, any individual or group of individuals acting in concert under 12 CFR part 174, who owns or proposes to acquire, directly or indirectly, ten percent or more of the stock of an association subject to this section, shall submit a Biographical and Financial Report, on forms prescribed by the OCC, to the appropriate OCC licensing office.

(f) *Supervisory transactions.* This section does not apply to any application for a Federal savings association charter submitted in connection with a transfer or an acquisition of the business or accounts of a savings association if the OCC determines that such transfer or acquisition is instituted for supervisory purposes, or in connection with applications for Federal charters for interim *de novo* associations chartered for the purpose of facilitating mergers, holding company reorganizations, or similar transactions.

§ 143.4 Issuance of charter.

Approval by the OCC of the organization of a Federal savings association or the conversion of an

insured association to Federal savings association form shall constitute issuance of a charter and shall be final, provided that the association complies with the procedures set out at § 144.2(a) of this chapter. The charter shall conform with the requirements of § 144.1 of this chapter, the permissible provisions of § 144.2, or other provisions specifically approved by the OCC.

§ 143.5 Completion of organization.

(a)(1) *Temporary officers.* When the OCC approves an application for permission to organize a Federal savings association, the applicants shall constitute the organization committee and elect a chairperson, vice-chairperson, and a secretary, who shall act as the temporary officers of the association until their successors are duly elected and qualified. The temporary officers may effect compliance with any conditions prescribed by the OCC.

(2) *Organization meeting.* Promptly upon receipt of a charter, the temporary officers shall call a meeting of the association's capital subscribers; notice of such meeting shall be mailed to each subscriber at least 5 days before the meeting day. Subscribers who have subscribed for a majority of the association's capital, present in person or by proxy, shall constitute a quorum. At such meeting, directors of the association shall be elected according to the association's charter and bylaws, and any other action permitted by such charter and bylaws may be taken; any such action shall be considered an acceptance by the association of such charter and of such bylaws, which shall be in the form provided in parts 144 and 152 of this chapter.

(b) First meeting of directors. Upon election, the association's board of directors shall hold a meeting to elect officers of the association as provided by its charter and bylaws and to take any other action necessary to permit operation of the association in accordance with law, the association's charter and bylaws, and these rules and regulations. When such officers have been bonded under § 163.190 of this chapter, they shall immediately collect the sums due on subscriptions to the association's capital.

(c) *Membership in Federal Home Loan Bank and insurance of accounts.* When a Federal savings association's charter is issued it must promptly qualify as a member of a Federal Home Loan Bank and meet all requirements necessary to obtain insurance of its accounts by the Federal Deposit Insurance Corporation.

(d) *Failure to complete.* Organization of a Federal savings association is completed when the organization meeting and the first meeting of its directors have been held, permanent officers have been bonded, the association holds the cash required to be paid on subscriptions to its capital, if required, Federal Home Loan Bank membership has been obtained and Federal Deposit Insurance Corporation insurance of accounts has been confirmed and any conditions imposed by the OTS prior to July 21, 2011 or by the OCC in connection with approval of the application have been met. If organization is not so completed within six months after issuance of a charter, or within such additional period granted for good cause, and in the case of an interim Federal savings association, if a merger, or other transaction facilitated by the existence of an interim association, has not been approved, the charter shall become void and all cash collected on subscriptions shall thereupon be returned.

§ 143.6 Limitations on transaction of business.

No person may organize a Federal savings association, collect money from others for such purpose, or represent himself or herself as authorized to do so, and no Federal savings association shall transact any business prior to completion of its organization, except as provided in this part.

§ 143.7 Federal savings association created in connection with an association in default or in danger of default.

The preceding sections of this part do not apply to a Federal savings association which is proposed by the Federal Deposit Insurance Corporation under section 11(c) of the Federal Deposit Insurance Act (12 U.S.C. 1821(c)) or section 21A of the Federal Home Loan Bank Act (12 U.S.C. 1441A), or is otherwise chartered by the OCC in connection with an association in default or in danger of default. Incorporation and organization of such associations are complete when the OCC so determines.

Conversion

§ 143.8 Conversion of depository institutions to Federal mutual charter.

(a) With the approval of the OCC, any depository institution, as defined in § 152.13 of this chapter, that is in mutual form, may convert into a Federal mutual savings association, provided that:

(1) The depository institution, upon conversion, will have its deposits insured by the Federal Deposit Insurance Corporation;

(2) The depository institution, in accomplishing the conversion, complies with all applicable state and Federal statutes and regulations, and OCC policies, and obtains all necessary regulatory and member approvals; and

(3) The resulting Federal mutual association conforms, within the time prescribed by the OCC, to the requirements of section 5(c) of the Home Owners' Loan Act.

(b) Recommendations regarding applications for issuance of Federal charters are privileged, confidential and subject to part 4, subpart C of this chapter.

§ 143.9 Application for conversion to Federal mutual charter.

(a)(1) *Filing.* Any depository institution that proposes to convert to a Federal mutual association as provided in § 143.8 must, after approval by its board of directors, file an application on forms obtained from the OCC with the appropriate licensing office. The applicant must submit any financial statements or other information the OCC may require.

(2) *Procedures.* An application for conversion filed under this section is subject to the procedures for organization of a Federal mutual association at § 143.2(d) through (f) of this chapter.

(b) *Plan of conversion.* The applicant shall submit with its application a plan of conversion specifying the location of the home office and any branch offices to be maintained by the Federal savings association, and providing for:

(1) Appropriate reserves and surplus for the Federal savings association;

(2) Satisfaction in full or assumption by the Federal savings association of all creditor obligations of the applicant;

(3) Issuance by the Federal savings association of savings accounts to current holders of withdrawable accounts in an amount equaling the value of such accounts; and

(4) If applicable, issuance of additional savings accounts to current holders of nonwithdrawable capital stock of the applicant in an amount equaling the value of their nonwithdrawable capital stock, including the present value of any preference to which such holders are entitled.

(c) *Action on application.* The OCC will consider such application and any information submitted with the application, and may approve the application in accordance with section 5(e) of the Home Owners' Loan Act and § 143.2(g)(1). Converting depository

institutions that have been in existence less than three years will be subject to all approval criteria and other requirements applicable to *de novo* Federal associations. Approval of an application and issuance by the OCC of a charter will be subject to:

(1) Compliance by the applicant with all conditions prescribed in the approval;

(2) Receipt by the applicant of approval of the plan of conversion by such vote as may be required by the laws of the applicant's jurisdiction to consider such action;

(3) In the case of a converting association the accounts of which are not insured by the Federal Deposit Insurance Corporation, receipt by the OCC of written confirmation from the Federal Deposit Insurance Corporation that the accounts of the converting association will be insured by the Federal Deposit Insurance Corporation; and

(4) Receipt by the OCC of written confirmation from the appropriate Federal Home Loan Bank of approval of the converting institution's application for Federal Home Loan Bank membership, if the institution is not a member.

§ 143.10 Organization after conversion.

Except as provided in § 143.11, after a Federal charter is issued under § 143.9 the association's members shall, after due notice, or upon a valid adjournment of a previous legal meeting, hold a meeting to elect directors and take all other action necessary fully to effect the conversion and operate the association in accordance with law and these rules and regulations. Immediately thereafter the board of directors shall meet, elect officers, and transact any other appropriate business.

§ 143.11 Organization plan for governance during first years after issuance of Federal mutual savings bank charter.

(a) *Organizational meeting.* Except as provided in paragraph (c)(1) of this section, promptly upon receipt of a charter, the officers of a Federal mutual savings bank which, immediately prior to conversion, was a state chartered mutual savings bank, shall call a meeting of the members. Notice for, and conduct of, such meeting shall be in accordance with the bank's Federal charter and bylaws. Business to be conducted at the organizational meeting shall include the election of trustees (who may also be known as a board of directors) and any other matters permitted by the charter and bylaws. Any action taken at such meeting shall be deemed an acceptance of the charter and bylaws approved by the OTS prior to July 21, 2011 or by the OCC pursuant to § 144.1 of this chapter.

(b) *First meeting of trustees.* Upon election or appointment, the board of trustees shall hold a meeting to elect the officers of the bank in accordance with its Federal charter and bylaws, and to take other action necessary to permit the operation of the bank in accordance with the Home Owners' Loan Act of 1933, as amended, the bank's charter and bylaws, these rules and regulations, and orders of the OCC.

(c) *Plan for governance of association during first six years after issuance of Federal charter.* (1)(i) An applicant for a Federal mutual savings bank charter may submit a plan which provides that each member of its governing board, *i.e.,* board of trustees, managers, or directors, may continue to serve, provided that within two years of the issuance of a Federal charter at least one-fifth of the members of such board shall have been elected by vote, either in person or by proxy, of the bank's membership as provided in its Federal charter, that within three years of the issuance of its Federal charter at least two-fifths of the members of such board shall have been elected by such a membership vote, that within four years of the issuance of its Federal charter at least three-fifths of the members of such board shall have been elected by such a membership vote, that within five years of the issuance of its Federal charter at least four-fifths of the members of such board shall have been elected by such a membership vote, and that within six years of the issuance of its Federal charter all of the members of such board shall have been elected by such a membership vote.

(ii) The plan:

(A) Shall set forth the names of those persons who are being proposed for service on the applicant's governing board after conversion to a Federal charter,

(B) Shall show how trustees not elected by the converted bank's membership will be appointed or otherwise selected, and

(C) Shall provide that no trustees may be appointed or elected to terms of more than three years.

(iii) The plan may provide that

(A) After receipt of its Federal charter the bank will be organized by its existing governing board,

(B) Within the first two years following receipt of its Federal charter, the bank's charter may be amended without a membership vote, provided any such amendment is first approved by a two-thirds vote of its board of trustees and is thereafter approved by the OCC, and

(C) The bank's first annua1 membership meeting need not take place until two years after receipt of its Federal charter.

(2) Except to the extent that the OTS prior to July 21, 2011 or by the OCC approves a plan under this paragraph (c) which is inconsistent with other provisions of this section, a Federal mutual savings bank shall in all respects comply with those other provisions.

§ 143.12 Grandfathered authority.

(a) A Federal savings bank formerly chartered or designated as a mutual savings bank under state law may exercise any authority it was authorized to exercise as a mutual savings bank under state law at the time of its conversion from a state mutual savings bank to a Federal or other state charter. Except to the extent such authority may be exercised by Federal savings associations not enjoying grandfathered rights hereunder, such authority may be exercised only to the degree authorized under state law at the time of such conversion. Unless otherwise determined by the OTS prior to July 21, 2011 or by the OCC an association, in the exercise of grandfathered authority, may continue to follow applicable state laws and regulations in effect at the time of such conversion.

(b) A Federal savings association that acquires, or has acquired, a Federal savings bank by merger or consolidation may itself exercise any grandfathered rights enjoyed by the disappearing institution, whether such rights were obtained directly through conversion or through merger or consolidation. The extent of the grandfathered rights of a Federal savings association that disappeared prior to the effective date of this section shall be determined exclusively pursuant to this section.

(c) This section shall not be construed to prevent the exercise by a Federal savings association enjoying grandfathered rights hereunder of authority that is available under the applicable state law only upon the occurrence of specific preconditions, such as the attainment of a particular future date or specified level of regulatory capital, which have not occurred at the time of conversion from a state mutual savings bank, provided they occur thereafter.

(d) This section shall not be construed to permit the exercise of any particular authority on a more liberal basis than is allowable under the most liberal construction of either state or Federal law or regulation.

§ 143.14 Continuity of existence.

The corporate existence of an association converting under this part shall continue in its successor. Each savings or demand accountholder shall receive a savings account or accounts in the converted association equal in amount to the value of accounts held in the former association.

PART 144—FEDERAL MUTUAL SAVINGS ASSOCIATIONS—CHARTER AND BYLAWS

Sec.

Charter

144.1 Federal mutual charter.
144.2 Charter amendments.
144.4 Issuance of charter.

Bylaws

144.5 Federal mutual savings association bylaws.
144.6 Effect of subsequent charter or bylaw change.

Availability

144.7 In association offices.
144.8 Communication between members of a Federal mutual savings association.

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901 *et seq.,* 5412(b)(2)(B).

Charter

§ 144.1 Federal mutual charter.

A Federal mutual savings association shall have a charter in the following form, which may include any of the additional provisions set forth in § 144.2 of this part, if such provisions are specifically requested. A charter for a Federal mutual savings bank shall substitute the term ''savings bank'' for ''association.'' The term ''trustee'' may be substituted for the term ''director.'' Associations adopting this charter with existing borrower members must grandfather those borrower members who were members as of the date of issuance of the new charter by the OCC. Such borrowers shall have one vote for the period of time such borrowings are in existence.

Federal Mutual Charter

Section 1. Corporate title. The full corporate title of the Federal savings association is _____.

Section 2. Office. The home office shall be located in _____ [city, state].

Section 3. Duration. The duration of the association is perpetual.

Section 4. Purpose and powers. The purpose of the association is to pursue any or all of the lawful objectives of a Federal mutual savings association chartered under section 5 of the Home Owners' Loan Act and to exercise all the express, implied, and incidental powers conferred thereby and by all acts amendatory thereof and supplemental thereto, subject to the Constitution and laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Office of the Comptroller of the Currency (''OCC'').

Section 5. Capital. The association may raise capital by accepting payments on savings and demand accounts and by any other means authorized by the OCC.

Section 6. Members. All holders of the association's savings, demand, or other authorized accounts are members of the association. In the consideration of all questions requiring action by the members of the association, each holder of an account shall be permitted to cast one vote for each $100, or fraction thereof, of the withdrawal value of the member's account. No member, however, shall cast more than 1000 votes. All accounts shall be nonassessable.

Section 7. Directors. The association shall be under the direction of a board of directors. The authorized number of directors shall not be fewer than five nor more than fifteen persons, as fixed in the association's bylaws, except that the number of directors may be decreased to a number less than five or increased to a number greater than fifteen with the prior approval of the OCC.

Section 8. Capital, surplus, and distribution of earnings. The association shall maintain for the purpose of meeting losses the amount of capital required by section 5 of the Home Owners' Loan Act and by regulations of the OCC. The association shall distribute net earnings on its accounts on such basis and in accordance with such terms and conditions as may from time to time be authorized by the OCC: *Provided,* That the association may establish minimum-balance requirements for accounts to be eligible for distribution of earnings.

All holders of accounts of the association shall be entitled to equal distribution of assets, *pro rata* to the value of their accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association. Moreover, in any such event, or in any other situation in which the priority of such accounts is in controversy, all such accounts shall, to the extent of their withdrawal value, be debts of the association having the same priority as the claims of general creditors of the association not having priority (other than any priority arising or resulting from consensual subordination) over other general creditors of the association.

Section 9. Amendment of charter. Adoption of any preapproved charter amendment shall be effective after such preapproved amendment has been approved by the members at a legal meeting. Any other amendment, addition, change, or repeal of this charter must be approved by the OCC prior to approval by the members at a legal meeting, and shall be effective upon filing with the OCC in accordance with regulatory procedures.

Attest: _____

Secretary of the Association

By: _____

President or Chief Executive Officer of the Association

Attest: _____

Deputy Comptroller for Licensing

By: _____

Comptroller of the Currency

Effective Date: _____

§ 144.2 Charter amendments.

(a) *General.* In order to adopt a charter amendment, a Federal mutual savings association must comply with the following requirements:

(1) *Board of directors approval.* The board of directors of the association must adopt a resolution proposing the charter amendment that states the text of such amendment;

(2) *Form of filing*—(i) *Application requirement.* If the proposed charter amendment would: render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; or involve a significant issue of law or policy; then, the association shall file the proposed amendment and obtain the prior approval of the OCC.

(ii) *Notice requirement.* If the proposed charter amendment does not involve a provision that would be covered by paragraph (a)(2)(i) of this section and is permissible under all applicable laws, rules and regulations, then the association shall submit the proposed amendment to the appropriate OCC licensing office, at least 30 days prior to the effective date of the proposed charter amendment.

(b) *Approval.* Any charter amendment filed pursuant to paragraph (a)(2)(ii) of this section shall automatically be approved 30 days from the date of filing of such amendment, provided that the association follows the requirements of its charter in adopting such amendment. This automatic approval does not apply if, prior to the expiration of such 30-day period, the OCC notifies the association that such amendment is rejected or that such amendment is deemed to be filed

under the provisions of paragraph (a)(2)(i) of this section. In addition, notwithstanding anything in paragraph (a) of this section to the contrary, the following charter amendments, including the adoption of the Federal mutual charter as set forth in § 144.1 of this part, shall be effective and deemed approved at the time of adoption, if adopted without change and filed with the OCC, within 30 days after adoption, provided the association follows the requirements of its charter in adopting such amendments:

(1) *Purpose and powers.* Add a second paragraph to section 4, as follows:

Section 4. Purpose and powers. * * * The association shall have the express power: (i) To act as fiscal agent of the United States when designated for that purpose by the Secretary of the Treasury, under such regulations as the Secretary may prescribe, to perform all such reasonable duties as fiscal agent of the United States as may be required, and to act as agent for any other instrumentality of the United States when designated for that purpose by any such instrumentality; (ii) To sue and be sued, complain and defend in any court of law or equity; (iii) To have a corporate seal, affixed by imprint, facsimile or otherwise; (iv) To appoint officers and agents as its business shall require and allow them suitable compensation; (v) To adopt bylaws not inconsistent with the Constitution or laws of the United States and rules and regulations adopted thereunder and under this Charter; (vi) To raise capital, which shall be unlimited, by accepting payments on savings, demand, or other accounts, as are authorized by rules and regulations made by the OCC, and the holders of all such accounts or other accounts as shall, to such extent as may be provided by such rules and regulations, be members of the association and shall have such voting rights and such other rights as are thereby provided; (vii) To issue notes, bonds, debentures, or other obligations, or securities, provided by or under any provision of Federal statute as from time to time is in effect; (viii) To provide for redemption of insured accounts; (ix) To borrow money without limitation and pledge and otherwise encumber any of its assets to secure its debts; (x) To lend and otherwise invest its funds as authorized by statute and the rules and regulations of the OCC; (xi) To wind up and dissolve, merge, consolidate, convert, or reorganize; (xii) To purchase, hold, and convey real estate and personalty consistent with its objects, purposes, and powers; (xiii) To mortgage or lease any real estate and personalty and take such property by gift, devise, or bequest; and (xiv) To exercise all powers conferred by law. In addition to the foregoing powers expressly enumerated, this association shall have power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers.

(2) *Title change.* A Federal mutual savings association that has complied with § 143.1(b) of this chapter may amend its charter by substituting a new corporate title in section 1.

(3) *Home office.* A Federal mutual savings association may amend its charter by substituting a new home office in section 2, if it has complied with applicable requirements of § 145.95 of this chapter.

(4) *Maximum number of votes.* A Federal mutual savings association may amend its charter by substituting ____ votes per member in section 6. [Fill in a number from 1 to 1000.]

(c) *Reissuance of charter.* A Federal mutual savings association that has amended its charter may apply to have its charter, including the amendments, reissued by the OCC. Such request for reissuance should be filed at the appropriate OCC licensing office and contain signatures required under § 144.1 of this part, together with such supporting documents as may be needed to demonstrate that the amendments were properly adopted.

§ 144.4 Issuance of charter.

Issuance by the OCC of a charter to a Federal mutual savings association within the meaning of § 143.4 of this chapter constitutes the incorporation of that association by the OCC.

Bylaws

§ 144.5 Federal mutual savings association bylaws.

(a) *General.* A Federal mutual savings association shall operate under bylaws that contain provisions that comply with all requirements specified by the OCC in this section and that are not otherwise inconsistent with the provisions of this section, the association's charter, and all other applicable laws, rules, and regulations *provided that,* a bylaw provision inconsistent with the provisions of this section may be adopted with the approval of the OCC. Bylaws may be adopted, amended or repealed by a majority of the votes cast by the members at a legal meeting or a majority of the association's board of directors. The bylaws for a Federal mutual savings bank shall substitute the term ''savings bank'' for ''association''. The term ''trustee'' may be substituted for the term ''director''.

(b) The following requirements are applicable to Federal mutual savings associations:

(1) *Annual meetings of members.* An association shall provide for and conduct an annual meeting of its members for the election of directors and at which any other business of the association may be conducted. Such meeting shall be held, as designated by its board of directors, at a location within the state that constitutes the principal place of business of the association, or at any other convenient place the board of directors may designate, and at a date and time within 150 days after the end of the association's fiscal year. At each annual meeting, the officers shall make a full report of the financial condition of the association and of its progress for the preceding year and shall outline a program for the succeeding year.

(2) *Special meetings of members.* Procedures for calling any special meeting of the members and for conducting such a meeting shall be set forth in the bylaws. The subject matter of such special meeting must be established in the notice for such meeting. The board of directors of the association or the holders of 10 percent or more of the voting capital shall be entitled to call a special meeting. For purposes of this section, ''voting capital'' means FDIC-insured deposits as of the voting record date.

(3) *Notice of meeting of members.* Notice specifying the date, time, and place of the annual or any special meeting and adequately describing any business to be conducted shall be published for two successive weeks immediately prior to the week in which such meeting shall convene in a newspaper of general circulation in the city or county in which the principal place of business of the association is located, or mailed postage prepaid at least 15 days and not more than 45 days prior to the date on which such meeting shall convene to each of its members of record at the last address appearing on the books of the association. A similar notice shall be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such meeting shall convene. The bylaws may permit a member to waive in writing any right to receive personal delivery of the notice. When any meeting is adjourned for 30 days or more, notice of the adjournment and reconvening of the meeting shall be given as in the case of the original meeting.

(4) *Fixing of record date.* For the purpose of determining members entitled to notice of or to vote at any meeting of members or any adjournment thereof, or in order to make a determination of members for any other proper purpose, the bylaws shall provide for the fixing of a record date and a method for determining from the books of the association the members entitled to vote. Such date shall be not more than 60 days nor fewer than 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The same determination shall apply to any adjourned meeting.

(5) *Member quorum.* Any number of members present and voting, represented in person or by proxy, at a regular or special meeting of the members shall constitute a quorum. A majority of all votes cast at any meeting of the members shall determine any question, unless otherwise required by regulation. At any adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called. Members present at a duly constituted meeting may continue to transact business until adjournment.

(6) *Voting by proxy.* Procedures shall be established for voting at any annual or special meeting of the members by proxy pursuant to the rules and regulations of the OCC, including the placing of such proxies on file with the secretary of the association, for verification, prior to the convening of such meeting. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the member. All proxies with a term greater than eleven months or solicited at the expense of the association must run to the board of directors as a whole, or to a committee appointed by a majority of such board.

(7) *Communications between members.* Provisions relating to communications between members shall be consistent with § 144.8 of this part. No member, however, shall have the right to inspect or copy any portion of any books or records of a Federal mutual savings association containing:

(i) A list of depositors in or borrowers from such association;

(ii) Their addresses;

(iii) Individual deposit or loan balances or records; or

(iv) Any data from which such information could be reasonably constructed.

(8) *Number of directors, membership.* The bylaws shall set forth a specific number of directors, not a range. The number of directors shall be not fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OCC. Each director of the association shall be a member of the association. Directors may be elected for periods of one to three years and until their successors are elected and qualified, but if a staggered board is chosen, provision shall be made for the election of approximately one-third or one-half of the board each year, as appropriate. State-chartered savings banks converting to Federal savings banks may include alternative provisions for the election and term of office of directors so long as such provisions are authorized by the OCC, and provide for compliance with the standard provisions of this section no later than six years after the conversion to a Federal savings association.

(9) *Meetings of the board.* The board of directors shall determine the place, frequency, time, procedure for notice, which shall be at least 24 hours unless waived by the directors, and waiver of notice for all regular and special meetings. The meetings shall be under the direction of a chairman, appointed annually by the board; or in the absence of the chairman, the meetings shall be under the direction of the president. The board also may permit telephonic participation at meetings. The bylaws may provide for action to be taken without a meeting if unanimous written consent is obtained for such action. A majority of the authorized directors shall constitute a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board.

(10) *Officers, employees and agents.* (i) The bylaws shall contain provisions regarding the officers of the association, their functions, duties, and powers. The officers of the association shall consist of a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom shall be elected annually by the board of directors. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed in the bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary.

(ii) All officers and agents of the association, as between themselves and the association, shall have such authority and perform such duties in the management of the association as may be provided in the bylaws, or as may be determined by resolution of the board of directors not inconsistent with the bylaws. In the absence of any such provision, officers shall have such powers and duties as generally pertain to their respective offices. Any officer may be removed by the board of directors with or without cause, but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the person so removed.

(iii) Any indemnification provision must provide that any indemnification is subject to applicable Federal law, rules, and regulations.

(11) *Vacancies, resignation or removal of directors.* Members of the association shall elect directors by ballot: Provided, that in the event of a vacancy on the board, the board of directors may, by their affirmative vote, fill such vacancy, even if the remaining directors constitute less than a quorum. A director elected to fill a vacancy shall be elected to serve only until the next election of directors by the members. The bylaws shall set out the procedure for the resignation of a director, which shall be by written notice or by any other procedure established in the bylaws. Directors may be removed only for cause as defined in § 163.39 of this chapter, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

(12) *Powers of the board.* The board of directors shall have the power:

(i) By resolution, to appoint from among its members and remove an executive committee and one or more other committees, which committee[s] shall have and may exercise all the powers of the board between the meetings or the board; but no such committee shall have the authority of the board to amend the charter or bylaws, adopt a plan of merger, consolidation, dissolution, or provide for the disposition of all or substantially all the property and assets of the association. Such committee shall not operate to relieve the board, or any member thereof, of any responsibility imposed by law;

(ii) To fix the compensation of directors, officers, and employees; and to remove any officer or employee at any time with or without cause;

(iii) To exercise any and all of the powers of the association not expressly reserved by the charter to the members.

(13) *Nominations for directors.* The bylaws shall provide that nominations for directors may be made at the annual meeting by any member and shall be voted upon, except, however, the bylaws may require that nominations by a member must be submitted to the secretary and then prominently posted in the principal place of business, at least 10 days prior to the date of the

annual meeting. However, if such provision is made for prior submission of nominations by a member, then the bylaws must provide for a nominating committee, which, except in the case of a nominee substituted as a result of death or other incapacity, must submit nominations to the secretary and have such nominations similarly posted at least 15 days prior to the date of the annual meeting.

(14) *New business.* The bylaws shall provide procedures for the introduction of new business at the annual meeting. Those provisions may require that such new business be stated in writing and filed with the secretary prior to the annual meeting at least 30 days prior to the date of the annual meeting.

(15) *Amendment.* Bylaws may include any provision for their amendment that would be consistent with applicable law, rules, and regulations and adequately addresses its subject and purpose.

(i) Amendments shall be effective:

(A) After approval by a majority vote of the authorized board, or by a majority of the vote cast by the members of the association at a legal meeting; and

(B) After receipt of any applicable regulatory approval.

(ii) When an association fails to meet its quorum requirement, solely due to vacancies on the board, the bylaws may be amended by an affirmative vote of a majority of the sitting board.

(16) *Miscellaneous.* The bylaws may also address the subject of age limitations for directors or officers as long as they are consistent with applicable Federal law, rules or regulations, and any other subjects necessary or appropriate for effective operation of the association.

(c) *Form of filing*—(1) *Application requirement.* (i) Any bylaw amendment shall be submitted to the appropriate OCC licensing office if it would:

(A) Render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management;

(B) Involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability; or

(C) Be inconsistent with the requirements of this section or with applicable laws, rules, regulations, or the association's charter.

(ii) Applications submitted under paragraph (c)(1)(i) of this section are subject to standard treatment processing procedures at part 116, subparts A and E of this chapter.

(iii) For purposes of this paragraph (c), bylaw provisions that adopt the language of the OCC's model or optional bylaws, if adopted without change, and filed with the OCC within 30 days after adoption, are effective upon adoption.

(2) *Filing requirement.* If the proposed bylaw amendment does not involve a provision that would be covered by paragraph (c)(1) or (c)(3) of this section, then the association shall submit the amendment to the appropriate OCC licensing office at least 30 days prior to the date the bylaw amendment is to be adopted by the association.

(3) *Corporate governance procedures.* A Federal mutual association may elect to follow the corporate governance procedures of the laws of the state where the main office of the institution is located, provided that such procedures may be elected only to the extent not inconsistent with applicable Federal statutes, regulations, and safety and soundness, and such procedures are not of the type described in paragraph (c)(1) of this section. If this election is selected, a Federal mutual association shall designate in its bylaws the provision or provisions from the body of law selected for its corporate governance procedures, and shall file a copy of such bylaws, which are effective upon adoption, within 30 days after adoption. The submission shall indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (c)(1) of this section.

(d) *Effectiveness.* Any bylaw amendment filed pursuant to paragraph (c)(2) of this section shall automatically be effective 30 days from the date of filing of such amendment, provided that the association follows the requirements of its charter and bylaws in adopting such amendment. This automatic effective date does not apply if, prior to the expiration of such 30-day period, the OCC notifies the association that such amendment is rejected or that such amendment requires an application to be filed pursuant to paragraph (c)(1) of this section.

§ 144.6 Effect of subsequent charter or bylaw change.

Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal mutual savings association to engage in any transaction shall be determined only by the association's charter or bylaws then in effect.

Availability

§ 144.7 In association offices.

A Federal mutual savings association shall make available to its members at all times in its offices a true copy of its charter and bylaws, including any amendments, and shall deliver such a copy to any member on request.

§ 144.8 Communication between members of a Federal mutual savings association.

(a) *Right of communication with other members.* A member of a Federal mutual savings association has the right to communicate, as prescribed in paragraph (b) of this section, with other members of the Federal savings association regarding any matter related to the Federal savings association's affairs, except for ''improper'' communications, as defined in paragraph (c) of this section. The association may not defeat that right by redeeming a savings member's savings account in the Federal mutual savings association.

(b) *Member communication procedures.* If a member of a Federal mutual savings association desires to communicate with other members, the following procedures shall be followed:

(1) The member shall give the Federal mutual savings association a written request to communicate;

(2) If the proposed communication is in connection with a meeting of the Federal savings association's members, the request shall be given at least thirty days before the annual meeting or 10 days before a special meeting;

(3) The request shall contain—

(i) The member's full name and address;

(ii) The nature and extent of the member's interest in the Federal savings association at the time the information is given;

(iii) A copy of the proposed communication; and

(iv) If the communication is in connection with a meeting of the members, the date of the meeting;

(4) The Federal savings association shall reply to the request within either—

(i) Fourteen days;

(ii) Ten days, if the communication is in connection with the annual meeting; or

(iii) Three days, if the communication is in connection with a special meeting;

(5) The reply shall provide either—

(i) The number of the Federal savings association's members and the estimated reasonable cost to the Federal savings association of mailing to them the proposed communication; or

(ii) Notification that the Federal savings association has determined not to mail the communication because it is ''improper'', as defined in paragraph (c) of this section;

(6) After receiving the amount of the estimated costs of mailing and sufficient copies of the communication, the Federal savings association shall mail

the communication to all members, by a class of mail specified by the requesting member, either—

(i) Within fourteen days;

(ii) Within seven days, if the communication is in connection with the annual meeting;

(iii) As soon as practicable before the meeting, if the communication is in connection with a special meeting; or

(iv) On a later date specified by the member;

(7) If the Federal savings association refuses to mail the proposed communication, it shall return the requesting member's materials together with a written statement of the specific reasons for refusal, and shall simultaneously send to the appropriate OCC licensing office two copies each of the requesting member's materials, the Federal savings association's written statement, and any other relevant material. The materials shall be sent within:

(i) Fourteen days,

(ii) Ten days if the communication is in connection with the annual meeting, or

(iii) Three days, if the communication is in connection with a special meeting, after the Federal savings association receives the request for communication.

(c) *Improper communication.* A communication is an ''improper communication'' if it contains material which:

(1) At the time and in the light of the circumstances under which it is made:

(i) Is false or misleading with respect to any material fact; or

(ii) Omits a material fact necessary to make the statements therein not false or misleading, or necessary to correct a statement in an earlier communication on the same subject which has become false or misleading;

(2) Relates to a personal claim or a personal grievance, or is solicitous of personal gain or business advantage by or on behalf of any party;

(3) Relates to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the Federal savings association or is not within the control of the Federal savings association; or

(4) Directly or indirectly and without expressed factual foundation:

(i) Impugns character, integrity, or personal reputation,

(ii) Makes charges concerning improper, illegal, or immoral conduct, or

(iii) Makes statements impugning the stability and soundness of the Federal savings association.

PART 145—FEDERAL SAVINGS ASSOCIATIONS—OPERATIONS

Sec.
145.1 General authority.
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Authority: 12 U.S.C. 1462a, 1463, 1464, 1828. 5412(b)(2)(B).

§ 145.1 General authority.

A Federal savings association may exercise all authority granted it by the Home Owners' Loan Act of 1933 (''Act''), 12 U.S.C. 1464, as amended, and its charter and bylaws, whether or not implemented specifically by OCC regulations, subject to the limitations and interpretations contained in this part.

§ 145.2 [Reserved]

§ 145.16 Public deposits, depositaries, and fiscal agents.

(a) *Definitions.* As used in this section—

(1) *Moneys* includes *monies* and has the same meaning it has in applicable state law;

(2) *State law* includes actions by a governmental body which has a charter adopted under the constitution of the state with provisions respecting deposits of public money of that body;

(3) *Surety* means surety under real and/or personal suretyship, and includes guarantor; and

(4) Terms in paragraph (b) of this section have the meanings they have under applicable state law.

(b) *Authority to act as surety for public deposits.* (1) A Federal savings association that is a deposit association may give bond or security for deposit in it of public moneys or investment in it by a governmental unit if required to do so by state law, either as an alternative condition or otherwise, regardless of the amount required. Any bond or security may be given and any substitution or increase thereof may be made under this section at any time.

(2) If state law requires as a condition of such deposit or investment that the Federal savings association or its bond or security, or any combination thereof, be surety for or with respect to other deposits or instruments, whether of that depositor or investor or of any other(s), and whether in the Federal savings association or in any other institution(s) having, when the investments or deposits were made, insurance by the Federal Deposit Insurance Corporation, the same shall become, or if the state law is self-executing shall be, such surety.

(c) *Depositaries and fiscal agents.* Subject to regulation of the United States Treasury Department, a Federal savings association may serve as a depositary for Federal taxes, as a Treasury tax and loan depositary, or as a depositary of public money and fiscal agent of the Government or any other instrumentality thereof when designated for that purpose by such instrumentality and approved by the OCC, and may satisfy any requirement in connection therewith, including maintaining accounts described in §§ 161.33, 161.52, 161.53, and 161.54 of this chapter; pledging collateral; and performing the services outlined in 31 CFR 202.3(b) or any section that supersedes or amends § 202.3(b).

§ 145.17 Funds transfer services.

A Federal savings association is authorized to transfer, with or without fee, its customers' funds from any account (including a line of credit) of the customer at the Federal savings association or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization by any mechanism or device, including cashier's checks, conforming with applicable laws and established commercial practices.

§ 145.91 Home office.

(a) All operations of a Federal savings association (''you'') are subject to direction from the home office.

(b) You must notify the appropriate OCC licensing office if the permanent address of your home office changes, unless you have submitted an application or notice regarding the change under §§ 145.93 and 145.95 of this chapter.

§ 145.92 Branch offices.

(a) *Definition.* A branch office of a Federal savings association (''you'') is any office other than your home office, agency office, administrative office, data processing office, or an electronic means or facility under part 155 of this chapter.

(b) *Branching.* Subject to the application and notice requirements at §§ 145.93 and 145.95 of this chapter, you may branch in any state or states of

the United States and its territories unless the location would violate:

(1) Section 5(r) of the HOLA (12 U.S.C. 1464(r));

(2) Section 10(e)(3) of the HOLA (12 U.S.C. 1467a(e)(3)); or

(3) Section 13(k)(4) of the FDIA (12 U.S.C. 1823(k)(4)).

(c) *Preemption.* This exercise of the OCC's authority is preemptive of any state law purporting to address the subject of branching by a Federal savings association.

§ 145.93 Application and notice requirements for branch and home offices.

(a) *Application and notice requirements.* A Federal savings association (''you'') must file an application or notice with the appropriate OCC licensing office and receive approval or non-objection under § 145.95 before you change the permanent location of, or establish a new, home or branch office, except as provided in this section.

(b) *Exceptions.* You are not required to submit an application or notice and receive OCC approval or non-objection under § 145.95 under the following circumstances:

(1) *Drive-in or pedestrian offices.* You may establish a drive-in or pedestrian office that is located within 500 feet of a public entrance to your existing home or branch office, provided the functions performed at the office are limited to functions that are ordinarily performed at a teller window.

(2) *Short-distance relocation.* You may change the permanent location of an existing home or branch office to a site that is within the market area and short-distance location area of the existing home or branch office. The short-distance relocation area of an existing office is the area that is within:

(i) A 1000-foot radius of an existing office that is within a Principal City in a Metropolitan Statistical Area (MSA) designated by the U.S. Department of Commerce;

(ii) A one-mile radius of an existing office that is within an MSA, but is not within a Principal City; or

(iii) A two-mile radius of an existing office that is not in an MSA.

(3) *Highly-rated Federal savings associations.* You may change the permanent location of, or establish a new, branch or home office if you meet all of the following requirements:

(i) You are eligible for expedited treatment under § 116.5 of this chapter. For the purposes of that section, you must meet the capital requirements under part 167 of this chapter before and immediately after you change the location of your home or branch office or establish a new branch office.

(ii) You published a notice of your intent to change the location of your home or branch office or establish a new branch office. To satisfy this publication requirement, you must follow the procedures in subpart B of part 116 of this chapter except that:

(A) Under § 116.55(d) and (e) of this chapter, your public notice must state that the public may submit comments to you and to the appropriate OCC licensing office, and must provide addresses for you and for the appropriate OCC licensing office where the public may submit comments;

(B) Section 4.14(c) of this chapter, which addresses public inspections of filings with the OCC, does not apply; and

(C) Under § 116.60 of this chapter, you must publish the public notice at least 35 days before you take the proposed action. If you publish a public notice more than 12 months before you take the proposed action, the publication is invalid.

(iii) If you intend to change the location of an existing office, you must post a notice of your intent in a prominent location in the existing office to be relocated. You must post the notice for 30 days from the date of publication of the initial public notice described in paragraph (b)(3)(ii) of this section.

(iv)(A) No person files a comment opposing the proposed action within 30 days after the date of the publication of the proposed notice; or

(B) A person files a comment opposing the proposed action and the OCC determines that the comment raises issues that are not relevant to the approval standards in § 145.95(b) of this chapter or that OCC action in response to the comment is not required.

(4) *Re-designations of home and branch offices.* You may re-designate an existing branch office as a home office at the same time that you re-designate your existing home office as a branch office.

(c) *Section 5(m) of the HOLA.* If you are incorporated under the laws of, organized in, or do business in the District of Columbia and you satisfy the requirements of paragraph (b) of this section, the Comptroller has approved your home or branch office changes under section 5(m) of the HOLA.

(d) *Maintenance of branch and home office following conversion, consolidation, purchase of bulk assets, merger, or purchase from receiver.* An existing savings association that converts to a Federal savings association may maintain an existing office and a Federal savings association may maintain any office acquired through consolidation, purchase of bulk assets, merger or purchase from the receiver of an association, except to the extent that the approval of the conversion, consolidation, merger, or purchase specifies otherwise.

(e) *Prohibition.* You may not file an application or notice (or utilize any exception described in paragraph (b) of this section) to establish a branch office, if you filed an application to merge or otherwise surrender your charter and the application has been pending for less than six months.

§ 145.95 What processing procedures apply to my home or branch office application or notice?

(a) *Processing procedures.* Applications and notices under § 145.93 are subject to expedited or standard treatment under the application processing procedures at part 116 of this chapter.

(1) *Publication and posting requirements.* (i) You must publish a public notice of your application or notice in accordance with the procedures in subpart B of part 116 of this chapter. Promptly after publication, you must transmit copies of the public notice and the publisher's affidavit to the appropriate OCC licensing office.

(ii) If you propose to change the location of an existing office, you must also post a notice of the application in a prominent location in the office to be relocated. You must post the notice for 30 days from the date of publication of the initial public notice.

(2) *Comment procedures.* Commenters may submit comments on your application or notice in accordance with the procedures in subpart C of part 116 of this chapter.

(3) *Meeting procedures. The* OCC may arrange a meeting in accordance with the procedures in subpart D of part 116 of this chapter.

(4) *OCC Review.* The OCC will process your application or notice in accordance with the procedures in subpart E of part 116 of this chapter. The applicable review period for applications filed under standard treatment is 30 days rather than the time period specified at § 116.270(a) of this chapter.

(b) *Approval standards.* (1) The OCC will approve an application (or not object to a notice), if your overall policies, condition, and operations afford no basis for supervisory objection.

(i) You should meet or exceed minimum capital requirements under part 167 of this chapter and should be at least adequately capitalized as described in § 165.4(b)(2) of this

chapter, before and immediately after the proposed action. If you are undercapitalized as described in § 165.4(b)(3) of this chapter, the OCC will deny your application (or disapprove your notice), unless the proposed action is otherwise permitted under section 38(e)(4) of the FDIA.

(ii) The OCC will evaluate your record of helping to meet the credit needs of your entire community, including low- and moderate-income neighborhoods, under part 195 of this chapter. The OCC may:

(A) Deny your application or disapprove your notice based upon this evaluation; or

(B) Impose a condition to the approval of your application (or non-objection to your notice) requiring you to improve specific practices and/or aspects of your performance under part 195 of this chapter. In most cases, a commitment to improve will not be sufficient to overcome a seriously deficient record.

(iii) The OCC will review the application or notice under the National Environmental Policy Act (42 U.S.C. 3421 *et seq.*) and the National Historic Preservation Act (16 U.S.C. 470).

(2) In reviewing your application and notice, the OCC may consider information available from any source, including any comments submitted by interested parties or views expressed by interested parties at meetings with the OCC.

(3) The OCC may approve an amendment to your charter in connection with a home office relocation under this section.

(c) *Expiration of OCC approval.* (1) You must open or relocate your office within twelve months of OCC approval of your application (or the date of OCC non-objection to your notice), unless the OCC prescribes another time period. The OCC may extend the time period if it determines that you are making a good-faith effort to promptly open or relocate the proposed office.

(2) If you do not open or relocate the proposed office within this time period, you must comply with the application and notice requirements of this section before you may open or relocate the proposed office.

§ 145.96 Agency office.

(a) *General.* A Federal savings association may establish or maintain an agency office to engage in one or more of the following activities:

(1) Servicing, originating, or approving loans and contracts;

(2) Managing or selling real estate owned by the Federal savings association; and

(3) Conducting fiduciary activities or activities ancillary to the association's fiduciary business in compliance with subpart A of part 150 of this chapter.

(b) *Additional services.* A Federal savings association may request, and the OCC may approve, any service not listed in paragraph (a) of this section, except for payment on savings accounts.

(c) *Records.* A Federal savings association must maintain records of all business it transacts at an agency office. It must maintain these records at the agency office, and must transmit copies to a home or branch office.

§ 145.101 Fiscal agency.

A Federal savings association designated fiscal agent by the Secretary of the Treasury or with OCC approval by another instrumentality of the United States, shall, as such, perform such reasonable duties and exercise only such powers and privileges as the Secretary of the Treasury or such instrumentality may prescribe.

§ 145.121 Indemnification of directors, officers and employees.

A Federal savings association shall indemnify its directors, officers, and employees in accordance with the following requirements:

(a) *Definitions and rules of construction.* (1) Definitions for purposes of this section.

(i) *Action.* The term ''action'' means any judicial or administrative proceeding, or threatened proceeding, whether civil, criminal, or otherwise, including any appeal or other proceeding for review;

(ii) *Court.* The term ''court'' includes, without limitation, any court to which or in which any appeal or any proceeding for review is brought.

(iii) *Final judgment.* The term ''final judgment'' means a judgment, decree, or order which is not appealable or as to which the period for appeal has expired with no appeal taken.

(iv) *Settlement.* The term ''settlement'' includes entry of a judgment by consent or confession or a plea of guilty or *nolo contendere.*

(2) References in this section to any individual or other person, including any association, shall include legal representatives, successors, and assigns thereof.

(b) *General.* Subject to paragraphs (c) and (g) of this section, a Federal savings association shall indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of the association, for:

(1) Any amount for which that person becomes liable under a judgment if such action; and

(2) Reasonable costs and expenses, including reasonable attorney's fees, actually paid or incurred by that person in defending or settling such action, or in enforcing his or her rights under this section if he or she attains a favorable judgment in such enforcement action.

(c) *Requirements.* (1) Indemnification shall be made to such person under paragraph (b) of this section only if:

(i) Final judgment on the merits is in his or her favor; or

(ii) In case of:

(A) Settlement,

(B) Final judgment against him or her, or

(C) Final judgment in his or her favor, other than on the merits, if a majority of the disinterested directors of the Federal savings association determine that he or she was acting in good faith within the scope of his or her employment or authority as he or she could reasonably have perceived it under the circumstances and for a purpose he or she could reasonably have believed under the circumstances was in the best interests of the savings association or its members.

(2) However, no indemnification shall be made unless the association gives the OCC at least 60 days' notice of its intention to make such indemnification. Such notice shall state the facts on which the action arose, the terms of any settlement, and any disposition of the action by a court. Such notice, a copy thereof, and a certified copy of the resolution containing the required determination by the board of directors shall be sent to the association's supervisory office, which shall promptly acknowledge receipt thereof. The notice period shall run from the date of such receipt. No such indemnification shall be made if the OCC advises the association in writing, within such notice period, the OCC's objection thereto.

(d) *Insurance.* A Federal savings association may obtain insurance to protect it and its directors, officers, and employees from potential losses arising from claims against any of them for alleged wrongful acts, or wrongful acts, committed in their capacity as directors, officers, or employees. However, no Federal savings association may obtain insurance which provides for payment of losses of any person incurred as a consequence of his or her willful or criminal misconduct.

(e) *Payment of expenses.* If a majority of the directors of a Federal savings association concludes that, in connection with an action, any person ultimately may become entitled to indemnification under this section, the directors may authorize payment of

reasonable costs and expenses, including reasonable attorneys' fees, arising from the defense or settlement of such action. Nothing in this paragraph (e) shall prevent the directors of the savings association from imposing such conditions on a payment of expenses as they deem warranted and in the interests of the savings association. Before making advance payment of expenses under this paragraph (e), the savings association shall obtain an agreement that the savings association will be repaid if the person on whose behalf payment is made is later determined not to be entitled to such indemnification.

(f) *Exclusiveness of provisions.* No Federal savings association shall indemnify any person referred to in paragraph (b) of this section or obtain insurance referred to in paragraph (d) of the section other than in accordance with this section. However, an association which has a bylaw in effect relating to indemnification of its personnel shall be governed solely by that bylaw, except that its authority to obtain insurance shall be governed by paragraph (d) of this section.

(g) The indemnification provided for in paragraph (b) of this section is subject to and qualified by 12 U.S.C. 1821(k).

PART 146—FEDERAL MUTUAL SAVINGS ASSOCIATIONS—MERGER, DISSOLUTION, REORGANIZATION, AND CONVERSION

Sec.
146.1 Definitions.
146.2 Procedure; effective date.
146.3 Transfer of assets upon merger or consolidation.
146.4 Voluntary dissolution.

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901 *et seq.* 5412(b)(2)(B).

§ 146.1 Definitions.

The terms used in §§ 146.2 and 146.3 shall have the same meaning as set forth in §§ 152.13(b) and 163.22(g) of this chapter.

§ 146.2 Procedure; effective date.

(a) A Federal mutual savings association may combine with any depository institution, provided that:

(1) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(2) Any resulting Federal savings association meets the requirements for Federal Home Loan Bank membership and insurance of accounts;

(3) Any resulting Federal savings association conforms within the time prescribed by the OCC to the requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act; and

(4) The resulting institution shall be a mutually held savings association, unless:

(i) The transaction involves a supervisory merger;

(ii) The transaction is approved under part 192 of this chapter; or

(iii) The transaction involves a transfer in the context of a mutual holding company reorganization under section 10(o) of the Home Owners' Loan Act.

(b) Each Federal mutual savings association, by a two-thirds vote of its board of directors, shall approve a plan of combination evidenced by a combination agreement. The agreement shall state:

(1) That the combination shall not be effective unless and until the combination receives any necessary approval from the OCC pursuant to § 163.22 (a) or (c), or in the case of a transaction requiring a notice pursuant to § 163.22(c), the notice has been filed, and the appropriate period of time has passed or the OCC has advised the parties that it will not disapprove the transaction;

(2) Which constituent institution is to be the resulting institution;

(3) The name of the resulting institution;

(4) The location of the home office and any other offices of the resulting institution;

(5) The terms and conditions of the combination and the method of effectuation;

(6) Any charter amendments, or the new charter in the combination;

(7) The basis upon which the resulting institution's savings accounts will be issued;

(8) If the Federal mutual savings association is the resulting institution, the number, names, residence addresses, and terms of directors;

(9) The effect upon and assumption of any liquidation account of a disappearing institution by the resulting institution; and

(10) Such other provisions, agreements, or understandings as relate to the combination.

(c) Prior written notification or notice to the appropriate OCC licensing office or prior written approval of the OCC, pursuant to § 163.22 of this chapter, is required for every combination. In the case of applications and notices pursuant to 163.22 (a) or (c), the OCC shall apply the criteria set out in § 163.22 of this chapter and shall impose any conditions it deems necessary or appropriate to ensure compliance with those criteria and the requirements of this chapter.

(d) Where the resulting institution is a Federal mutual savings association, the OCC may approve a temporary increase in the number of directors of the resulting institution provided that the association submits a plan for bringing the board of directors into compliance with the requirements of § 144.1 of this chapter within a reasonable period of time.

(e) Notwithstanding any other provision of this part, the OCC may require that a plan of combination be submitted to the voting members of any of the mutual savings associations that are constituent institutions at a duly called meeting(s), and that the plan, to be effective, be approved by such voting members.

(f) A conservator or receiver for a Federal mutual savings association may combine the association with another insured depository institution without submitting the plan to the association's board of directors or members for their approval.

(g) If a plan of combination provides for a resulting Federal mutual savings association's name or location to be changed, its charter shall be amended accordingly. If the resulting institution is a Federal mutual savings association, the effective date of the combination shall be the date specified in the approval; if the resulting institution is not a Federal savings association, the effective date shall be that prescribed under applicable law. Approval of a merger automatically cancels the Federal charter of a Federal association that is a disappearing institution as of the effective date of merger, and the association shall, on that date, surrender its charter to the OCC.

§ 146.3 Transfer of assets upon merger or consolidation.

On the effective date of a merger or consolidation in which the resulting institution is a Federal association, all assets and property of the disappearing institutions shall immediately, without any further act, become the property of the resulting institution to the same extent as they were the property of the disappearing institutions, and the resulting institution shall be a continuation of the entity which absorbed the disappearing institutions. All rights and obligations of the disappearing institutions shall remain unimpaired, and the resulting institution shall, on the effective date of the merger or consolidation, succeed to all those rights and obligations, subject to the Home Owners' Loan Act and other applicable statutes.

§ 146.4 Voluntary dissolution.

(a) A Federal savings association's board of directors may propose a plan for dissolution of the association. The plan may provide for either:

(1) Appointment of the Federal Deposit Insurance Corporation (under section 5 of the Act and section 11 of the Federal Deposit Insurance Act, as amended or section 21A of the Federal Home Loan Bank Act, as amended) as receiver for the purpose of liquidation;

(2) Transfer of all the association's assets to another association or home-financing institution under Federal or state charter either for cash sufficient to pay all obligations of the association and retire all outstanding accounts or in exchange for that association's payment of all the association's outstanding obligations and issuance of share accounts or other evidence of interest to the association's members on a *pro rata* basis; or

(3) Dissolution in a manner proposed by the directors which they consider best for all concerned.

(b) The plan, and a statement of reasons for proposing dissolution and for proposing the plan, shall be submitted to the appropriate OCC licensing office for approval. The OCC will approve the plan if the OCC believes dissolution is advisable and the plan best for all concerned, but if the OCC considers the plan inadvisable, the OCC may either make recommendations to the association concerning the plan or disapprove it. When the plan is approved by the association's board of directors and by the OCC, it shall be submitted to the association's members at a duly called meeting and, when approved by a majority of votes cast at that meeting, shall become effective. After dissolution in accordance with the plan, a certificate evidencing dissolution, supported by such evidence as the may require, shall immediately be filed with the OCC. When the OCC receives such evidence satisfactory to the OCC, it will terminate the corporate existence of the dissolved association and the association's charter shall thereby be canceled. A Federal savings association is not required to obtain approval under this section where the Federal savings association transfers all of its assets and liabilities to a bank in a transaction that is subject to § 163.22(b) of this chapter.

PART 150—FIDUCIARY POWERS OF FEDERAL SAVINGS ASSOCIATIONS

Sec.

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Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 150.10 What regulations govern the fiduciary operations of Federal savings associations?

A Federal savings association (''you'') must conduct its fiduciary operations in accordance with 12 U.S.C. 1464(n) and this part.

§ 150.20 What are fiduciary powers?

Fiduciary powers are the authority that the OCC permits you to exercise under 12 U.S.C. 1464(n).

§ 150.30 What fiduciary capacities does this part cover?

You are subject to this part if you act in a fiduciary capacity, except as described in subpart E of this part. You act in a fiduciary capacity when you act in any of the following capacities:

(a) Trustee.
(b) Executor.
(c) Administrator.
(d) Registrar of stocks and bonds.
(e) Transfer agent.
(f) Assignee.
(g) Receiver.
(h) Guardian or conservator of the estate of a minor, an incompetent person, an absent person, or a person over whose estate a court has taken jurisdiction, other than under bankruptcy or insolvency laws.
(i) A fiduciary in a relationship established under a state law that is substantially similar to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act as published by the American Law Institute.
(j) Investment adviser, if you receive a fee for your investment advice.
(k) Any capacity in which you have investment discretion on behalf of another.
(l) Any other similar capacity that the OCC may authorize under 12 U.S.C. 1464(n).

§ 150.40 When do I have investment discretion?

(a) *General.* You have investment discretion when you have, with respect to a fiduciary account, the sole or shared authority to determine what securities or other assets to purchase or sell on behalf of that account. It does not matter whether you have exercised this authority.

(b) *Delegations.* You retain investment discretion if you delegate investment discretion to another. You also have investment discretion if you receive delegated authority to exercise investment discretion from another.

§ 150.50 What is a fiduciary account?

A fiduciary account is an account that you administer acting in a fiduciary capacity.

§ 150.60 What other definitions apply to this part?

Activities ancillary to your fiduciary business include advertising, marketing, or soliciting fiduciary business, contacting existing or potential customers, answering questions and providing information to customers related to their accounts, acting as liaison between you and your customer (for example, forwarding requests for distribution, changes in investment objectives, forms, or funds received from the customer), and inspecting or maintaining custody of fiduciary assets or holding title to real property. This list is illustrative and not comprehensive. Other activities may also be ''ancillary activities'' for purposes of this definition.

Affiliate has the same meaning as in 12 U.S.C. 221a(b). For purposes of this part, substitute the term ''Federal savings association'' for the term ''member bank'' whenever it appears in 12 U.S.C. 221a(b).

Applicable law means the law of a state or other jurisdiction governing your fiduciary relationships, any Federal law governing those relationships, the terms of the instrument governing a fiduciary relationship, and any court order pertaining to the relationship.

Fiduciary activities include accepting a fiduciary appointment, executing fiduciary-related documents, providing investment advice for a fee regarding fiduciary assets, or making discretionary decisions regarding investment or distribution of assets.

Fiduciary officers and employees means the officers and employees of a Federal savings association to whom the board of directors or its designee has assigned functions involving the exercise of the association's fiduciary powers.

Subpart A—Obtaining Fiduciary Powers

§ 150.70 Must I obtain OCC approval or file a notice before I exercise fiduciary powers?

You should refer to the following chart to determine if you must obtain OCC approval or file a notice with the OCC before you exercise fiduciary powers. This chart does not apply to activities that are exempt under subpart E of this part.

If you will conduct . . .	Then . . .
(a) Fiduciary activities for the first time and the OCC has not previously approved an application that you submitted under this part.	You must obtain prior approval from the OCC under §§ 150.80 through 150.120 before you conduct the activities
(b) Fiduciary activities that are materially different from the activities that the OCC has previously approved for you, including fiduciary activities that the OCC has previously approved for you that you have not exercised for at least five years.	You must obtain prior approval from the OCC under §§ 150.80 through 150.120 before you conduct the activities
(c) Fiduciary activities that are not materially different from the activities that the OCC has previously approved for you.	You must file a written notice described at § 150.125 if you commence the activities in a new state. You do not need to file a written notice if you commence the activities at a new location in a state where you already conduct these activities.
(d) Activities that are ancillary to your fiduciary business	You do not have to obtain prior OCC approval or file a notice with the OCC.

§ 150.80 How do I obtain OCC approval?

You must file an application under part 116, subparts A and E of this chapter.

§ 150.90 What information must I include in my application?

You must describe the fiduciary powers that you or your affiliate will exercise. You must also include information necessary to enable the OCC to make the determinations described in § 150.100.

§ 150.100 What factors may the OCC consider in its review of my application?

The OCC may consider the following factors when reviewing your application:

(a) Your financial condition.

(b) Your capital and whether that capital is sufficient under the circumstances.

(c) Your overall performance.

(d) The fiduciary powers you propose to exercise.

(e) Your proposed supervision of those powers.

(f) The availability of legal counsel.

(g) The needs of the community to be served.

(h) Any other facts or circumstances that the OCC considers proper.

§ 150.110 [Reserved]

§ 150.120 What action will the OCC take on my application?

The OCC may approve or deny your application. If your application is approved, the OCC may impose conditions to ensure that the requirements of this part are met.

§ 150.125 How do I file the notice under § 150.70(c)?

(a) If you are required to file a notice under § 150.70(c), within ten days after you commence the fiduciary activities in a new state, you must file a written notice that identifies each new state in which you conduct or will conduct fiduciary activities, describe the fiduciary activities that you conduct or will conduct in each new state, and provide sufficient information supporting a conclusion that the activities are permissible in the state.

(b) You must file the notice with the appropriate OCC licensing office.

Subpart B—Exercising Fiduciary Powers

§ 150.130 How may I conduct multi-state operations?

(a) *Conducting fiduciary activities in more than one state.* You may conduct fiduciary activities in any state, subject to the application and notice requirements in subpart A of this part.

(b) *Serving customers in more than one state.* When you conduct fiduciary activities in a state:

(1) You may market your fiduciary services to, and act as a fiduciary for, customers located in any state, may act as a fiduciary for relationships that include property located in other states, and may act as a testamentary trustee for a testator located in other states.

(2) You may establish or utilize an office in any state to perform activities that are ancillary to your fiduciary business.

§ 150.135 How do I determine which state's laws apply to my operations?

(a) The state laws that apply to you by virtue of 12 U.S.C. 1464(n) are the laws of the states in which you conduct fiduciary activities. For each individual state, you may conduct fiduciary activities in the capacity of trustee, executor, administrator, guardian, or in any other fiduciary capacity the state permits for its state banks, trust companies, or other corporations that compete with Federal savings associations in the state.

(b) For each fiduciary relationship, the state referred to in 12 U.S.C. 1464(n) is the state in which you conduct fiduciary activities for that relationship.

§ 150.136 To what extent do state laws apply to my fiduciary operations?

(a) *Application of state law.* To enhance safety and soundness and to enable Federal savings associations to conduct their fiduciary activities in accordance with the best practices of thrift institutions in the United States (by efficiently delivering fiduciary services to the public free from undue regulatory duplication and burden), the OCC intends to give Federal savings associations maximum flexibility to exercise their fiduciary powers in accordance with a uniform scheme of Federal regulation. Accordingly, Federal savings associations may exercise fiduciary powers as authorized under Federal law, including this part, without regard to state laws that purport to regulate or otherwise affect their fiduciary activities, except to the extent provided in 12 U.S.C. 1464(n) (state laws regarding scope of fiduciary powers, access to examination reports regarding trust activities, deposits of securities, oaths and affidavits, and capital) or in paragraph (c) of this section. For purposes of this section, ''state law'' includes any state statute, regulation, ruling, order, or judicial decision.

(b) *Illustrative examples.* Examples of state laws that are preempted by the HOLA and this section include those regarding:

(1) Registration and licensing;

(2) Recordkeeping;

(3) Advertising and marketing;

(4) The ability of a Federal savings association conducting fiduciary activities to maintain an action or proceeding in state court; and

(5) Fiduciary-related fees.

(c) *State laws that are not preempted.* State laws of the following types are not preempted to the extent that they only incidentally affect the fiduciary operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Tort law;

(4) Criminal law;

(5) Probate law; and

(6) Any other law that the OCC, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on fiduciary operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

§ 150.140 Must I adopt and follow written policies and procedures in exercising fiduciary powers?

You must adopt and follow written policies and procedures adequate to maintain your fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures should address, where appropriate, the following areas:

(a) Your brokerage placement practices.

(b) Your methods for ensuring that your fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security.

(c) Your methods for preventing self-dealing and conflicts of interest.

(d) Your selection and retention of legal counsel who is ready and available to advise you and your fiduciary officers and employees on fiduciary matters.

(e) Your investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

Fiduciary Personnel and Facilities

§ 150.150 Who is responsible for the exercise of fiduciary powers?

The exercise of your fiduciary powers must be managed by or under the direction of your board of directors. In discharging its responsibilities, the board may assign any function related to the exercise of fiduciary powers to any director, officer, employee, or committee of directors, officers, or employees.

§ 150.160 What personnel and facilities may I use to perform fiduciary services?

You may use your qualified personnel and facilities or an affiliate's qualified personnel and facilities to perform services related to the exercise of fiduciary powers.

§ 150.170 May my other departments or affiliates use fiduciary personnel and facilities to perform other services?

Your other departments or affiliates may use fiduciary officers, employees, and facilities to perform services unrelated to the exercise of fiduciary powers, to the extent not prohibited by applicable law.

§ 150.180 May I perform fiduciary services for, or purchase fiduciary services from, another association or entity?

You may perform services related to the exercise of fiduciary powers for another association or other entity under a written agreement. You may also purchase services related to the exercise of fiduciary powers from another association or other entity under a written agreement.

§ 150.190 Must fiduciary officers and employees be bonded?

You must obtain an adequate bond for all fiduciary officers and employees.

Review of a Fiduciary Account

§ 150.200 Must I review a prospective account before I accept it?

Before accepting a prospective fiduciary account, you must review it to determine whether you can properly administer the account.

§ 150.210 Must I conduct another review of an account after I accept it?

After you accept a fiduciary account for which you have investment discretion, you must conduct a prompt review of all assets of the account to evaluate whether they are appropriate, individually and collectively, for the account.

§ 150.220 Are any other account reviews required?

At least once every calendar year, you must conduct a review of all assets of each fiduciary account for which you have investment discretion. In this review, you must evaluate whether the assets are appropriate, individually and collectively, for the account.

Custody and Control of Assets

§ 150.230 Who must maintain custody or control of assets in a fiduciary account?

You must place assets of fiduciary accounts in the joint custody or control of not fewer than two fiduciary officers or employees designated for that purpose by the board of directors.

§ 150.240 May I hold investments of a fiduciary account off-premises?

You may hold the investments of a fiduciary account off-premises, if this practice is consistent with applicable law, and you maintain adequate safeguards and controls.

§ 150.250 Must I keep fiduciary assets separate from other assets?

You must keep the assets of fiduciary accounts separate from your other assets. You must also keep the assets of each fiduciary account separate from all other accounts, or you must identify the investments as the property of a particular account, except as provided in § 150.260.

Investing Funds of a Fiduciary Account

§ 150.260 How may I invest funds of a fiduciary account?

(a) *General.* You must invest funds of a fiduciary account in a manner consistent with applicable law.

(b) *Collective investment funds.* (1) You may invest funds of a fiduciary account in a collective investment fund, including a collective investment fund that you have established. In establishing and administering such funds, you must comply with 12 CFR 9.18.

(2) If you must file a document with the OCC under 12 CFR 9.18, the OCC may review such documents for compliance with this part and other laws and regulations.

(3) ''Bank'' and ''national bank'' as used in 12 CFR 9.18 shall be deemed to include a Federal savings association.

Funds Awaiting Investment or Distribution

§ 150.290 What must I do with fiduciary funds awaiting investment or distribution?

If you have investment discretion or discretion over distributions for a fiduciary account which contains funds awaiting investment or distribution, you must ensure that those funds do not remain uninvested and undistributed any longer than is reasonable for the proper management of the account and consistent with applicable law. You also must obtain a rate of return for those funds that is consistent with applicable law.

§ 150.300 Where may I deposit fiduciary funds awaiting investment or distribution?

(a) *Self deposits.* You may deposit funds of a fiduciary account that are awaiting investment or distribution in your other departments, unless prohibited by applicable law.

(b) *Affiliate deposits.* You may also deposit funds of a fiduciary account that are awaiting investment or distribution with an affiliated insured depository institution, unless prohibited by applicable law.

§ 150.310 What if the FDIC does not insure the deposits?

If the FDIC does not insure the entire amount of a self deposit, you must set aside collateral as security. If the FDIC does not insure the entire amount of an affiliate deposit, you or your affiliate must set aside collateral as security. The market value of the collateral must at all times equal or exceed the amount of the uninsured fiduciary funds. You must place the collateral under the control of appropriate fiduciary officers and employees.

§ 150.320 What is acceptable collateral for uninsured deposits?

Any of the following is acceptable collateral for self deposits or affiliate deposits under § 150.310:

(a) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest.

(b) Readily marketable securities of the classes in which state-chartered corporate fiduciaries are permitted to invest fiduciary funds under applicable state law.

(c) Other readily marketable securities as the OCC may determine.

(d) Surety bonds, to the extent they provide adequate security, unless prohibited by applicable law.

(e) Any other assets that qualify under applicable state law as appropriate security for deposits of fiduciary funds.

Restrictions on Self Dealing

§ 150.330 Are there investments in which I may not invest funds of a fiduciary account?

You may not invest funds of a fiduciary account for which you have investment discretion in the following assets, unless authorized by applicable law:

(a) The stock or obligations of, or assets acquired from, you or any of your directors, officers, or employees.

(b) The stock or obligations of, or assets acquired from, your affiliates or any of their directors, officers, or employees.

(c) The stock or obligations of, or assets acquired from, other individuals or organizations if you have an interest in the individual or organization that might affect the exercise of your best judgment.

§ 150.340 May I exercise rights to purchase additional stock or fractional shares of my stock or obligations or the stock or obligations of my affiliates?

If the retention of investments in your stock or obligations or the stock or obligations of an affiliate in fiduciary accounts is consistent with applicable law, you may do either of the following:

(a) Exercise rights to purchase additional stock (or securities convertible into additional stock) when these rights are offered *pro rata* to stockholders.

(b) Purchase fractional shares to complement fractional shares acquired through the exercise of rights or through the receipt of a stock dividend resulting in fractional share holdings.

§ 150.350 May I lend, sell, or transfer assets of a fiduciary account if I have an interest in the transaction?

(a) *General restriction.* Except as provided in paragraph (b) of this section, you may not lend, sell, or otherwise transfer assets of a fiduciary account for which you have investment discretion to yourself or any of your directors, officers, or employees; to your affiliates or any of their directors, officers, or employees; or to other individuals or organizations with whom you have an interest that might affect the exercise of your best judgment.

(b) *Exceptions*—(1) *Funds for which you have investment discretion.* You may lend, sell or otherwise transfer assets of a fiduciary account for which you have investment discretion to yourself or any of your directors, officers, or employees; to your affiliates or any of their directors, officers, or employees; or to other individuals or organizations with whom you have an interest that might affect the exercise of your best judgment, if you meet one of the following conditions:

(i) The transaction is authorized by applicable law.

(ii) Legal counsel advises you in writing that you have incurred, in your fiduciary capacity, a contingent or potential liability. Upon the sale or transfer of assets, you must reimburse the fiduciary account in cash in an amount equal to the greater of book or market value of the assets.

(iii) The transaction is permitted under 12 CFR 9.18(b)(8)(iii) for defaulted fixed-income investments.

(iv) The OCC requires you to do so.

(2) *Funds held as trustee.* You may make loans of funds held in trust to any of your directors, officers, or employees if the funds are held in an employee benefit plan and the loan is made in accordance with the exemptions found at section 408 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108).

§ 150.360 May I make a loan to a fiduciary account that is secured by an interest in the assets of the account?

You may make a loan to a fiduciary account that is secured by an interest in the assets of the account, if the transaction is fair to the account and is not prohibited by applicable law.

§ 150.370 May I sell assets or lend money between fiduciary accounts?

You may sell assets or lend money between fiduciary accounts, if the transaction is fair to both accounts and is not prohibited by applicable law.

Compensation, Gifts, and Bequests

§ 150.380 May I earn compensation for acting in a fiduciary capacity?

If the amount of your compensation for acting in a fiduciary capacity is not set or governed by applicable law, you may charge a reasonable fee for your services.

§ 150.390 May my officer or employee retain compensation for acting as a co-fiduciary?

You may not permit your officers or employees to retain any compensation for acting as a co-fiduciary with you in the administration of a fiduciary account, except with the specific approval of your board of directors.

§ 150.400 May my fiduciary officer or employee accept a gift or bequest?

You may not permit any fiduciary officer or employee to accept a bequest or gift of fiduciary assets, unless the bequest or gift is directed or made by a relative of the officer or employee or is specifically approved by your board of directors.

Recordkeeping Requirements

§ 150.410 What records must I keep?

You must keep adequate records for all fiduciary accounts. For example, you must keep documents on the establishment and termination of each fiduciary account.

§ 150.420 How long must I keep these records?

You must keep fiduciary records for three years after the termination of the account or the termination of any litigation relating to the account, whichever is later.

§ 150.430 Must I keep fiduciary records separate and distinct from other records?

You must keep fiduciary records separate and distinct from your other records.

Audit Requirements

§ 150.440 When do I have to audit my fiduciary activities?

(a) *Annual audit.* If you do not use a continuous audit system described in paragraph (b) of this section, then you must arrange for a suitable audit of all significant fiduciary activities at least once during each calendar year.

(b) *Continuous audit.* Instead of an annual audit, you may adopt a continuous audit system. Under a continuous audit system, you must arrange for a discrete audit of each significant fiduciary activity (*i.e.,* on an activity-by-activity basis) at an interval commensurate with the nature and risk of that activity. Some fiduciary activities may receive audits at intervals greater or less than one year, as appropriate.

§ 150.450 What standards govern the conduct of the audit?

Auditors must follow generally accepted standards for attestation engagements and other standards established by the OCC. An audit must ascertain whether your internal control policies and procedures provide reasonable assurance of three things:

(a) You are administering fiduciary activities in accordance with applicable law.

(b) You are properly safeguarding fiduciary assets.

(c) You are accurately recording transactions in appropriate accounts in a timely manner.

§ 150.460 Who may conduct an audit?

Internal auditors, external auditors, or other qualified persons who are responsible only to the board of directors, may conduct an audit.

§ 150.470 Who directs the conduct of the audit?

Your fiduciary audit committee directs the conduct of the audit. Your fiduciary audit committee may consist of a committee of your directors or an audit committee of an affiliate. There are two restrictions on who may serve on the committee:

(a) Your officers and officers of an affiliate who participate significantly in administering your fiduciary activities may not serve on the audit committee.

(b) A majority of the members of the audit committee may not serve on any committee to which the board of directors has delegated power to manage and control your fiduciary activities.

§ 150.480 How do I report the results of the audit?

(a) *Annual audit.* If you conduct an annual audit, you must note the results of the audit (including significant actions taken as a result of the audit) in the minutes of the board of directors.

(b) *Continuous audit.* If you adopt a continuous audit system, you must note the results of all discrete audits conducted since the last audit report (including significant actions taken as a result of the audits) in the minutes of the board of directors at least once during each calendar year.

Subpart C—Depositing Securities With State Authorities

§ 150.490 When must I deposit securities with state authorities?

You must deposit securities with a state's authorities or, if applicable, a Federal Home Loan Bank under § 150.510, if you meet all of the following:

(a) You are located in the state.

(b) You act as a private or court-appointed trustee.

(c) The law of the state requires corporations acting in a fiduciary capacity to deposit securities with state authorities for the protection of private or court trusts.

§ 150.500 How much must I deposit if I administer fiduciary assets in more than one state?

If you administer fiduciary assets in more than one state, you must compute the amount of deposit required for each state on the basis of fiduciary assets that you administer primarily from offices located in that state.

§ 150.510 What must I do if state authorities refuse my deposit?

If state authorities refuse to accept your deposit under § 150.490, you must deposit the securities with the Federal Home Loan Bank of which you are a member. The Federal Home Loan Bank will hold the securities for the protection of private or court trusts to the same extent as if the securities had been deposited with state authorities.

Subpart D—Terminating Fiduciary Activities Receivership or Liquidation

§ 150.520 What happens if I am placed in receivership or voluntary liquidation?

If the OCC appoints a conservator or receiver, or if you place yourself in voluntary liquidation, the receiver, conservator, or liquidating agent must promptly close or transfer all fiduciary accounts to a substitute fiduciary, in accordance with OCC instructions and the orders of the court having jurisdiction.

Surrender of Fiduciary Powers

§ 150.530 How do I surrender fiduciary powers?

If you want to surrender your fiduciary powers, you must file a certified copy of a resolution of your board of directors evidencing that intent. You must file the resolution with the appropriate OCC licensing office.

§ 150.540 When will the OCC terminate my fiduciary powers?

If, after appropriate investigation, the OCC is satisfied that you have been discharged from all fiduciary duties, the appropriate OCC licensing office will issue a written notice indicating that you are no longer authorized to exercise fiduciary powers.

§ 150.550 May I recover my deposit from state authorities?

Upon issuance of the OCC written notice under § 150.540, you may recover any securities deposited with state authorities, or a Federal Home Loan Bank, under subpart C of this part.

Revocation of Fiduciary Powers

§ 150.560 When may the OCC revoke my fiduciary powers?

The OCC may revoke your fiduciary powers if it determines that you have done any of the following:

(a) Exercised those fiduciary powers unlawfully or unsoundly.

(b) Failed to exercise those fiduciary powers for five consecutive years.

(c) Otherwise failed to follow the requirements of this part.

§ 150.570 What procedures govern the revocation?

The procedures for revocation of fiduciary powers are set forth in 12 U.S.C. 1464(n)(10). The OCC will conduct the hearing required under 12 U.S.C. 1464(n)(10)(B) under part 109 of this chapter.

Subpart E—Activities Exempt From This Part

§ 150.580 When may I conduct fiduciary activities without obtaining OCC approval?

Subject to the requirements of this subpart E, you do not need OCC approval under subpart B if you conduct fiduciary activities in the following fiduciary capacities:

(a) Trustee of a trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan qualifying for specific tax treatment under section 401(d) of the Internal Revenue Code of 1954 (26 U.S.C. 401(d)).

(b) Trustee or custodian of a Individual Retirement Account within the meaning of section 408(a) of the Internal Revenue Code of 1954 (26 U.S.C. 408(a)).

§ 150.590 What standards must I observe when acting in exempt fiduciary capacities?

You must observe principles of sound fiduciary administration, including those related to recordkeeping and segregation of assets.

§ 150.600 How may funds be invested when I act in an exempt fiduciary capacity?

If you act in an exempt fiduciary capacity under § 150.580, the funds of the fiduciary account may be invested only in the following:

(a) Your accounts, deposits, obligations, or securities.

(b) Other assets as the customer may direct, provided you do not exercise any investment discretion and do not directly or indirectly provide any investment advice for the fiduciary account.

§ 150.610 What disclosures must I make when acting in exempt fiduciary capacities?

(a) If you act in an exempt fiduciary capacity under § 150.580 and fiduciary investments are not limited to accounts or deposits insured by the FDIC, you must include the following language in bold type on the first page of any contract documents:

(b) Funds invested pursuant to this agreement are not insured by the FDIC merely because the trustee or custodian is a Federal savings association the accounts of which are covered by such insurance. Only investments in the accounts of a Federal savings association are insured by the FDIC, subject to its rules and regulations.

§ 150.620 May I receive compensation for acting in exempt fiduciary capacities?

You may receive reasonable compensation.

PART 151—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS

Sec.

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Subpart A—Recordkeeping Requirements

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Subpart D—Securities Trading Policies and Procedures

151.140 What policies and procedures must I maintain and follow for securities transactions?

151.150 How do my officers and employees file reports of personal securities trading transactions?

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 151.10 What does this part do?

This part establishes recordkeeping and confirmation requirements that apply when a Federal savings association (''you'') effects certain securities transactions for customers.

§ 151.20 Must I comply with this part?

(a) *General.* Except as provided under paragraph (b) of this section, you must comply with this part when:

(1) You effect a securities transaction for a customer.

(2) You effect a transaction in government securities.

(3) You effect a transaction in municipal securities and are not registered as a municipal securities dealer with the SEC.

(4) You effect a securities transaction as fiduciary. You also must comply with 12 CFR part 150 when you effect such a transaction.

(b) *Exceptions*—(1) *Small number of transactions.* You are not required to comply with § 151.50(b) through (d) (recordkeeping) and § 151.140(a) through (c) (policies and procedures), if you effected an average of fewer than 500 securities transactions per year for customers over the three prior calendar years. You may exclude transactions in government securities when you calculate this average.

(2) *Government securities.* If you effect fewer than 500 government securities brokerage transactions per year, you are not required to comply with § 151.50 (recordkeeping) for those transactions. This exception does not apply to government securities dealer transactions. *See* 17 CFR 404.4(a).

(3) *Municipal securities.* If you are registered with the SEC as a ''municipal securities dealer,'' as defined in 15 U.S.C. 78c(a)(30) (*see* 15 U.S.C. 78o–4), you are not required to comply with this part when you conduct municipal securities transactions.

(4) *Foreign branches.* You are not required to comply with this part when you conduct a transaction at your foreign branch.

(5) *Transactions by registered broker-dealers.* You are not required to comply with this part for securities transactions effected by a registered broker-dealer, if the registered broker-dealer directly provides the customer with a confirmation. These transactions include a transaction effected by your employee who also acts as an employee of a registered broker-dealer (''dual employee'').

§ 151.30 What requirements apply to all transactions?

You must effect all transactions, including transactions excepted under § 151.20, in a safe and sound manner. You must maintain effective systems of records and controls regarding your customers' securities transactions. These systems must clearly and accurately reflect all appropriate information and provide an adequate basis for an audit.

§ 151.40 What definitions apply to this part?

Asset-backed security means a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period. *Asset-backed security* includes any rights or other assets designed to ensure the servicing or timely distribution of proceeds to the security holders.

Common or collective investment fund means any fund established under 12 CFR 150.260(b) or 12 CFR 9.18.

Completion of the transaction means:

(1) If the customer purchases a security through or from you, except as provided in paragraph (2) of this definition, the time the customer pays you any part of the purchase price. If payment is made by a bookkeeping entry, the time you make the bookkeeping entry for any part of the purchase price.

(2) If the customer purchases a security through or from you and pays for the security before you request payment or notify the customer that payment is due, the time you deliver the security to or into the account of the customer.

(3) If the customer sells a security through or to you, except as provided in paragraph (4) of this definition, the time the customer delivers the security to you. If you have custody of the security at the time of sale, the time you transfer the security from the customer's account.

(4) If the customer sells a security through or to you and delivers the security to you before you request delivery or notify the customer that delivery is due, the time you pay the customer or pay into the customer's account.

Customer means a person or account, including an agency, trust, estate, guardianship, or other fiduciary account for which you effect a securities transaction. *Customer* does not include a broker or dealer, or you when you: act as a broker or dealer; act as a fiduciary with investment discretion over an account; are a trustee that acts as the shareholder of record for the purchase or sale of securities; or are the issuer of securities that are the subject of the transaction.

Debt security means any security, such as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer (including any security of this type that is convertible into stock or a similar security). *Debt security* also includes a fractional or participation interest in these debt securities. *Debt security* does not include securities issued by an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a–1, *et seq.*

Government security means:

(1) A security that is a direct obligation of, or an obligation that is guaranteed as to principal and interest by, the United States;

(2) A security that is issued or guaranteed by a corporation in which the United States has a direct or indirect interest if the Secretary of the Treasury has designated the security for exemption as necessary or appropriate in the public interest or for the protection of investors;

(3) A security issued or guaranteed as to principal and interest by a corporation if a statute specifically designates, by name, the corporation's securities as exempt securities within the meaning of the laws administered by the SEC; or

(4) Any put, call, straddle, option, or privilege on a government security described in this definition, other than a put, call, straddle, option, or privilege:

(i) That is traded on one or more national securities exchanges; or

(ii) For which quotations are disseminated through an automated quotation system operated by a registered securities association.

Investment discretion means the same as under 12 CFR 150.40(a).

Investment company plan means any plan under which:

(1) A customer purchases securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940, making the payments directly to, or made payable to, the registered investment company, or the principal underwriter, custodian, trustee, or other designated agent of the registered investment company; or

(2) A customer sells securities issued by an open-end investment company or unit investment trust registered under the Investment Company Act of 1940 under:

(i) An individual retirement or individual pension plan qualified under the Internal Revenue Code; or

(ii) A contractual or systematic agreement under which the customer purchases at the applicable public offering price, or redeems at the applicable redemption price, securities in specified amounts (calculated in security units or dollars) at specified time intervals, and stating the commissions or charges (or the means of calculating them) that the customer will pay in connection with the purchase.

Municipal security means:

(1) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, a state or any political subdivision, or any agency or instrumentality of a state or any political subdivision.

(2) A security that is a direct obligation of, or an obligation guaranteed as to principal or interest by, any municipal corporate instrumentality of one or more states; or

(3) A security that is an industrial development bond, the interest on which is excludable from gross income under section 103(a) of the Code (26 U.S.C. 103(a)).

Periodic plan means a written document that authorizes you to act as agent to purchase or sell for a customer a specific security or securities (other than securities issued by an open end investment company or unit investment trust registered under the Investment Company Act of 1940). The written document must authorize you to purchase or sell in specific amounts (calculated in security units or dollars) or to the extent of dividends and funds available, at specific time intervals, and must set forth the commission or charges to be paid by the customer or the manner of calculating them.

SEC means the Securities and Exchange Commission.

Security means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, and any put, call, straddle, option, or privilege on any security or group or index of securities (including any interest therein or based on the value thereof), or, in general, any instrument commonly known as a ''security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

Security does not include currency; any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of less than nine months, exclusive of days of grace, or any renewal thereof, the maturity of which is likewise limited; a deposit or share account in a Federal or state chartered depository institution; a loan participation; a letter of credit or other form of bank indebtedness incurred in the ordinary course of business; units of a collective investment fund; interests in a variable amount (master) note of a borrower of prime credit; U.S. Savings Bonds; or any other instrument the OCC determines does not constitute a security for purposes of this part.

Sweep account means any prearranged, automatic transfer or sweep of funds above a certain dollar level from a deposit account to purchase a security or securities, or any prearranged, automatic redemption or sale of a security or securities when a deposit account drops below a certain level with the proceeds being transferred into a deposit account.

Subpart A—Recordkeeping Requirements

§ 151.50 What records must I maintain for securities transactions?

If you effect securities transactions for customers, you must maintain all of the following records for at least three years:

(a) *Chronological records.* You must maintain an itemized daily record of each purchase and sale of securities in chronological order, including:

(1) The account or customer name for which you effected each transaction;

(2) The name and amount of the securities;

(3) The unit and aggregate purchase or sale price;

(4) The trade date; and

(5) The name or other designation of the registered broker-dealer or other person from whom you purchased the securities or to whom you sold the securities.

(b) *Account records.* You must maintain account records for each customer reflecting:

(1) Purchases and sales of securities;

(2) Receipts and deliveries of securities;

(3) Receipts and disbursements of cash; and

(4) Other debits and credits pertaining to transactions in securities.

(c) *Memorandum (order ticket).* You must make and keep current a memorandum (order ticket) of each order or any other instruction given or received for the purchase or sale of securities (whether executed or not), including:

(1) The account or customer name for which you effected each transaction;

(2) Whether the transaction was a market order, limit order, or subject to special instructions;

(3) The time the trader received the order;

(4) The time the trader placed the order with the registered broker-dealer, or if there was no registered broker-dealer, the time the trader executed or cancelled the order;

(5) The price at which the trader executed the order;

(6) The name of the registered broker-dealer you used.

(d) *Record of registered broker-dealers.* You must maintain a record of all registered broker-dealers that you selected to effect securities transactions and the amount of commissions that you paid or allocated to each registered broker-dealer during each calendar year.

(e) *Notices.* You must maintain a copy of the written notice required under subpart B of this part.

§ 151.60 How must I maintain my records?

(a) You may maintain the records required under § 151.50 in any manner, form, or format that you deem appropriate. However, your records must clearly and accurately reflect the required information and provide an adequate basis for an audit of the information.

(b) You, or the person that maintains and preserves records on your behalf, must:

(1) Arrange and index the records in a way that permits easy location, access, and retrieval of a particular record;

(2) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section;

(3) Provide promptly any of the following that OCC examiners or your directors may request:

(i) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(ii) A legible, true, and complete printout of the record; and

(iii) Means to access, view, and print the records.

(4) In the case of records on electronic storage media, you, or the person that maintains and preserves records for you, must establish procedures:

(i) To maintain, preserve, and reasonably safeguard the records from loss, alteration, or destruction;

(ii) To limit access to the records to properly authorized personnel, your directors, and OCC examiners; and

(iii) To reasonably ensure that any reproduction of a non-electronic

original record on electronic storage media is complete, true, and legible when retrieved.

(c) You may contract with third party service providers to maintain the records.

Subpart B—Content and Timing of Notice

§ 151.70 What type of notice must I provide when I effect a securities transaction for a customer?

If you effect a securities transaction for a customer, you must give or send the customer the registered broker-dealer confirmation described at § 151.80, or the written notice described at § 151.90. For certain types of transactions, you may elect to provide the alternate notices described in § 151.100.

§ 151.80 How do I provide a registered broker-dealer confirmation?

(a) If you elect to satisfy § 151.70 by providing the customer with a registered broker-dealer confirmation, you must provide the confirmation by having the registered broker-dealer send the confirmation directly to the customer or by sending a copy of the registered broker-dealer's confirmation to the customer within one business day after you receive it.

(b) If you have received or will receive remuneration from any source, including the customer, in connection with the transaction, you must provide a statement of the source and amount of the remuneration in addition to the registered broker-dealer confirmation described in paragraph (a) of this section.

§ 151.90 How do I provide a written notice?

If you elect to satisfy § 151.70 by providing the customer a written notice, you must give or send the written notice at or before the completion of the securities transaction. You must include all of the following information in a written notice:

(a) Your name and the customer's name.

(b) The capacity in which you acted (for example, as agent).

(c) The date and time of execution of the securities transaction (or a statement that you will furnish this information within a reasonable time after the customer's written request), and the identity, price, and number of shares or units (or principal amount in the case of debt securities) of the security the customer purchased or sold.

(d) The name of the person from whom you purchased or to whom you sold the security, or a statement that you will furnish this information within a reasonable time after the customer's written request.

(e) The amount of any remuneration that you have received or will receive from the customer in connection with the transaction unless the remuneration paid by the customer is determined under a written agreement, other than on a transaction basis.

(f) The source and amount of any other remuneration you have received or will receive in connection with the transaction. If, in the case of a purchase, you were not participating in a distribution, or in the case of a sale, were not participating in a tender offer, the written notice may state whether you have or will receive any other remuneration and state that you will furnish the source and amount of the other remuneration within a reasonable time after the customer's written request.

(g) That you are not a member of the Securities Investor Protection Corporation, if that is the case. This does not apply to a transaction in shares of a registered open-end investment company or unit investment trust if the customer sends funds or securities directly to, or receives funds or securities directly from, the registered open-end investment company or unit investment trust, its transfer agent, its custodian, or a designated broker or dealer who sends the customer either a confirmation or the written notice in this section.

(h) Additional disclosures. You must provide all of the additional disclosures described in the following chart for transactions involving certain debt securities:

If you effect a transaction involving . . .	You must provide the following additional information in your written notice . . .
(1) A debt security subject to redemption before maturity	A statement that the issuer may redeem the debt security in whole or in part before maturity, that the redemption could affect the represented yield, and that additional redemption information is available upon request.
(2) A debt security that you effected exclusively on the basis of a dollar price.	(i) The dollar price at which you effected the transaction; and (ii) The yield to maturity calculated from the dollar price. You do not have to disclose the yield to maturity if: (A) The issuer may extend the maturity date of the security with a variable interest rate; or (B) The security is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment.
(3) A debt security that you effected on basis of yield	(i) The yield at which the transaction, including the percentage amount and its characterization (e.g., current yield, yield to maturity, or yield to call). If you effected the transaction at yield to call, you must indicate the type of call, the call date, and the call price; (ii) The dollar price calculated from that yield; and (iii) The yield to maturity and the represented yield, if you effected the transaction on a basis other than yield to maturity and the yield to maturity is lower than the represented yield. You are not required to disclose this information if: (A) The issuer may extend the maturity date of the security with a variable interest rate; or (B) The security is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment.

If you effect a transaction involving . . .	You must provide the following additional information in your written notice . . .
(4) A debt security that is an asset-backed security that represents an interest in, or is secured by, a pool of receivables or other financial assets that are subject continuously to prepayment.	(i) A statement that the actual yield of the asset-backed security may vary according to the rate at which the underlying receivables or other financial assets are prepaid; and (ii) A statement that you will furnish information concerning the factors that affect yield (including at a minimum estimated yield, weighted average life, and the prepayment assumptions underlying yield) upon the customer's written request.
(5) A debt security, other than a government security	A statement that the security is unrated by a nationally recognized statistical rating organization, if that is the case.

§ 151.100 What are the alternate notice requirements?

You may elect to satisfy § 151.70 by providing the alternate notices described in the following chart for certain types of transactions.

If you effect a securities transaction . . .	Then you may elect to . . .
(a) For or with the account of a customer under a periodic plan, sweep account, or investment company plan.	Give or send to the customer within five business days after the end of each quarterly period a written statement disclosing: (1) Each purchase and redemption that you effected for or with, and each dividend or distribution that you credited to or reinvested for, the customer's account during the period; (2) The date of each transaction; (3) The identity, number, and price of any securities that the customer purchased or redeemed in each transaction; (4) The total number of shares of the securities in the customer's account; (5) Any remuneration that you received or will receive in connection with the transaction; and (6) That you will give or send the registered broker-dealer confirmation described in § 151.80 or the written notice described in § 151.90 within a reasonable time after the customer's written request.
(b) For or with the account of a customer in shares of an open-ended management company registered under the Investment Company Act of 1940 that holds itself out as a money market fund and attempts to maintain a stable net asset value per share.	Give or send to the customer the written statement described at paragraph (a) of this section on a monthly basis. You may not use the alternate notice, however, if you deduct sales loads upon the purchase or redemption of shares in the money market fund.
(c) For an account for which you do not exercise investment discretion, and for which you and the customer have agreed in writing to an arrangement concerning the time and content of the written notice.	Give or send to the customer a written notice at the agreed-upon time and with the agreed-upon content, and include a statement that you will furnish the registered broker-dealer confirmation described in § 151.80 or the written notice described in § 151.90 within a reasonable time after the customer's written request.
(d) For an account for which you exercise investment discretion other than in an agency capacity, excluding common or collective investment funds.	Give or send the registered broker-dealer confirmation described in § 151.80 or the written notice described in § 151.90 within a reasonable time after a written request by the person with the power to terminate the account or, if there is no such person, any person holding a vested beneficial interest in the account.
(e) For an account in which you exercise investment discretion in an agency capacity.	Give or send each customer a written itemized statement specifying the funds and securities in your custody or possession and all debits, credits, and transactions in the customer's account. You must provide this information to the customer not less than once every three months. You must give or send the registered broker-dealer confirmation described in § 151.80 or the written notice described in § 151.90 within a reasonable time after a customer's written request.
(f) For a common or collective investment fund	(1) Give or send to a customer who invests in the fund a copy of the annual financial report of the fund, or (2) Notify the customer that a copy of the report is available and that you will furnish the report within a reasonable time after a written request by a person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account.

§ 151.110 May I provide a notice electronically?

You may provide any written notice required under this subpart B electronically. If a customer has a facsimile machine, you may send the notice by facsimile transmission. You may use other electronic communications if:

(a) The parties agree to use electronic instead of hard copy notices;

(b) The parties are able to print or download the notice;

(c) Your electronic communications system cannot automatically delete the electronic notice; and

(d) Both parties are able to receive electronic messages.

§ 151.120 May I charge a fee for a notice?

You may not charge a fee for providing a notice required under this subpart B, except that you may charge a reasonable fee for the notices provided under §§ 151.100(a), (d), and (e).

Subpart C—Settlement of Securities Transactions

§ 151.130 When must I settle a securities transaction?

(a) You may not effect or enter into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the latest of:

(1) The third business day after the date of the contract. This deadline is no later than the fourth business day after the contract for contracts involving the sale for cash of securities that are priced after 4:30 p.m. Eastern Standard Time on the date the securities are priced and are sold by an issuer to an underwriter under a firm commitment underwritten offering registered under the Securities Act of 1933, 15 U.S.C. 77a, *et seq.,* or are sold by you to an initial purchaser participating in the offering;

(2) Such other time as the SEC specifies by rule (*see* SEC Rule 15c6–1, 17 CFR 240.15c6–1); or

(3) Such time as the parties expressly agree at the time of the transaction. The parties to a contract are deemed to have expressly agreed to an alternate date for payment of funds and delivery of securities at the time of the transaction for a contract for the sale for cash of securities under a firm commitment offering, if the managing underwriter and the issuer have agreed to the date for all securities sold under the offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.

(b) The deadlines in paragraph (a) of this section do not apply to the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association.

Subpart D—Securities Trading Policies and Procedures

§ 151.140 What policies and procedures must I maintain and follow for securities transactions?

If you effect securities transactions for customers, you must maintain and follow policies and procedures that meet all of the following requirements:

(a) Your policies and procedures must assign responsibility for the supervision of all officers or employees who:

(1) Transmit orders to, or place orders with, registered broker-dealers;

(2) Execute transactions in securities for customers; or

(3) Process orders for notice or settlement purposes, or perform other back office functions for securities transactions that you effect for customers. Policies and procedures for personnel described in this paragraph (a)(3) must provide supervision and reporting lines that are separate from supervision and reporting lines for personnel described in paragraphs (a)(1) and (2) of this section.

(b) Your policies and procedures must provide for the fair and equitable allocation of securities and prices to accounts when you receive orders for the same security at approximately the same time and you place the orders for execution either individually or in combination.

(c) Your policies and procedures must provide for securities transactions in which you act as agent for the buyer and seller (crossing of buy and sell orders) on a fair and equitable basis to the parties to the transaction, where permissible under applicable law.

(d) Your policies and procedures must require your officers and employees to file the personal securities trading reports described at § 151.150, if the officer or employee:

(1) Makes investment recommendations or decisions for the accounts of customers;

(2) Participates in the determination of these recommendations or decisions; or

(3) In connection with their duties, obtains information concerning which securities you intend to purchase, sell, or recommend for purchase or sale.

§ 151.150 How do my officers and employees file reports of personal securities trading transactions?

An officer or employee described in § 151.140(d) must report all personal transactions in securities made by or on behalf of the officer or employee if he or she has a beneficial interest in the security.

(a) *Contents and filing of report.* The officer or employee must file the report with you no later than 30 calendar days after the end of each calendar quarter. The report must include the following information:

(1) The date of each transaction, the title and number of shares, the interest rate and maturity date (if applicable), and the principal amount of each security involved.

(2) The nature of each transaction (i.e., purchase, sale, or other type of acquisition or disposition).

(3) The price at which each transaction was effected.

(4) The name of the broker, dealer, or other intermediary effecting the transaction.

(5) The date the officer or employee submitted the report.

(b) *Report not required for certain transactions.* Your officer or employee is not required to report a transaction if:

(1) He or she has no direct or indirect influence or control over the account for which the transaction was effected or over the securities held in that account;

(2) The transaction was in shares issued by an open-end investment company registered under the Investment Company Act of 1940;

(3) The transaction was in direct obligations of the government of the United States;

(4) The transaction was in bankers' acceptances, bank certificates of deposit, commercial paper or high quality short term debt instruments, including repurchase agreements; or

(5) The officer or employee had an aggregate amount of purchases and sales of $10,000 or less during the calendar quarter.

(c) *Alternate report.* When you act as an investment adviser to an investment company registered under the Investment Company Act of 1940, an officer or employee that is an ''access person'' may fulfill his or her reporting requirements under this section by filing with you the ''access person'' personal securities trading report required by SEC Rule 17j–1(d), 17 CFR 270.17j–1(d).

PART 152—FEDERAL STOCK ASSOCIATIONS—INCORPORATION, ORGANIZATION, AND CONVERSION

Sec.

152.1 Procedure for organization of Federal stock association.
152.2 Procedures for organization of interim Federal stock association.
152.3 Charters for Federal stock associations.
152.4 Charter amendments.
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152.6 Shareholders.
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152.10 Annual reports to stockholders.
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152.13 Combinations involving Federal stock associations.
152.14 Dissenter and appraisal rights.
152.15 Supervisory combinations.
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152.17 Federal stock association created in connection with an association in default or in danger of default.

152.18 Conversion from stock form depository institution to Federal stock association.
152.19 Conversion to National banking association or state bank.

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 5412(b)(2)(B).

§ 152.1 Procedure for organization of Federal stock association.

(a) *Application for permission to organize.* Applications for permission to organize a Federal stock association are subject to this section and to § 143.3 of this chapter. Recommendations by employees of the OCC regarding applications for permission to organize are privileged, confidential, and subject to Part 4, subpart C of this chapter. The processing of an application under this section shall be subject to the following procedures:

(1) *Publication.* (i) The applicant shall publish a public notice of the application to organize in accordance with the procedures specified in subpart B of part 116 of this chapter.

(ii) Promptly after publication of the public notice, the applicant shall transmit copies of the public notice and publisher's affidavit of publication to the appropriate OCC licensing office in the same manner as the original filing.

(iii) Any person may inspect the application and all related communications at the offices specified in 12 CFR 4.14(c) during regular business hours, unless such information is exempt from public disclosure.

(2) *Notification to interested parties.* The OCC shall give notice of the application to the state official who supervises savings associations in the state in which the new association is to be located.

(3) *Submission of comments.* Commenters may submit comments on the application in accordance with the procedures specified in subpart C of part 116 of this chapter.

(4) *Meetings.* The OCC may arrange a meeting in accordance with the procedures in subpart D of part 116 of this chapter.

(b) *Conditions of approval.* The OCC will decide all applications for permission to organize a Federal stock association.

(1) Factors that will be considered on all applications for permission to organize a Federal stock association are:

(i) Whether the applicants are persons of good character and responsibility;

(ii) Whether a necessity exists for such association in the community to be served;

(iii) Whether there is a reasonable probability of the association's usefulness and success;

(iv) Whether the association can be established without undue injury to properly conducted existing local thrift and home financing institutions; and

(v) Whether the association will perform a role of providing credit for housing consistent with safe and sound operation of a Federal savings association.

(2) [Reserved]

(3) Approvals of applications will be conditioned on the following:

(i) Receipt by the OCC of written confirmation from the Federal Deposit Insurance Corporation that the accounts of the association will be insured by the Federal Deposit Insurance Corporation;

(ii) The sale of a minimum amount of fully-paid capital stock of the association prior to commencing business;

(iii) The submission of a statement that:

(A) The applicants have incurred no expense in organization which is chargeable to the association, and that no such expense will be incurred, and

(B) No funds will be accepted for deposit by the association until organization has been completed;

(iv) Compliance with all applicable laws, rules, and regulations; and

(v) The satisfaction of any other requirement or condition the OCC may impose.

(c) *Issuance of charter.* Upon approval of an application, the OCC shall issue to the association a charter for a Federal stock savings association or for a Federal stock savings bank, as requested by the applicants, which shall be in the form provided in this part. Issuance of the charter shall be subject to the condition subsequent that the organization of the association is completed pursuant to this section.

(d) *Interim board of directors and officers.* Upon approval of the application and the issuance of the charter, the applicants shall constitute the interim board of directors of the association until the board of directors of the association are elected by its stockholders at the organizational meeting required by paragraph (g) of this section, and the interim officers of the association shall be those persons set forth in the application for permission to organize.

(e) *Sale of capital stock.* Upon the issuance of the charter, the association shall proceed to offer and sell its capital stock pursuant to the requirements of part 197 of this chapter.

(f) *Bank membership and insurance of accounts.* Promptly upon the issuance of the charter, a Federal stock association must qualify as a member of the appropriate Federal Home Loan Bank and meet all requirements necessary to obtain insurance of accounts by the Federal Deposit Insurance Corporation.

(g) *Organizational meeting.* Promptly upon the completion of the sale of its capital stock, the association shall provide notice, pursuant to § 152.6(b), of a meeting of its stockholders to elect a board of directors. Immediately following such election, the directors shall meet to elect the officers of the association and to undertake any other action necessary under the charter or bylaws to complete corporate organization.

(h) *Completion of organization.* Organization of a Federal stock association shall be deemed complete for the purposes of this part when:

(1) The association has obtained Federal Home Loan Bank membership and insurance of its accounts from the Federal Deposit Insurance Corporation;

(2) It has completed the sale of and received full payment for its capital stock;

(3) It has complied with all requirements of part 197 of this chapter;

(4) It has held its organizational meeting for the election of directors and all directors have been elected;

(5) Its officers have been elected and bonded; and

(6) It has met the requirements and conditions imposed by the OCC in connection with approval of the application.

(i) *Failure of completion.* If organization of a Federal stock association is not completed within six months after approval of the application, or unless extended for an additional period for good cause shown, the charter shall become null and void and all subscriptions to capital stock shall be returned.

§ 152.2 Procedures for organization of interim Federal stock association.

(a) Applications for permission to organize an interim Federal savings association are not subject to subparts B, C and D of part 116 of this chapter or § 152.1(b)(3) of this part.

(b) Approval of an application for permission to organize an interim Federal stock association shall be conditioned upon approval by the OCC of an application to merge the interim Federal stock association, or upon approval by the OCC of another transaction which the interim was chartered to facilitate. Applications for permission to organize an interim Federal stock association shall be submitted in the same manner as the related filing(s). In evaluating the application, the OCC will consider the

purpose for which the association will be organized, the form of any proposed transactions involving the association, the effect of the transactions on existing associations involved in the transactions, and the factors specified in § 152.1(b)(1) to the extent relevant.

(c) If a merger or other transaction facilitated by the existence of the interim Federal stock association has not been approved within six months of the approval of the application for permission to organize, unless extended for good cause shown, the charter shall be void and all subscriptions for capital stock shall be returned.

§ 152.3 Charters for Federal stock associations.

The charter of a Federal stock association shall be in the following form, except that an association that has converted from the mutual form pursuant to part 192 of this chapter shall include in its charter a section establishing a liquidation account as required by § 192.3(c)(13) of this chapter. A charter for a Federal stock savings bank shall substitute the term ''savings bank'' for ''association.'' Charters may also include any preapproved optional provision contained in § 152.4 of this part.

Federal Stock Charter

Section 1. Corporate title. The full corporate title of the association is ____.

Section 2. Office. The home office shall be located in ____ [city, state].

Section 3. Duration. The duration of the association is perpetual.

Section 4. Purpose and powers. The purpose of the association is to pursue any or all of the lawful objectives of a Federal savings association chartered under section 5 of the Home Owners' Loan Act and to exercise all of the express, implied, and incidental powers conferred thereby and by all acts amendatory thereof and supplemental thereto, subject to the Constitution and laws of the United States as they are now in effect, or as they may hereafter be amended, and subject to all lawful and applicable rules, regulations, and orders of the Office of the Comptroller of the Currency (''OCC'').

Section 5. Capital stock. The total number of shares of all classes of the capital stock that the association has the authority to issue is ____, all of which shall be common stock of par [or if no par is specified then shares shall have a stated] value of ____ per share. The shares may be issued from time to time as authorized by the board of directors without the approval of its shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares shall be paid in full before their issuance and shall not be less than the par [or stated] value. Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of the association. The consideration for the shares shall be cash, tangible or intangible property (to the extent direct investment in such property would be permitted to the association), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, shall be conclusive. Upon payment of such consideration, such shares shall be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend shall be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) shall be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless the issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

The holders of the common stock shall exclusively possess all voting power. Each holder of shares of common stock shall be entitled to one vote for each share held by such holder, except as to the cumulation of votes for the election of directors, unless the charter provides that there shall be no such cumulative voting. Subject to any provision for a liquidation account, in the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock shall be entitled, after payment or provision for payment of all debts and liabilities of the association, to receive the remaining assets of the association available for distribution, in cash or in kind. Each share of common stock shall have the same relative rights as and be identical in all respects with all the other shares of common stock.

Section 6. Preemptive rights. Holders of the capital stock of the association shall not be entitled to preemptive rights with respect to any shares of the association which may be issued.

Section 7. Directors. The association shall be under the direction of a board of directors. The authorized number of directors, as stated in the association's bylaws, shall not be fewer than five nor more than fifteen except when a greater or lesser number is approved by the OCC.

Section 8. Amendment of charter. Except as provided in Section 5, no amendment, addition, alteration, change or repeal of this charter shall be made, unless such is proposed by the board of directors of the association, approved by the shareholders by a majority of the votes eligible to be cast at a legal meeting, unless a higher vote is otherwise required, and approved or preapproved by the OCC.

Attest: _____
Secretary of the Association
By: _____
President or Chief Executive Officer of the Association
Attest: _____
Deputy Comptroller for Licensing
By: _____
Comptroller of the Currency
Effective Date: _____

§ 152.4 Charter amendments.

(a) *General.* In order to adopt a charter amendment, a Federal stock association must comply with the following requirements:

(1) *Board of directors approval.* The board of directors of the association must adopt a resolution proposing the charter amendment that states the text of such amendment.

(2) *Form of filing*—(i) *Application requirement.* If the proposed charter amendment would render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a block of the association's stock, the removal of incumbent management, or involve a significant issue of law or policy, the association shall file the proposed amendment and shall obtain the prior approval of the OCC; and

(ii) *Notice requirement.* If the proposed charter amendment does not involve a provision that would be covered by paragraph (a)(2)(i) of this section and such amendment is permissible under all applicable laws, rules or regulations, then the association shall submit the proposed amendments to the appropriate OCC licensing office, at least 30 days prior to the date the proposed charter amendment is to be mailed for consideration by the association's shareholders.

(b) *Approval.* Any charter amendment filed pursuant to paragraph (a)(2)(ii) of this section shall automatically be approved 30 days from the date of filing of such amendment, provided that the association follows the requirements of its charter in adopting such amendment, unless prior to the expiration of such 30-day period the OCC notifies the association that such amendment is rejected or that such amendment is deemed to be filed under the provisions of paragraph (a)(2)(i) of this section. In addition, the following charter amendments, including the adoption of the Federal stock charter as set forth in § 152.3 of this part, shall be approved at the time of adoption, if adopted without change and filed with the OCC within 30 days after adoption, provided the association follows the requirements of its charter in adopting such amendments:

(1) *Title change.* A Federal stock association that has complied with § 143.1(b) of this chapter may amend its charter by substituting a new corporate title in section 1.

(2) *Home office.* A Federal savings association may amend its charter by substituting a new home office in section 2, if it has complied with applicable requirements of § 145.95 of this chapter.

(3) *Number of shares of stock and par value.* A Federal stock association may amend Section 5 of its charter to change the number of authorized shares of stock, the number of shares within each class of stock, and the par or stated value of such shares.

(4) *Capital stock.* A Federal stock association may amend its charter by revising Section 5 to read as follows:

Section 5. Capital stock. The total number of shares of all classes of capital stock that the association has the authority to issue is ____, of which ____ shall be common stock of par [or if no par value is specified the stated] value of ____ per share and of which [list the number of each class of preferred and the par or if no par value is specified the stated value per share of each such class]. The shares may be issued from time to time as authorized by the board of directors without further approval of shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares shall be paid in full before their issuance and shall not be less than the par [or stated] value. Neither promissory notes nor future services shall constitute payment or part payment for the issuance of shares of the association. The consideration for the shares shall be cash, tangible or intangible property (to the extent direct investment in such property would be permitted), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, shall be conclusive. Upon payment of such consideration, such shares shall be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend shall be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to the stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) shall be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless their issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

Nothing contained in this Section 5 (or in any supplementary sections hereto) shall entitle the holders of any class of a series of capital stock to vote as a separate class or series or to more than one vote per share, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there shall be no such cumulative voting: *Provided,* That this restriction on voting separately by class or series shall not apply:

(i) To any provision which would authorize the holders of preferred stock, voting as a class or series, to elect some members of the board of directors, less than a majority thereof, in the event of default in the payment of dividends on any class or series of preferred stock;

(ii) To any provision that would require the holders of preferred stock, voting as a class or series, to approve the merger or consolidation of the association with another corporation or the sale, lease, or conveyance (other than by mortgage or pledge) of properties or business in exchange for securities of a corporation other than the association if the preferred stock is exchanged for securities of such other corporation: *Provided,* That no provision may require such approval for transactions undertaken with the assistance or pursuant to the direction of the OCC or the Federal Deposit Insurance Corporation;

(iii) To any amendment which would adversely change the specific terms of any class or series of capital stock as set forth in this Section 5 (or in any supplementary sections hereto), including any amendment which would create or enlarge any class or series ranking prior thereto in rights and preferences. An amendment which increases the number of authorized shares of any class or series of capital stock, or substitutes the surviving association in a merger or consolidation for the association, shall not be considered to be such an adverse change.

A description of the different classes and series (if any) of the association's capital stock and a statement of the designations, and the relative rights, preferences, and limitations of the shares of each class of and series (if any) of capital stock are as follows:

A. *Common stock.* Except as provided in this Section 5 (or in any supplementary sections thereto) the holders of the common stock shall exclusively possess all voting power. Each holder of shares of the common stock shall be entitled to one vote for each share held by each holder, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there shall be no such cumulative voting.

Whenever there shall have been paid, or declared and set aside for payment, to the holders of the outstanding shares of any class of stock having preference over the common stock as to the payment of dividends, the full amount of dividends and of sinking fund, retirement fund, or other retirement payments, if any, to which such holders are respectively entitled in preference to the common stock, then dividends may be paid on the common stock and on any class or series of stock entitled to participate therewith as to dividends out of any assets legally available for the payment of dividends.

In the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock (and the holders of any class or series of stock entitled to participate with the common stock in the distribution of assets) shall be entitled to receive, in cash or in kind, the assets of the association available for distribution remaining after: (i) Payment or provision for payment of the association's debts and liabilities; (ii) distributions or provision for distributions in settlement of its

liquidation account; and (iii) distributions or provision for distributions to holders of any class or series of stock having preference over the common stock in the liquidation, dissolution, or winding up of the association. Each share of common stock shall have the same relative rights as and be identical in all respects with all the other shares of common stock.

B. *Preferred stock.* The association may provide in supplementary sections to its charter for one or more classes of preferred stock, which shall be separately identified. The shares of any class may be divided into and issued in series, with each series separately designated so as to distinguish the shares thereof from the shares of all other series and classes. The terms of each series shall be set forth in a supplementary section to the charter. All shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

(a) The distinctive serial designation and the number of shares constituting such series;

(b) The dividend rate or the amount of dividends to be paid on the shares of such series, whether dividends shall be cumulative and, if so, from which date(s), the payment date(s) for dividends, and the participating or other special rights, if any, with respect to dividends;

(c) The voting powers, full or limited, if any, of shares of such series;

(d) Whether the shares of such series shall be redeemable and, if so, the price(s) at which, and the terms and conditions on which, such shares may be redeemed;

(e) The amount(s) payable upon the shares of such series in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association;

(f) Whether the shares of such series shall be entitled to the benefit of a sinking or retirement fund to be applied to the purchase or redemption of such shares, and if so entitled, the amount of such fund and the manner of its application, including the price(s) at which such shares may be redeemed or purchased through the application of such fund;

(g) Whether the shares of such series shall be convertible into, or exchangeable for, shares of any other class or classes of stock of the association and, if so, the conversion price(s) or the rate(s) of exchange, and the adjustments thereof, if any, at which such conversion or exchange may be made, and any other terms and conditions of such conversion or exchange.

(h) The price or other consideration for which the shares of such series shall be issued; and

(i) Whether the shares of such series which are redeemed or converted shall have the status of authorized but unissued shares of serial preferred stock and whether such shares may be reissued as shares of the same or any other series of serial preferred stock.

Each share of each series of serial preferred stock shall have the same relative rights as and be identical in all respects with all the other shares of the same series.

The board of directors shall have authority to divide, by the adoption of supplementary charter sections, any authorized class of preferred stock into series, and, within the limitations set forth in this section and the remainder of this charter, fix and determine the relative rights and preferences of the shares of any series so established.

Prior to the issuance of any preferred shares of a series established by a supplementary charter section adopted by the board of directors, the association shall file with the OCC a dated copy of that supplementary section of this charter established and designating the series and fixing and determining the relative rights and preferences thereof.

(5) *Limitations on subsequent issuances.* A Federal stock association may amend its charter to require shareholder approval of the issuance or reservation of common stock or securities convertible into common stock under circumstances which would require shareholder approval under the rules of the New York or American Stock Exchange if the shares were then listed on the New York or American Stock Exchange.

(6) *Cumulative voting.* A Federal stock association may amend its charter by substituting the following sentence for the second sentence in the third paragraph of Section 5: ''Each holder of shares of common stock shall be entitled to one vote for each share held by such holder and there shall be no right to cumulate votes in an election of directors.''

(7) [Reserved]

(8) *Anti-takeover provisions following mutual to stock conversion.* Notwithstanding the law of the state in which the association is located, a Federal stock association may amend its charter by renumbering existing sections as appropriate and adding a new section 8 as follows:

Section 8. Certain Provisions Applicable for Five Years. Notwithstanding anything contained in the Association's charter or bylaws to the contrary, for a period of [specify number of years up to five] years from the date of completion of the conversion of the Association from mutual to stock form, the following provisions shall apply:

A. *Beneficial Ownership Limitation.* No person shall directly or indirectly offer to acquire or acquire the beneficial ownership of more than 10 percent of any class of an equity security of the association. This limitation shall not apply to a transaction in which the association forms a holding company without change in the respective beneficial ownership interests of its stockholders other than pursuant to the exercise of any dissenter and appraisal rights, the purchase of shares by underwriters in connection with a public offering, or the purchase of shares by a tax-qualified employee stock benefit plan which is exempt from the approval requirements under § 174.3(c)(2)(i)(D) of the OCC's regulations.

In the event shares are acquired in violation of this section 8, all shares beneficially owned by any person in excess of 10% shall be considered ''excess shares'' and shall not be counted as shares entitled to vote and shall not be voted by any person or counted as voting shares in connection with any matters submitted to the stockholders for a vote.

For purposes of this section 8, the following definitions apply:

(1) The term ''person'' includes an individual, a group acting in concert, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization or similar company, a syndicate or any other group formed for the purpose of acquiring, holding or disposing of the equity securities of the association.

(2) The term ''offer'' includes every offer to buy or otherwise acquire, solicitation of an offer to sell, tender offer for, or request or invitation for tenders of, a security or interest in a security for value.

(3) The term ''acquire'' includes every type of acquisition, whether effected by purchase, exchange, operation of law or otherwise.

(4) The term ''acting in concert'' means (a) knowing participation in a joint activity or conscious parallel action towards a common goal whether or not pursuant to an express agreement, or (b) a combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other

arrangements, whether written or otherwise.

B. *Cumulative Voting Limitation.* Stockholders shall not be permitted to cumulate their votes for election of directors.

C. *Call for Special Meetings.* Special meetings of stockholders relating to changes in control of the association or amendments to its charter shall be called only upon direction of the board of directors.

(c) *Anti-takeover provisions.* The OCC may grant approval to a charter amendment not listed in paragraph (b) of this section regarding the acquisition by any person or persons of its equity securities provided that the association shall file as part of its application for approval an opinion, acceptable to the OCC, of counsel independent from the association that the proposed charter provision would be permitted to be adopted by a corporation chartered by the state in which the principal office of the association is located. Any such provision must be consistent with applicable statutes, regulations, and OCC policies. Further, any such provision that would have the effect of rendering more difficult a change in control of the association and would require for any corporate action (other than the removal of directors) the affirmative vote of a larger percentage of shareholders than is required by this part, shall not be effective unless adopted by a percentage of shareholder vote at least equal to the highest percentage that would be required to take any action under such provision.

(d) *Reissuance of charter.* A Federal stock association that has amended its charter may apply to have its charter, including the amendments, reissued by the OCC. Such requests for reissuance should be filed with the appropriate OCC licensing office, and contain signatures required under § 152.3 of this part, together with such supporting documents as needed to demonstrate that the amendments were properly adopted.

§ 152.5 Bylaws.

(a) *General.* At its first organizational meeting, the board of directors of a Federal stock association shall adopt a set of bylaws for the administration and regulation of its affairs. Bylaws may be adopted, amended or repealed by either a majority of the votes cast by the shareholders at a legal meeting or a majority of the board of directors. The bylaws shall contain sufficient provisions to govern the association in accordance with the requirements of §§ 152.6, 152.7, 152.8, and 152.9 of this part and shall not contain any provision that is inconsistent with those sections or with applicable laws, rules, regulations or the association's charter, except that a bylaw provision inconsistent with §§ 152.6, 152.7, and 152.9, of this part may be adopted with the approval of the OCC.

(b) *Form of Filing*—(1) *Application requirement.* (i) Any bylaw amendment shall be submitted to the OCC for approval if it would:

(A) Render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a large block of the association's stock, or the removal of incumbent management; or

(B) Be inconsistent with §§ 152.6, 152.7, 152.8, and 152.9 of this part, with applicable laws, rules, regulations or the association's charter or involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability.

(ii) Applications submitted under paragraph (b)(1)(i) of this section are subject to standard treatment processing procedures at part 116, subparts A and E of this chapter.

(iii) Bylaw provisions that adopt the language of the OCC's model or optional bylaws, if adopted without change, and filed with the OCC within 30 days after adoption, are effective upon adoption.

(2) *Filing requirement.* If the proposed bylaw amendment does not involve a provision that would be covered by paragraph (b)(1) or (b)(3) of this section and is permissible under all applicable laws, rules, or regulations, then the association shall submit the amendment to the OCC at least 30 days prior to the date the bylaw amendment is to be adopted by the association.

(3) *Corporate governance procedures.* A Federal stock association may elect to follow the corporate governance procedures of: The laws of the state where the main office of the association is located; the laws of the state where the association's holding company, if any, is incorporated or chartered; Delaware General Corporation law; or The Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not of the type described in paragraph (b)(1) of this section. If this election is selected, a Federal stock association shall designate in its bylaws the provision or provisions from the body or bodies of law selected for its corporate governance procedures, and shall file a copy of such bylaws, which are effective upon adoption, within 30 days after adoption. The submission shall indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (b)(1) of this section.

(c) *Effectiveness.* Any bylaw amendment filed pursuant to paragraph (b)(2) of this section shall automatically be effective 30 days from the date of filing of such amendment, provided that the association follows the requirements of its charter and bylaws in adopting such amendment, unless prior to the expiration of such 30-day period the OCC notifies the association that such amendment is rejected or that such amendment requires an application to be filed pursuant to paragraph (b)(1) of this section.

(d) *Effect of subsequent charter or bylaw change.* Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal stock association to engage in any transaction shall be determined only by the association's charter or bylaws then in effect, unless otherwise provided by Federal law or regulation.

§ 152.6 Shareholders.

(a) *Shareholder meetings.* A meeting of the shareholders of the association for the election of directors and for the transaction of any other business of the association shall be held annually within 150 days after the end of the association's fiscal year. Unless otherwise provided in the association's charter, special meetings of the shareholders may be called by the board of directors or on the request of the holders of 10 percent or more of the shares entitled to vote at the meeting, or by such other persons as may be specified in the bylaws of the association. All annual and special meetings of shareholders shall be held at such place as the board of directors may determine in the state in which the association has its principal place of business, or at any other convenient place the board of directors may designate.

(b) *Notice of shareholder meetings.* Written notice stating the place, day, and hour of the meeting and the purpose or purposes for which the meeting is called shall be delivered not fewer than 20 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chairman of the board, the president, the secretary, or the directors, or other persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the mail, addressed to the shareholder at the address appearing on the stock transfer

books or records of the association as of the record date prescribed in paragraph (c) of this section, with postage thereon prepaid. When any shareholders' meeting, either annual or special, is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned shall not be subject to the shareholder notice requirement.

(c) *Fixing of record date.* For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors shall fix in advance a date as the record date for any such determination of shareholders. Such date in any case shall be not more than 60 days and, in case of a meeting of shareholders, not less than 10 days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof.

(d) *Voting lists.* (1) At least 20 days before each meeting of the shareholders, the officer or agent having charge of the stock transfer books for the shares of the association shall make a complete list of the stockholders of record entitled to vote at such meeting, or any adjournments thereof, arranged in alphabetical order, with the address and the number of shares held by each. This list of shareholders shall be kept on file at the home office of the association and shall be subject to inspection by any shareholder of record or the stockholder's agent during the entire time of the meeting. The original stock transfer book shall constitute *prima facie* evidence of the stockholders entitled to examine such list or transfer books or to vote at any meeting of stockholders. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned shall not be subject to the voting list requirements.

(2) In lieu of making the shareholders list available for inspection by any shareholders as provided in paragraph (d)(1) of this section, the board of directors may perform such acts as required by paragraphs (a) and (b) of Rule 14a–7 of the General Rules and Regulations under the Securities and Exchange Act of 1934 (17 CFR 240.14a–7) as may be duly requested in writing, with respect to any matter which may be properly considered at a meeting of shareholders, by any shareholder who is entitled to vote on such matter and who shall defray the reasonable expenses to be incurred by the association in performance of the act or acts required.

(e) *Shareholder quorum.* A majority of the outstanding shares of the association entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the stockholders, unless the vote of a greater number of stockholders voting together or voting by classes is required by law or the charter. Directors, however, are elected by a plurality of the votes cast at an election of directors.

(f) *Shareholder voting*—(1) *Proxies.* Unless otherwise provided in the association's charter, at all meetings of shareholders, a shareholder may vote in person or by proxy executed in writing by the shareholder or by a duly authorized attorney in fact. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the shareholder. A proxy may designate as holder a corporation, partnership or company as defined in part 174 of this chapter, or other person. Proxies solicited on behalf of the management shall be voted as directed by the shareholder or, in the absence of such direction, as determined by a majority of the board of directors. No proxy shall be valid more than eleven months from the date of its execution except for a proxy coupled with an interest.

(2) *Shares controlled by association.* Neither treasury shares of its own stock held by the association nor shares held by another corporation, if a majority of the shares entitled to vote for the election of directors of such other corporation are held by the association, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting.

(g) *Nominations and new business submitted by shareholders.* Nominations for directors and new business submitted by shareholders shall be voted upon at the annual meeting if such nominations or new business are submitted in writing and delivered to the secretary of the association at least five days prior to the date of the annual meeting. Ballots bearing the names of all the persons nominated shall be provided for use at the annual meeting.

(h) *Informal action by stockholders.* If the bylaws of the association so provide, any action required to be taken at a meeting of the stockholders, or any other action that may be taken at a meeting of the stockholders, may be taken without a meeting if consent in writing has been given by all the stockholders entitled to vote with respect to the subject matter.

§ 152.7 Board of directors.

(a) *General powers and duties.* The business and affairs of the association shall be under the direction of its board of directors. The board of directors shall annually elect a chairman of the board from among its members and shall designate the chairman of the board, when present, to preside at its meeting. Directors need not be stockholders unless the bylaws so require.

(b) *Number and term.* The bylaws shall set forth a specific number of directors, not a range. The number of directors shall be not fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS, prior to July 21, 2011 or the OCC. Directors shall be elected for a term of one to three years and until their successors are elected and qualified. If a staggered board is chosen, the directors shall be divided into two or three classes as nearly equal in number as possible and one class shall be elected by ballot annually. In the case of a converting or newly chartered association where all directors shall be elected at the first election of directors, if a staggered board is chosen, the terms shall be staggered in length from one to three years.

(c) *Regular meetings.* A regular meeting of the board of directors shall be held immediately after, and at the same place as, the annual meeting of shareholders. The board of directors shall determine the place, frequency, time and procedure for notice of regular meetings.

(d) *Quorum.* A majority of the number of directors shall constitute a quorum for the transaction of business at any meeting of the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless a greater number is prescribed by regulation of the OCC.

(e) *Vacancies.* Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of

the remaining directors although less than a quorum of the board of directors. A director elected to fill a vacancy shall be elected to serve only until the next election of directors by the shareholders. Any directorship to be filled by reason of an increase in the number of directors may be filled by election by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

(f) *Removal or resignation of directors.* (1) At a meeting of shareholders called expressly for that purpose, any director may be removed only for cause, as defined in § 163.39 of this chapter, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. Associations may provide for procedures regarding resignations in the bylaws.

(2) If less than the entire board is to be removed, no one of the directors may be removed if the votes cast against the removal would be sufficient to elect a director if then cumulatively voted at an election of the class of directors of which such director is a part.

(3) Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the charter or supplemental sections thereto, the provisions of this section shall apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

(g) *Executive and other committees.* The board of directors, by resolution adopted by a majority of the full board, may designate from among its members an executive committee and one or more other committees each of which, to the extent provided in the resolution or bylaws of the association, shall have and may exercise all of the authority of the board of directors, except no committee shall have the authority of the board of directors with reference to: the declaration of dividends; the amendment of the charter or bylaws of the association; recommending to the stockholders a plan of merger, consolidation, or conversion; the sale, lease, or other disposition of all, or substantially all, of the property and assets of the association otherwise than in the usual and regular course of its business; a voluntary dissolution of the association; a revocation of any of the foregoing; or the approval of a transaction in which any member of the executive committee, directly or indirectly, has any material beneficial interest. The designation of any committee and the delegation of authority thereto shall not operate to relieve the board of directors, or any director, of any responsibility imposed by law or regulation.

(h) *Notice of special meetings.* Written notice of at least 24 hours regarding any special meeting of the board of directors or of any committee designated thereby shall be given to each director in accordance with the bylaws, although such notice may be waived by the director. The attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting need be specified in the notice or waiver of notice of such meeting. The bylaws may provide for telephonic participation at a meeting.

(i) *Action without a meeting.* Any action required or permitted to be taken by the board of directors at a meeting may be taken without a meeting if a consent in writing, setting forth the actions so taken, shall be signed by all of the directors.

(j) *Presumption of assent.* A director of the association who is present at a meeting of the board of directors at which action on any association matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention shall be entered in the minutes of the meeting or unless a written dissent to such action shall be filed with the person acting as the secretary of the meeting before the adjournment thereof or shall be forwarded by registered mail to the secretary of the association within five days after the date on which a copy of the minutes of the meeting is received. Such right to dissent shall not apply to a director who voted in favor of such action.

(k) *Age limitation on directors.* A Federal association may provide a bylaw on age limitation for directors. Bylaws on age limitations must comply with all Federal laws, rules and regulations.

§ 152.8 Officers.

(a) *Positions.* The officers of the association shall be a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom shall be elected by the board of directors. The board of directors may also designate the chairman of the board as an officer. The offices of the secretary and treasurer or comptroller may be held by the same person and the vice president may also be either the secretary or the treasurer or comptroller. The board of directors may designate one or more vice presidents as executive vice president or senior vice president. The board of directors may also elect or authorize the appointment of such other officers as the business of the association may require. The officers shall have such authority and perform such duties as the board of directors may from time to time authorize or determine. In the absence of action by the board of directors, the officers shall have such powers and duties as generally pertain to their respective offices.

(b) *Removal.* Any officer may be removed by the board of directors whenever in its judgment the best interests of the association will be served thereby; but such removal, other than for cause, shall be without prejudice to the contractual rights, if any, of the person so removed. Employment contracts shall conform with § 163.39 of this chapter.

(c) *Age limitation on officers.* A Federal association may provide a bylaw on age limitation for officers. Bylaws on age limitations must comply with all Federal laws, rules, and regulations.

§ 152.9 Certificates for shares and their transfer.

(a) *Certificates for shares.* Certificates representing shares of capital stock of the association shall be in such form as shall be determined by the board of directors and approved by the OCC. The certificates shall be signed by the chief executive officer or by any other officer of the association authorized by the board of directors, attested by the secretary or an assistant secretary, and sealed with the corporate seal or a facsimile thereof. The signatures of such officers upon a certificate may be facsimiles if the certificate is manually signed on behalf of a transfer agent or a registrar other than the association itself or one of its employees. Each certificate for shares of capital stock shall be consecutively numbered or otherwise identified. The name and address of the person to whom the shares are issued, with the number of shares and date of issue, shall be entered on the stock transfer books of the association. All certificates surrendered to the association for transfer shall be cancelled and no new certificate shall be issued until the former certificate for a like number of shares shall have been surrendered and cancelled, except that in the case of a lost or destroyed certificate a new certificate may be issued upon such terms and indemnity to the association as the board of directors may prescribe.

(b) *Transfer of shares.* Transfer of shares of capital stock of the association shall be made only on its stock transfer books. Authority for such transfer shall be given only by the holder of record or by a legal representative, who shall furnish proper evidence of such authority, or by an attorney authorized by a duly executed power of attorney and filed with the association. The transfer shall be made only on surrender for cancellation of the certificate for the shares. The person in whose name shares of capital stock stand on the books of the association shall be deemed by the association to be the owner for all purposes.

§ 152.10 Annual reports to stockholders.

A Federal stock association not wholly-owned by a holding company shall, within 130 days after the end of its fiscal year, mail to each of its stockholders entitled to vote at its annual meeting an annual report containing financial statements that satisfy the requirements of rule 14a–3 under the Securities Exchange Act of 1934. (17 CFR 240.14a–3). Concurrently with such mailing a certification of such mailing signed by the chairman of the board, the president or a vice president of the association, together with copies of the report, shall be transmitted by the association to the OCC.

§ 152.11 Books and records.

(a) Each Federal stock association shall keep correct and complete books and records of account; shall keep minutes of the proceedings of its stockholders, board of directors, and committees of directors; and shall keep at its home office or at the office of its transfer agent or registrar, a record of its stockholders, giving the names and addresses of all stockholders, and the number, class and series, if any, of the shares held by each.

(b)(1) Any stockholder or group of stockholders of a Federal stock association, holding of record the number of voting shares of such association specified below, upon making written demand stating a proper purpose, shall have the right to examine, in person or by agent or attorney, at any reasonable time or times, nonconfidential portions of its books and records of account, minutes and record of stockholders and to make extracts therefrom. Such right of examination is limited to a stockholder or group of stockholders holding of record:

(i) Voting shares having a cost of not less than $100,000 or constituting not less than one percent of the total outstanding voting shares, provided in either case such stockholder or group of stockholders have held of record such voting shares for a period of at least six months before making such written demand, or

(ii) Not less than five percent of the total outstanding voting shares.

(2) No stockholder or group of stockholders of a Federal stock association shall have any other right under this section or common law to examine its books and records of account, minutes and record of stockholders, except as provided in its bylaws with respect to inspection of a list of stockholders.

(c) The right to examination authorized by paragraph (b) of this section and the right to inspect the list of stockholders provided by a Federal stock association's bylaws may be denied to any stockholder or group of stockholders upon the refusal of any such stockholder or group of stockholders to furnish such association, its transfer agent or registrar an affidavit that such examination or inspection is not desired for any purpose which is in the interest of a business or object other than the business of the association, that such stockholder has not within the five years preceding the date of the affidavit sold or offered for sale, and does not now intend to sell or offer for sale, any list of stockholders of the association or of any other corporation, and that such stockholder has not within said five-year period aided or abetted any other person in procuring any list of stockholders for purposes of selling or offering for sale such list.

(d) Notwithstanding any provision of this section or common law, no stockholder or group of stockholders shall have the right to obtain, inspect or copy any portion of any books or records of a Federal stock association containing:

(1) A list of depositors in or borrowers from such association;

(2) Their addresses;

(3) Individual deposit or loan balances or records; or

(4) Any data from which such information could be reasonably constructed.

§ 152.12 [Reserved]

§ 152.13 Combinations involving Federal stock associations.

(a) *Scope and authority.* Federal stock associations may enter into combinations only in accordance with the provisions of this section, section 18(c) of the Federal Deposit Insurance Act, sections 5(d)(3)(A) and 10(s) of the Home Owners' Loan Act, and § 163.22 of this part.

(b) *Definitions.* The following definitions apply to §§ 152.13 and 152.14 of this part:

(1) *Combination.* A merger or consolidation with another depository institution, or an acquisition of all or substantially all of the assets or assumption of all or substantially all of the liabilities of a depository institution by another depository institution. *Combine* means to be a constituent institution in a combination.

(2) *Consolidation.* Fusion of two or more depository institutions into a newly-created depository institution.

(3) *Constituent institution.* Resulting, disappearing, acquiring, or transferring depository institution in a combination.

(4) *Depository institution* means any commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank or a credit union, chartered in the United States and having its principal office located in the United States.

(5) *Disappearing institution.* A depository institution whose corporate existence does not continue after a combination.

(6) *Merger.* Uniting two or more depository institutions by the transfer of all property rights and franchises to the resulting depository institution, which retains its corporate identity.

(7) *Mutual savings association.* Any savings association organized in a form not requiring non-withdrawable stock under Federal or state law.

(8) *Resulting institution.* The depository institution whose corporate existence continues after a combination.

(9) *Savings association* has the same meaning as defined in § 161.43 of this chapter.

(10) *State.* Includes the District of Columbia, Commonwealth of Puerto Rico, and states, territories, and possessions of the United States.

(11) *Stock association.* Any savings association organized in a form requiring non-withdrawable stock.

(c) *Forms of combination.* A Federal stock association may combine with any depository institution, provided that:

(1) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(2) Any resulting Federal savings association meets the requirements for Federal Home Loan Bank membership and insurance of accounts;

(3) Any resulting Federal savings association conforms within the time prescribed by the OCC to the

requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act; and

(4) If any constituent savings association is a mutual savings association, the resulting institution shall be mutually held, unless:

(i) The transaction involves a supervisory merger;

(ii) The transaction is approved under part 192 of this chapter;

(iii) The transaction involves an interim Federal stock association or an interim state stock savings association; or

(iv) The transaction involves a transfer in the context of a mutual holding company reorganization under section 10(o) of the Home Owners' Loan Act.

(d) *Combinations.* Prior written notification to, notice to, or prior written approval of, the OCC pursuant to § 163.22 of this chapter is required for every combination. In the case of applications and notices pursuant to § 163.22 (a) or (c), the OCC shall apply the criteria set out in § 163.22 of this chapter and shall impose any conditions it deems necessary or appropriate to ensure compliance with those criteria and the requirements of this chapter.

(e) *Approval of the board of directors.* Before filing a notice or application for any combination involving a Federal stock association, the combination shall be approved:

(1) By a two-thirds vote of the entire board of each constituent Federal savings association; and

(2) As required by other applicable Federal or state law, for other constituent institutions.

(f) *Combination agreement.* All terms, conditions, agreements or understandings, or other provisions with respect to a combination involving a Federal savings association shall be set forth fully in a written combination agreement. The combination agreement shall state:

(1) That the combination shall not be effective unless and until:

(i) The combination receives any necessary approval from the OCC pursuant to § 163.22 (a) or (c);

(ii) In the case of a transaction requiring a notification pursuant to § 163.22(b), notification has been provided to the OCC; or

(iii) In the case of a transaction requiring a notice pursuant to § 163.22(c), the notice has been filed, and the appropriate period of time has passed or the OCC has advised the parties that it will not disapprove the transaction;

(2) Which constituent institution is to be the resulting institution;

(3) The name of the resulting institution;

(4) The location of the home office and any other offices of the resulting institution;

(5) The terms and conditions of the combination and the method of effectuation;

(6) Any charter amendments, or the new charter in the combination;

(7) The basis upon which the savings accounts of the resulting institution shall be issued;

(8) If a Federal association is the resulting institution, the number, names, residence addresses, and terms of directors;

(9) The effect upon and assumption of any liquidation account of a disappearing institution by the resulting institution; and

(10) Such other provisions, agreements, or understandings as relate to the combination.

(g) [Reserved]

(h) *Approval by stockholders*—(1) *General rule.* Except as otherwise provided in this section, an affirmative vote of two-thirds of the outstanding voting stock of any constituent Federal savings association shall be required for approval of the combination agreement. If any class of shares is entitled to vote as a class pursuant to § 152.4 of this part, an affirmative vote of a majority of the shares of each voting class and two-thirds of the total voting shares shall be required. The required vote shall be taken at a meeting of the savings association.

(2) *General exception.* Stockholders of the resulting Federal stock association need not authorize a combination agreement if:

(i) It does not involve an interim Federal savings association or an interim state savings association;

(ii) The association's charter is not changed;

(iii) Each share of stock outstanding immediately prior to the effective date of the combination is to be an identical outstanding share or a treasury share of the resulting Federal stock association after such effective date; and

(iv) Either:

(A) No shares of voting stock of the resulting Federal stock association and no securities convertible into such stock are to be issued or delivered under the plan of combination, or

(B) The authorized unissued shares or the treasury shares of voting stock of the resulting Federal stock association to be issued or delivered under the plan of combination, plus those initially issuable upon conversion of any securities to be issued or delivered under such plan, do not exceed 15% of the total shares of voting stock of such association outstanding immediately prior to the effective date of the combination.

(3) *Exceptions for certain combinations involving an interim association.* Stockholders of a Federal stock association need not authorize by a two-thirds affirmative vote combinations involving an interim Federal savings association or interim state savings association when the resulting Federal stock association is acquired pursuant to regulations of the Board of Governors of the Federal Reserve System. In those cases, an affirmative vote of 50 percent of the shares of the outstanding voting stock of the Federal stock association plus one affirmative vote shall be required. If any class of shares is entitled to vote as a class pursuant to § 152.4 of this part, an affirmative vote of 50 percent of the shares of each voting class plus one affirmative vote shall be required. The required votes shall be taken at a meeting of the association.

(i) *Disclosure.* The OCC may require, in connection with a combination under this section, such disclosure of information as the OCC deems necessary or desirable for the protection of investors in any of the constituent associations.

(j) *Articles of combination.* (1) Following stockholder approval of any combination in which a Federal savings association is the resulting institution, articles of combination shall be executed in duplicate by each constituent institution, by its chief executive officer or executive vice president and by its secretary or an assistant secretary, and verified by one of the officers of each institution signing such articles, and shall set forth:

(i) The plan of combination;

(ii) The number of shares outstanding in each depository institution; and

(iii) The number of shares in each depository institution voted for and against such plan.

(2) Both sets of articles of combination shall be filed with the OCC. If the OCC determines that such articles conform to the requirements of this section, the OCC shall endorse the articles and return one set to the resulting institution.

(k) *Effective date.* No combination under this section shall be effective until receipt of any approvals required by the OCC. The effective date of a combination in which the resulting institution is a Federal stock association shall be the date of consummation of the transaction or such other later date specified on the endorsement of the articles of combination by the OCC. If a disappearing institution combining under this section is a Federal stock

association, its charter shall be deemed to be cancelled as of the effective date of the combination and such charter must be surrendered to the OCC as soon as practicable after the effective date.

(l) *Mergers and consolidations: transfer of assets and liabilities to the resulting institution.* Upon the effective date of a merger or consolidation under this section, if the resulting institution is a Federal savings association, all assets and property (real, personal and mixed, tangible and intangible, choses in action, rights, and credits) then owned by each constituent institution or which would inure to any of them, shall, immediately by operation of law and without any conveyance, transfer, or further action, become the property of the resulting Federal savings association. The resulting Federal savings association shall be deemed to be a continuation of the entity of each constituent institution, the rights and obligations of which shall succeed to such rights and obligations and the duties and liabilities connected therewith, subject to the Home Owners' Loan Act and other applicable statutes.

§ 152.14 Dissenter and appraisal rights.

(a) *Right to demand payment of fair or appraised value.* Except as provided in paragraph (b) of this section, any stockholder of a stock association combining in accordance with § 152.13 of this part shall have the right to demand payment of the fair or appraised value of his stock: *Provided,* That such stockholder has not voted in favor of the combination and complies with the provisions of paragraph (c) of this section.

(b) *Exceptions.* No stockholder required to accept only qualified consideration for his or her stock shall have the right under this section to demand payment of the stock's fair or appraised value, if such stock was listed on a national securities exchange or quoted on the National Association of Securities Dealers' Automated Quotation System (''NASDAQ'') on the date of the meeting at which the combination was acted upon or stockholder action is not required for a combination made pursuant to § 152.13(h)(2) of this part. ''Qualified consideration'' means cash, shares of stock of any association or corporation which at the effective date of the combination will be listed on a national securities exchange or quoted on NASDAQ, or any combination of such shares of stock and cash.

(c) *Procedure*—(1) *Notice.* Each constituent Federal stock association shall notify all stockholders entitled to rights under this section, not less than twenty days prior to the meeting at which the combination agreement is to be submitted for stockholder approval, of the right to demand payment of appraised value of shares, and shall include in such notice a copy of this section. Such written notice shall be mailed to stockholders of record and may be part of management's proxy solicitation for such meeting.

(2) *Demand for appraisal and payment.* Each stockholder electing to make a demand under this section shall deliver to the Federal stock association, before voting on the combination, a writing identifying himself or herself and stating his or her intention thereby to demand appraisal of and payment for his or her shares. Such demand must be in addition to and separate from any proxy or vote against the combination by the stockholder.

(3) *Notification of effective date and written offer.* (i) Within ten days after the effective date of the combination, the resulting association shall:

(A) Give written notice by mail to stockholders of constituent Federal stock associations who have complied with the provisions of paragraph (c)(2) of this section and have not voted in favor of the combination, of the effective date of the combination;

(B) Make a written offer to each stockholder to pay for dissenting shares at a specified price deemed by the resulting association to be the fair value thereof; and

(C) Inform them that, within sixty days of such date, the respective requirements of paragraphs (c)(5) and (c)(6) of this section (set out in the notice) must be satisfied.

(ii) The notice and offer shall be accompanied by a balance sheet and statement of income of the association the shares of which the dissenting stockholder holds, for a fiscal year ending not more than sixteen months before the date of notice and offer, together with the latest available interim financial statements.

(4) *Acceptance of offer.* If within sixty days of the effective date of the combination the fair value is agreed upon between the resulting association and any stockholder who has complied with the provisions of paragraph (c)(2) of this section, payment therefore shall be made within ninety days of the effective date of the combination.

(5) *Petition to be filed if offer not accepted.* If within sixty days of the effective date of the combination the resulting association and any stockholder who has complied with the provisions of paragraph (c)(2) of this section do not agree as to the fair value, then any such stockholder may file a petition with the OCC, with a copy by registered or certified mail to the resulting association, demanding a determination of the fair market value of the stock of all such stockholders. A stockholder entitled to file a petition under this section who fails to file such petition within sixty days of the effective date of the combination shall be deemed to have accepted the terms offered under the combination.

(6) *Stock certificates to be noted.* Within sixty days of the effective date of the combination, each stockholder demanding appraisal and payment under this section shall submit to the transfer agent his certificates of stock for notation thereon that an appraisal and payment have been demanded with respect to such stock and that appraisal proceedings are pending. Any stockholder who fails to submit his or her stock certificates for such notation shall no longer be entitled to appraisal rights under this section and shall be deemed to have accepted the terms offered under the combination.

(7) *Withdrawal of demand.* Notwithstanding the foregoing, at any time within sixty days after the effective date of the combination, any stockholder shall have the right to withdraw his or her demand for appraisal and to accept the terms offered upon the combination.

(8) *Valuation and payment.* The Comptroller shall, as he or she may elect, either appoint one or more independent persons or direct appropriate staff of the OCC to appraise the shares to determine their fair market value, as of the effective date of the combination, exclusive of any element of value arising from the accomplishment or expectation of the combination. Appropriate staff of the OCC shall review and provide an opinion on appraisals prepared by independent persons as to the suitability of the appraisal methodology and the adequacy of the analysis and supportive data. The Comptroller after consideration of the appraisal report and the advice of the appropriate staff shall, if he or she concurs in the valuation of the shares, direct payment by the resulting association of the appraised fair market value of the shares, upon surrender of the certificates representing such stock. Payment shall be made, together with interest from the effective date of the combination, at a rate deemed equitable by the Comptroller.

(9) *Costs and expenses.* The costs and expenses of any proceeding under this section may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some

of the parties. In making this determination the Comptroller shall consider whether any party has acted arbitrarily, vexatiously, or not in good faith in respect to the rights provided by this section.

(10) *Voting and distribution.* Any stockholder who has demanded appraisal rights as provided in paragraph (c)(2) of this section shall thereafter neither be entitled to vote such stock for any purpose nor be entitled to the payment of dividends or other distributions on the stock (except dividends or other distribution payable to, or a vote to be taken by stockholders of record at a date which is on or prior to, the effective date of the combination): *Provided,* That if any stockholder becomes unentitled to appraisal and payment of appraised value with respect to such stock and accepts or is deemed to have accepted the terms offered upon the combination, such stockholder shall thereupon be entitled to vote and receive the distributions described above.

(11) *Status.* Shares of the resulting association into which shares of the stockholders demanding appraisal rights would have been converted or exchanged, had they assented to the combination, shall have the status of authorized and unissued shares of the resulting association.

§ 152.15 Supervisory combinations.

Notwithstanding the foregoing provisions of this part, the Comptroller may waive or deem inapplicable any provision of § 152.13 or § 152.14 of this part if he or she determines that grounds exist, or may imminently exist, for appointment of a conservator or receiver for an association under subsection 5(d) of the Home Owners' Loan Act.

§ 152.16 Effect of subsequent charter or bylaw change.

Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal stock association to engage in any transaction shall be determined only by the association's charter or bylaws then in effect.

§ 152.17 Federal stock association created in connection with an association in default or in danger of default.

Sections 152.1 and 152.2 of this part do not apply to a Federal stock association which is proposed by the Federal Deposit Insurance Corporation, or the Resolution Trust Corporation under section 5(p) of the Home Owner's Loan Act of 1933, section 11(c) of the Federal Deposit Insurance Act, or section 21A of the Federal Home Loan Bank Act, or is otherwise chartered by the OCC in connection with an association in default or in danger of default. Incorporation and organization of such associations are complete when and under such conditions as the OCC so determines.

§ 152.18 Conversion from stock form depository institution to Federal stock association.

(a) With the approval of the OCC, any stock depository institution that is, or is eligible to become, a member of a Federal Home Loan Bank, may convert to a Federal stock association, provided that the depository institution, at the time of the conversion, has deposits insured by the Federal Deposit Insurance Corporation, and provided further, that the depository institution, in accomplishing the conversion, complies with all applicable statutes and regulations, including, without limitation, section 5(d) of the Federal Deposit Insurance Act. The resulting Federal stock association must conform within the time prescribed by the OCC to the requirements of section 5(c) of the Home Owners' Loan Act. For purposes of this section, the term ''depository institution'' shall have the meaning set forth at 12 CFR 152.13(b). An application for conversion filed under this section is subject to the procedures for organization of a Federal stock organization at § 152.1.

(b) Any and all of the assets and other property (whether real, personal, mixed, tangible or intangible, including choses in action, rights, and credits) of the former stock form depository institution become assets and property of the Federal stock association when the conversion occurs. Similarly, any and all of the obligations and debts of or claims against the former stock form depository institution become obligations and debts of and claims against the Federal stock association when the conversion occurs. In effect, the Federal stock association is the same as the former stock form depository institution with respect to any and all assets, property, claims and debts of or claims against the former stock form depository institution.

§ 152.19 Conversion to National banking association or state bank.

A Federal stock association may convert to a national banking association or a state bank after filing a notification or application, as appropriate, with the appropriate OCC licensing office in accordance with the applicable provisions of § 163.22(b) of this chapter.

PART 155—ELECTRONIC OPERATIONS

Sec.
155.100 What does this part do?
155.200 How may I use or participate with others to use electronic means and facilities?
155.210 What precautions must I take?
155.300 Must I inform the OCC before I use electronic means or facilities?
155.310 How do I notify the OCC?

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 155.100 What does this part do?

This part describes how a Federal savings association may provide products and services through electronic means and facilities.

§ 155.200 How may I use or participate with others to use electronic means and facilities?

(a) *General.* A Federal savings association (''you'') may use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.

(b) *Other.* To optimize the use of your resources, you may market and sell, or participate with others to market and sell, electronic capacities and by-products to third-parties, if you acquired or developed these capacities and by-products in good faith as part of providing financial services.

§ 155.210 What precautions must I take?

If you use electronic means and facilities under this subpart, your management must:

(a) Identify, assess, and mitigate potential risks and establish prudent internal controls; and

(b) Implement security measures designed to ensure secure operations. Such measures must be adequate to:

(1) Prevent unauthorized access to your records and your customers' records;

(2) Prevent financial fraud through the use of electronic means or facilities; and

(3) Comply with applicable security devices requirements of part 168 of this chapter.

§ 155.300 Must I inform the OCC before I use electronic means or facilities?

(a) *General.* You are not required to inform the OCC before you use electronic means or facilities, except as

provided in paragraphs (b) and (c) of this section. However, you are encouraged to consult with the OCC before you engage in any activities using electronic means or facilities.

(b) *Activities requiring advance notice.* You must file a written notice as described in § 155.310 before you establish a transactional web site. A transactional web site is an Internet site that enables users to conduct financial transactions such as accessing an account, obtaining an account balance, transferring funds, processing bill payments, opening an account, applying for or obtaining a loan, or purchasing other authorized products or services.

(c) *Other procedures.* If the OCC informs you of any supervisory or compliance concerns that may affect your use of electronic means or facilities, you must follow any procedures it imposes in writing.

§ 155.310 How do I notify the OCC?

You must file a written notice with your OCC supervisory office at least 30 days before you establish a transactional Web site. The notice must do three things:

(a) Describe the transactional web site.

(b) Indicate the date the transactional web site will become operational.

(c) List a contact familiar with the deployment, operation, and security of the transactional web site.

PART 157—DEPOSITS

Sec.
157.1 What does this part do?
157.10 What authorities govern the issuance of deposit accounts by a Federal savings association?
157.11 To what extent does Federal law preempt state laws?
157.12 [Reserved]
157.13 [Reserved]
157.14 What interest rate may I pay on accounts?
157.15 Who owns a deposit account?
157.20 What records should I maintain on deposit activities?

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 157.1 What does this part do?

This part applies to the deposit activities of Federal savings associations.

§ 157.10 What authorities govern the issuance of deposit accounts by Federal savings associations?

A Federal savings association (''you'') may raise funds through accounts and may issue evidence of accounts under section 5(b)(1) of the HOLA (12 U.S.C. 1464(b)(1)), your charter, and this part. Additionally, 12 CFR parts 204 and 230 apply to your deposit activities.

§ 157.11 To what extent does Federal law preempt deposit-related state laws?

State law applies to the deposit activities of Federal savings associations and their subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries.

§ 157.12 [Reserved]

§ 157.13 [Reserved]

§ 157.14 What interest rate may I pay on accounts?

(a) You may pay interest at any rate or anticipated rate of return on accounts, either in deposit or in share form, as provided in your charter and the account's terms.

(b) You may pay fixed or variable rates. If you pay a variable rate, you must base it on a schedule, index, or formula that you specify in the account's terms.

§ 157.15 Who owns a deposit account?

You may treat the holder of record as the account owner, even if you receive contrary notice, until you transfer the account on your records.

§ 157.20 What records should I maintain on deposit activities?

You should establish and maintain deposit documentation practices and records that demonstrate that you appropriately administer and monitor deposit-related activities. Your records should adequately evidence ownership, balances, and all transactions involving each account. You may maintain records on deposit activities in any format that is consistent with standard business practices.

PART 159—SUBORDINATE ORGANIZATIONS

Sec.
159.1 What does this part cover?
159.2 Definitions.
159.3 What are the characteristics of, and what requirements apply to, subordinate organizations of Federal savings associations?
159.4 What activities are preapproved for service corporations?
159.5 How much may a Federal savings association invest in service corporations or lower-tier entities?
159.10 How must separate corporate identities be maintained?
159.11 What notices are required to establish or acquire a new subsidiary or engage in new activities through an existing subsidiary?
159.12 How may a subsidiary of a Federal savings association issue securities?
159.13 How may a Federal savings association exercise its salvage power in connection with its service corporation or lower-tier entities?

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1828, 5412(b)(2)(B).

§ 159.1 What does this part cover?

(a) The OCC is issuing this part 159 pursuant to its general rulemaking and supervisory authority under the Home Owners' Loan Act, 12 U.S.C. 1462 *et seq.,* and its specific authority under section 18(m) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(m). This part 159 applies to subordinate organizations of Federal savings associations. The OCC may, at any time, limit a Federal savings association's investment in any of these entities, or may limit or refuse to permit any activities of any of these entities for supervisory, legal, or safety and soundness reasons.

(b) Notices under this part are applications for purposes of statutory and regulatory references to ''applications.'' Any conditions that the OCC imposes in approving any application are enforceable as a condition imposed in writing by the OCC in connection with the granting of a request by a Federal savings association within the meaning of 12 U.S.C. 1818(b) or 1818(i).

§ 159.2 Definitions.

For purposes of this part:

Control has the same meaning as in part 174 of this chapter.

GAAP-consolidated subsidiary means an entity in which a Federal savings association has a direct or indirect ownership interest and whose assets are consolidated with those of the savings association for purposes of reporting under Generally Accepted Accounting Principles (GAAP). Generally, these are entities in which the savings association has a majority ownership interest.

Lower-tier entity includes any company in which an operating subsidiary or a service corporation has a direct or indirect ownership interest.

Operating subsidiary means any entity that satisfies all of the requirements for an operating subsidiary set forth in § 159.3 of this part and that is designated by the parent Federal savings association as an operating subsidiary pursuant to § 159.3 of this part. More than 50% of the voting shares of an operating subsidiary must be owned, directly or indirectly, by a Federal savings association and no other person or entity may exercise effective operating control. An operating subsidiary may only engage in activities

permissible for a Federal savings association.

Ownership interest means any equity interest in a business organization, including stock, limited or general partnership interests, or shares in a limited liability company.

Service corporation means any entity that satisfies all of the requirements for service corporations in 12 U.S.C. 1464(c)(4)(B) and § 159.3 of this part and that is designated by the investing Federal savings association as a service corporation pursuant to § 159.3 of this part. A service corporation must be organized under the laws of the state where the Federal savings association's home office is located, may only be owned by savings associations with home offices in that state, and may engage in the activities identified in §§ 159.3(e)(2) and 159.4 of this part.

Subordinate organization means any corporation, partnership, business trust, association, joint venture, pool, syndicate, or other similar business organization in which a Federal savings association has a direct or indirect ownership interest, unless that ownership interest qualifies as a pass-through investment pursuant to § 160.32 of this chapter and is so designated by the investing savings association.

Subsidiary means any subordinate organization directly or indirectly controlled by a Federal savings association.

§ 159.3 What are the characteristics of, and what requirements apply to, subordinate organizations of Federal savings associations?

A Federal savings association (''you'') that meets the requirements of this section, as detailed in the following chart, may establish, or obtain an interest in an operating subsidiary or a service corporation. For ease of reference, this section cross-references other regulations in this chapter affecting operating subsidiaries and service corporations. You should refer to those regulations for the details of how they apply. The chart also discusses the regulations that may apply to lower-tier entities in which you have an indirect ownership interest through your operating subsidiary or service corporation. The chart follows:

	Operating subsidiary	Service corporation
(a) How may a Federal savings association (''you'') establish an operating subsidiary or a service corporation?	(1) You must file a notice, with the appropriate OCC licensing office, satisfying § 159.11. Any finance subsidiary that existed on January 1, 1997 is deemed an operating subsidiary without further action on your part.	(2) You must file a notice, with the appropriate OCC licensing office, satisfying § 159.11. Depending upon your condition and the activities in which the service corporation will engage, § 159.3(e)(2) may require you to file an application.
(b) Who may be an owner?	(1) Anyone may have an ownership interest in an operating subsidiary.	(2) Only Federal or state chartered savings associations with home offices in the state where you have your home office may have an ownership interest in any service corporation in which you invest.
(c) What ownership requirements apply?	(1) You must own, directly or indirectly, more than 50% of the voting shares of the operating subsidiary. No one else may exercise effective operating control.	(2) You are not required to have any particular percentage ownership interest and need not have control of the service corporation.
(d) What geographic restrictions apply?	(1) An operating subsidiary may be organized in any geographic location.	(2) A service corporation must be organized in the state where your home office is located.
(e) What activities are permissible?	(1) After you have notified the OCC in accordance with § 159.11, an operating subsidiary may engage in any activity that you may conduct directly. You may hold another insured depository institution as an operating subsidiary.	(2)(i) If you are eligible for expedited treatment under § 116.5 of this chapter, and notify the OCC as required by § 159.11, your service corporation may engage in the preapproved activities listed in § 159.4. You may request OCC approval for your service corporation to engage in any other activity reasonably related to the activities of financial institutions by filing an application in accordance with standard treatment processing procedures at part 116, subparts A and E of this chapter. (ii) If you are subject to standard treatment under § 116.5 of this chapter, and notify the OCC as required by § 159.11, your service corporation may engage in any activity that you may conduct directly except taking deposits. You may request OCC approval for your service corporation to engage in any other activity reasonably related to the activities of financial institutions, including the activities set forth in § 159.4(b)–(j), by filing an application in accordance with standard treatment processing procedures at part 116, subparts A and E of this chapter.

	Operating subsidiary	Service corporation
(f) May the operating subsidiary or service corporation invest in lower-tier entities?	(1)(i) An operating subsidiary may itself hold an operating subsidiary. Part 159 applies equally to a lower-tier operating subsidiary. In applying the regulations in this part, the investing operating subsidiary should substitute ''investing operating subsidiary'' wherever the part uses ''you'' or ''savings association.'' (ii) An operating subsidiary may also invest in other types of lower-tier entities. These entities must comply with all of the requirements of this part 159 that apply to service corporations except for paragraphs (b)(2) and (d)(2) of this section.	(2) A service corporation may invest in all types of lower-tier entities as long as the lower-tier entity is engaged solely in activities that are permissible for a service corporation. All of the requirements of this part apply to such entities except for paragraphs (b)(2) and (d)(2) of this section.
(g) How much may a Federal savings association invest?	(1) There are no limits on the amount you may invest in your operating subsidiaries, either separately or in the aggregate.	(2) Section 159.5 limits your aggregate investments in service corporations and indicates when your investments (both debt and equity) in lower-tier entities must be aggregated with your investments in service corporations.
(h) Do Federal statutes and regulations that apply to the savings association apply?	(1) Unless otherwise specifically provided by statute, regulation, or OCC policy, all Federal statutes and regulations apply to operating subsidiaries in the same manner as they apply to you. You and your operating subsidiary are generally consolidated and treated as a unit for statutory and regulatory purposes.	(2)(i) If the Federal statute or regulation specifically refers to ''service corporation,'' it applies to all service corporations, even if you do not control the service corporation or it is not a GAAP-consolidated subsidiary. (ii) If the Federal statute or regulation refers to ''subsidiary,'' it applies only to service corporations that you directly or indirectly control.
(i) Do the investment limits that apply to Federal savings associations (HOLA section 5(c) and part 160 of this chapter) apply?	(1) Your assets and those of your operating subsidiary are aggregated when calculating investment limitations.	(2) Your service corporation's assets are not subject to the same investment limitations that apply to you. The investment activities of your service corporation are governed by paragraph (e)(2) of this section and § 159.4.
(j) How does the capital regulation (part 167 of this chapter) apply?	(1) Your assets and those of your operating subsidiary are consolidated for all capital purposes.	(2) The capital treatment of a service corporation depends upon whether it is an includable subsidiary. That determination is based upon factors set forth in part 167 of this chapter, including your percentage ownership of the service corporation and the activities in which the service corporation engages. Both debt and equity investments in service corporations that are GAAP-consolidated subsidiaries are considered investments in subsidiaries for purposes of the capital regulation, regardless of the authority under which they are made.
(k) How does the loans-to-one-borrower (LTOB) regulation (§ 160.93 of this chapter) apply?	(1) The LTOB regulation does not apply to loans from you to your operating subsidiary or loans from your operating subsidiary to you. Other loans made by your operating subsidiary are aggregated with your loans for LTOB purposes.	(2) The LTOB regulation does not apply to loans from you to your service corporation or from your service corporation to you. However, § 159.5 imposes restrictions on the amount of loans you may make to certain service corporations. Loans made by a service corporation that you control to entities other than you or your subordinate organizations are aggregated with your loans for LTOB purposes.

	Operating subsidiary	Service corporation
(l) How do the transactions with affiliates (TWA) regulations of the Board of Governors of the Federal Reserve System (Board) apply?	(1) Board rules explain how TWA applies. Generally, an operating subsidiary is not an affiliate, unless it is a depository institution; is directly controlled by another affiliate of the savings association or by shareholders that control the savings association; or is an employee stock option plan, trust, or similar organization that exists for the benefit of shareholders, partners, members, or employees of the savings association or an affiliate. A non-affiliate operating subsidiary is treated as a part of the savings association and its transactions with affiliates of the savings association are aggregated with those of the savings association	(2) Board rules explain how TWA applies. Generally, a service corporation is not an affiliate, unless it is a depository institution; is directly controlled by another affiliate of the savings association or by shareholders that control the savings association; or is an employee stock option plan, trust, or similar organization that exists for the benefit of shareholders, partners, members, or employees of the savings association or an affiliate. If a savings association directly or indirectly controls a service corporation and the service corporation is not otherwise an affiliate under Board rules, the service corporation is treated as a part of the savings association and its transactions with affiliates of the savings association are aggregated with those of the savings association.
(m) How does the Qualified Thrift Lender (QTL) (12 U.S.C. 1467a(m)) test apply?	(1) Under 12 U.S.C. 1467a(m)(5), you may determine whether to consolidate the assets of a particular operating subsidiary for purposes of calculating your qualified thrift investments. If the operating subsidiary's assets are not consolidated with yours for that purpose, your investment in the operating subsidiary will be considered in calculating your qualified thrift investments.	(2) Under 12 U.S.C. 1467a(m)(5), you may determine whether to consolidate the assets of a particular service corporation for purposes of calculating your qualified thrift investments. If a service corporation's assets are not consolidated with yours for that purpose, your investment in the service corporation will be considered in calculating your qualified thrift investments.
(n) Does state law apply?	(1) State law applies to operating subsidiaries regardless of whether it applies to you.	(2) State law applies to service corporations regardless of whether it applies to you.
(o) May the OCC conduct examinations?	(1) An operating subsidiary is subject to examination by the OCC.	(2) A service corporation is subject to examination by the OCC.
(p) What must be done to redesignate an operating subsidiary as a service corporation or a service corporation as an operating subsidiary?	(1) Before redesignating an operating subsidiary as a service corporation, you should consult with the OCC licensing office in the district in which your home office is located. You must maintain adequate internal records, available for examination by the OCC, demonstrating that the redesignated service corporation meets all of the applicable requirements of this part and that your board of directors has approved the redesignation.	(2) Before redesignating a service corporation as an operating subsidiary, you should consult with the OCC licensing office in the district in which your home office is located. You must maintain adequate internal records, available for examination by the OCC, demonstrating that the redesignated operating subsidiary meets all of the applicable requirements of this part and that your board of directors has approved the redesignation.
(q) What are the consequences of failing to comply with the requirements of this part?	(1) If an operating subsidiary, or any lower-tier entity in which the operating subsidiary invests pursuant to paragraph (f)(1) of this section fails to meet any of the requirements of this section, you must notify the appropriate OCC licensing office. Unless otherwise advised by the OCC, if the company cannot comply within 90 days with all of the requirements for either an operating subsidiary or a service corporation under this section, or any other investment authorized by 12 U.S.C. 1464(c) or part 160 of this chapter, you must promptly dispose of your investment.	(2) If a service corporation, or any lower-tier entity in which the service corporation invests pursuant to paragraph (f)(2) of this section, fails to meet any of the requirements of this section, you must notify the appropriate OCC licensing office. Unless otherwise advised by the OCC, if the company cannot comply within 90 days with all of the requirements for either an operating subsidiary or a service corporation under this section, or any other investment authorized by 12 U.S.C. 1464(c) or part 160 of this chapter, you must promptly dispose of your investment.

§ 159.4 What activities are preapproved for service corporations?

This section sets forth the activities that have been preapproved for service corporations. Section 159.3(e)(2) of this part sets forth the procedures for engaging in a broader scope of activities on a case-by-case basis. You should read these two sections together to determine whether you must file a notice with the OCC under § 159.11 of this part, or whether you must file an application under part 116 of this chapter and receive prior written OCC approval for your service corporation to engage in a particular activity. The notice or application should be filed with the appropriate OCC licensing office. To the extent permitted by § 159.3(e)(2) of this part, a service corporation may engage in the following activities:

(a) Any activity that all Federal savings associations may conduct directly, except taking deposits.

(b) Business and professional services. The following services are preapproved for service corporations only when they are limited to financial documents or financial clients or are generally finance-related:

(1) Accounting or internal audit;

(2) Advertising, marketing research and other marketing;

(3) Clerical;

(4) Consulting;

(5) Courier;

(6) Data processing;

(7) Data storage facilities operation and related services;

(8) Office supplies, furniture, and equipment purchasing and distribution;

(9) Personnel benefit program development or administration;

(10) Printing and selling forms that require Magnetic Ink Character Recognition (MICR) encoding;

(11) Relocation of personnel;

(12) Research studies and surveys;

(13) Software development and systems integration; and

(14) Remote service unit operation, leasing, ownership or establishment.

(c) Credit-related activities.

(1) Abstracting;

(2) Acquiring and leasing personal property;

(3) Appraising;

(4) Collection agency;

(5) Credit analysis;

(6) Check or credit card guaranty and verification;

(7) Escrow agent or trustee (under deeds of trust, including executing and deliverance of conveyances, reconveyances and transfers of title); and

(8) Loan inspection.

(d) Consumer services.

(1) Financial advice or consulting;

(2) Foreign currency exchange;

(3) Home ownership counseling;

(4) Income tax return preparation;

(5) Postal services;

(6) Stored value instrument sales;

(7) Welfare benefit distribution;

(8) Check printing and related services; and

(9) Remote service unit operation, leasing, ownership, or establishment.

(e) Real estate related services.

(1) Acquiring real estate for prompt development or subdivision, for construction of improvements, for resale or leasing to others for such construction, or for use as manufactured home sites, in accordance with a prudent program of property development;

(2) Acquiring improved real estate or manufactured homes to be held for rental or resale, for remodeling, renovating, or demolishing and rebuilding for sale or rental, or to be used for offices and related facilities of a stockholder of the service corporation;

(3) Maintaining and managing real estate; and

(4) Real estate brokerage for property owned by a savings association that owns capital stock of the service corporation, the service corporation, or a lower-tier entity in which the service corporation invests.

(f) Securities activities, liquidity management, and coins.

(1) Execution of transactions in securities on an agency or riskless principal basis solely upon the order and for the account of customers or the provision of investment advice. The service corporation must register with the Securities and Exchange Commission and state securities regulators, as required by applicable Federal and state law and regulations;

(2) Liquidity management;

(3) Issuing notes, bonds, debentures, or other obligations or securities;

(4) Purchase or sale of coins issued by the U.S. Treasury.

(g) *Investments.* (1) Tax-exempt bonds used to finance residential real property for family units;

(2) Tax-exempt obligations of public housing agencies used to finance housing projects with rental assistance subsidies;

(3) Small business investment companies and new markets venture capital companies licensed by the U.S. Small Business Administration;

(4) Rural business investment companies; and

(5) Investing in savings accounts of an investing thrift.

(h) Community development and charitable activities:

(1) Investments in governmentally insured, guaranteed, subsidized or otherwise sponsored programs for housing, small farms, or businesses that are local in character;

(2) Investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs);

(3) Investments in low-income housing tax credit and new markets tax credit projects and entities authorized by statute (e.g., community development financial institutions) to promote community, inner city, and community development purposes; and

(4) Establishing a corporation that is recognized by the Internal Revenue Service as organized for charitable purposes under 26 U.S.C. 501(c)(3) of the Internal Revenue Code and making a reasonable contribution to capitalize it, *provided* that the corporation engages exclusively in activities designed to promote the well-being of communities in which the owners of the service corporation operate.

(i) Activities conducted on behalf of a customer on an other than ''as principal'' basis.

(j) Activities reasonably incident to those listed in paragraphs (a) through (i) of this section if the service corporation engages in those activities.

§ 159.5 How much may a Federal savings association invest in service corporations or lower-tier entities?

The amount that a Federal savings association (''you'') may invest in a service corporation or any lower-tier entity depends upon several factors. These include your total assets, your capital, the purpose of the investment, and your ownership interest in the service corporation or entity.

(a) Under section 5(c)(4)(B) of the HOLA, you may invest up to 3% of your assets in the capital stock, obligations, and other securities of service corporations. Any investment you make under this paragraph that would cause your investment, in the aggregate, to exceed 2% of your assets must serve primarily community, inner city, or community development purposes. You must designate the investments serving those purposes, which include:

(1) Investments in governmentally insured, guaranteed, subsidized or otherwise sponsored programs for housing, small farms, or businesses that are local in character;

(2) Investments for the preservation or revitalization of either urban or rural communities;

(3) Investments designed to meet the community development needs of, and primarily benefit, low- and moderate-income communities; or

(4) Other community, inner city, or community development-related investments approved by the OTS or the OCC.

(b) In addition to the amounts you may invest under paragraph (a) of this section, and to the extent that you have authority under other provisions of section 5(c) of the HOLA and part 160 of this chapter, and available capacity within any applicable investment limits, you may make loans to any service corporation and any lower-tier entity, subject to the following conditions:

(1) You and your GAAP-consolidated subsidiaries may, in the aggregate, make loans of up to 15% of your total capital, as described in part 167 of this chapter to each subordinate organization that does not qualify as a GAAP-consolidated subsidiary. All loans made under this paragraph (b)(1) may not, in the aggregate, exceed 50% of your total capital, as described in part 167 of this chapter.

(2) The OCC may limit the amount of loans to a GAAP-consolidated subsidiary, or may adjust the limits set forth in paragraph (b)(1) of this section where safety and soundness considerations warrant such action.

(c) For purposes of this section, the terms ''loans'' and ''obligations'' include all loans and other debt instruments (except accounts payable incurred in the ordinary course of business and paid within 60 days) and all guarantees or take-out commitments of such loans or debt instruments.

§ 159.10 How must separate corporate identities be maintained?

(a) Each Federal savings association and subordinate organization thereof must be operated in a manner that demonstrates to the public that each maintains a separate corporate existence. Each must operate so that:

(1) Their respective business transactions, accounts, and records are not intermingled;

(2) Each observes the formalities of their separate corporate procedures;

(3) Each is adequately financed as a separate unit in light of normal obligations reasonably foreseeable in a business of its size and character;

(4) Each is held out to the public as a separate enterprise; and

(5) Unless the parent savings association has guaranteed a loan to the subordinate organization, all borrowings by the subordinate organization indicate that the parent is not liable.

(b) OCC regulations that apply both to Federal savings associations and subordinate organizations shall not be construed as requiring a savings association and its subordinate organizations to operate as a single entity.

§ 159.11 What notices are required to establish or acquire a new subsidiary or engage in new activities through an existing subsidiary?

When required by section 18(m) of the Federal Deposit Insurance Act, a Federal savings association (''you'') must file a notice (''Notice'') under part 116, subpart A of this chapter at least 30 days before establishing or acquiring a subsidiary or engaging in new activities in a subsidiary. The Notice should be filed with the appropriate OCC licensing office and must contain all of the information the Federal Deposit Insurance Corporation (FDIC) requires under 12 CFR 362.15. Providing the OCC with a copy of the notice you file with the FDIC will satisfy this requirement. If the OCC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the OCC's prior written approval under the standard treatment processing procedures at part 116, subpart A and E of this chapter before establishing or acquiring the subsidiary or engaging in new activities in the subsidiary.

§ 159.12 How may a subsidiary of a Federal savings association issue securities?

(a) A subsidiary may issue, either directly or through a third party intermediary, any securities that its parent Federal savings association (''you'') may issue. The subsidiary must not state or imply that the securities it issues are covered by Federal deposit insurance. A subsidiary may not issue any security the payment, maturity, or redemption of which may be accelerated upon the condition that you are insolvent or have been placed into receivership.

(b) You must file a notice with the appropriate OCC licensing office in accordance with § 159.11 of this part at least 30 days before your first issuance of any securities through an existing subsidiary or in conjunction with establishing or acquiring a new subsidiary. If the OCC notifies you within 30 days that the notice presents supervisory concerns or raises significant issues of law or policy, you must receive the OCC's prior written approval before issuing securities through your subsidiary.

(c) For as long as any securities are outstanding, you must maintain all records generated through each securities issuance in the ordinary course of business, including a copy of any prospectus, offering circular, or similar document concerning such issuance, and make such records available for examination by the OCC. Such records must include, but are not limited to:

(1) The amount of your assets or liabilities (including any guarantees you make with respect to the securities issuance) that have been transferred or made available to the subsidiary; the percentage that such amount represents of the current book value of your assets on an unconsolidated basis; and the current book value of all such assets of the subsidiary;

(2) The terms of any guarantee(s) issued by you or any third party;

(3) A description of the securities the subsidiary issued;

(4) The net proceeds from the issuance of securities (or the pro rata portion of the net proceeds from securities issued through a jointly owned subsidiary); the gross proceeds of the securities issuance; and the market value of assets collateralizing the securities issuance (any assets of the subsidiary, including any guarantees of its securities issuance you have made);

(5) The interest or dividend rates and yields, or the range thereof, and the frequency of payments on the subsidiary's securities;

(6) The minimum denomination of the subsidiary's securities; and

(7) Where the subsidiary marketed or intends to market the securities.

§ 159.13 How may a Federal savings association exercise its salvage power in connection with its service corporation or lower-tier entities?

(a) In accordance with this section, a Federal savings association (''you'') may exercise your salvage power to make a contribution or a loan (including a guarantee of a loan made by any other person) to your service corporation or lower-tier entity (''salvage investment'') that exceeds the maximum amount otherwise permitted under law or regulation. You must notify the appropriate OCC licensing office at least 30 days before making such a salvage investment. This notice must demonstrate that:

(1) The salvage investment protects your interest in the service corporation or lower-tier entity;

(2) The salvage investment is consistent with safety and soundness; and

(3) You considered alternatives to the salvage investment and determined that such alternatives would not adequately satisfy paragraphs (a)(1) and (a)(2) of this section.

(b) If the OCC notifies you within 30 days that the Notice presents supervisory concerns, or raises significant issues of law or policy, you must apply for and receive the OCC's prior written approval under the standard treatment processing procedures at part 116, subparts A and E of this chapter before making a salvage investment.

(c) If your service corporation or lower-tier entity is a GAAP-consolidated subsidiary, your salvage investment under this section will be considered an investment in a subsidiary for purposes of part 167 of this chapter.

PART 160—LENDING AND INVESTMENT

Sec.

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160.210 [Reserved]
160.220 [Reserved]

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1701j–3, 1828, 3803, 3806, 5412(b)(2)(B); 42 U.S.C. 4106.

§ 160.1 General.

(a) *Authority and scope.* This part is being issued by the OCC under its general rulemaking and supervisory authority under the Home Owners' Loan Act (HOLA), 12 U.S.C. 1462 *et seq.*

(b) *General lending standards.* Each savings association is expected to conduct its lending and investment activities prudently. Each association should use lending and investment standards that are consistent with safety and soundness, ensure adequate portfolio diversification and are appropriate for the size and condition of the institution, the nature and scope of its operations, and conditions in its lending market. Each association should adequately monitor the condition of its portfolio and the adequacy of any collateral securing its loans.

§ 160.2 Applicability of law.

State law applies to the lending activities of Federal savings associations and their subsidiaries to the same extent and in the same manner that those laws apply to national banks and their subsidiaries.

§ 160.3 Definitions.

For purposes of this part and any determination under 12 U.S.C. 1467a(m):

Consumer loans include loans for personal, family, or household purposes and loans reasonably incident thereto, and may be made as either open-end or closed-end consumer credit (as defined at 12 CFR 226.2(a)(10) and (20)). Consumer loans do not include credit extended in connection with credit card loans, bona fide overdraft loans, and other loans that the savings association has designated as made under investment or lending authority other than section 5(c)(2)(D) of the HOLA.

Credit card is any card, plate, coupon book, or other single credit device that may be used from time to time to obtain credit.

Credit card account is a credit account established in conjunction with the issuance of, or the extension of credit through, a credit card. This term includes loans made to consolidate credit card debt, including credit card debt held by other lenders, and participation certificates, securities and similar instruments secured by credit card receivables.

Home loans include any loans made on the security of a home (including a dwelling unit in a multi-family residential property such as a condominium or a cooperative), combinations of homes and business property (*i.e.,* a home used in part for business), farm residences, and combinations of farm residences and commercial farm real estate.

Loan commitment includes a loan in process, a letter of credit, or any other commitment to extend credit.

Real estate loan, for purposes of this part, is a loan for which the savings association substantially relies upon a security interest in real estate given by the borrower as a condition of making the loan. A loan is made on the security of real estate if:

(1) The security property is real estate pursuant to the law of the state in which the property is located;

(2) The security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located;

(3) The security property is capable of separate appraisal; and

(4) With regard to a security property that is a leasehold or other interest for a period of years, the term of the interest extends, or is subject to extension or renewal at the option of the Federal savings association for a term of at least five years following the maturity of the loan.

Small business includes a small business concern or entity as defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a), and implemented by the regulations of the Small Business Administration at 13 CFR part 121.

Small business loans and *loans to small businesses* include any loan to a small business as defined in this section; or a loan that does not exceed $2 million (including a group of loans to one borrower) and is for commercial, corporate, business, or agricultural purposes.

§ 160.30 General lending and investment powers of Federal savings associations.

Pursuant to section 5(c) of the Home Owners' Loan Act (''HOLA''), 12 U.S.C. 1464(c), a Federal savings association may make, invest in, purchase, sell, participate in, or otherwise deal in (including brokerage or warehousing) all loans and investments allowed under section 5(c) of the HOLA including, without limitation, the following loans, extensions of credit, and investments, subject to the limitations indicated and any such terms, conditions, or limitations as may be prescribed from time to time by the OCC by policy directive, order, or regulation:

LENDING AND INVESTMENT POWERS CHART

Category	Statutory authorization [1]	Statutory investment limitations (Endnotes contain applicable regulatory limitations)
Bankers' bank stock	5(c)(4)(E)	Same terms as applicable to national banks.
Business development credit corporations	5(c)(4)(A)	The lesser of .5% of total outstanding loans or $250,000.
Commercial loans	5(c)(2)(A)	20% of total assets, provided that amounts in excess of 10% of total assets may be used only for small business loans.
Commercial paper and corporate debt securities.	5(c)(2)(D)	Up to 35% of total assets.[2 3]
Community development loans and equity investments.	5(c)(3)(A)	5% of total assets, provided equity investments do not exceed 2% of total assets.[4]

LENDING AND INVESTMENT POWERS CHART—Continued

Category	Statutory authorization [1]	Statutory investment limitations (Endnotes contain applicable regulatory limitations)
Construction loans without security	5(c)(3)(C)	In the aggregate, the greater of total capital or 5% of total assets.
Consumer loans	5(c)(2)(D)	Up to 35% of total assets.[2 5]
Credit card loans or loans made through credit card accounts.	5(c)(1)(T)	None.[6]
Deposits in insured depository institutions	5(c)(1)(G)	None.[6]
Education loans	5(c)(1)(U)	None.[6]
Federal government and government-sponsored enterprise securities and instruments.	5(c)(1)(C), 5(c)(1)(D), 5(c)(1)(E), 5(c)(1)(F)	None.[6]
Finance leasing	5(c)(1)(B), 5(c)(2)(A), 5(c)(2)(B), 5(c)(2)(D)	Based on purpose and property financed.[7]
Foreign assistance investments	5(c)(4)(C)	1% of total assets.[8]
General leasing	5(c)(2)(C)	10% of assets.[7]
Home improvement loans	5(c)(1)(J)	None.[6]
Home (residential) loans [9]	5(c)(1)(B)	None.[6 10]
HUD-insured or guaranteed investments	5(c)(1)(O)	None.[6]
Insured loans	5(c)(1)(I), 5(c)(1)(K)	None.[6]
Liquidity investments	5(c)(1)(M)	None.[6]
Loans secured by deposit accounts	5(c)(1)(A)	None.[6 11]
Loans to financial institutions, brokers, and dealers.	5(c)(1)(L)	None.[6 12]
Manufactured home loans	5(c)(1)(J)	None.[6 13]
Mortgage-backed securities	5(c)(1)(R)	None.[6]
National Housing Partnership Corporation and related partnerships and joint ventures.	5(c)(1)(N)	None.[6]
New markets venture capital companies	5(c)(4)(F)	5% of total capital.
Nonconforming loans	5(c)(3)(B)	5% of total assets.
Nonresidential real property loans	5(c)(2)(B)	400% of total capital.[14]
Open-end management investment companies [15].	5(c)(1)(Q)	None.[6]
Rural business investment companies	7 U.S.C. 2009cc–9	Five percent of total capital.
Service corporations	5(c)(4)(B)	3% of total assets, as long as any amounts in excess of 2% of total assets further community, inner city, or community development purposes.[16]
Small business investment companies	15 U.S.C. 682(b)(2)	5% of total capital.
Small business-related securities	5(c)(1)(S)	None.[6]
State and local government obligations	5(c)(1)(H)	None for general obligations. Per issuer limitation of 10% of capital for other obligations.[6 17]
State housing corporations	5(c)(1)(P)	None.[6 18]
Transaction account loans, including overdrafts	5(c)(1)(A)	None.[6 19]

Endnotes

[1] All references are to section 5 of the Home Owners' Loan Act (12 U.S.C. 1464) unless otherwise indicated.

[2] For purposes of determining a Federal savings association's percentage of assets limitation, investment in commercial paper and corporate debt securities must be aggregated with the Federal savings association's investment in consumer loans.

[3] A Federal savings association may invest in commercial paper and corporate debt securities, which includes corporate debt securities convertible into stock, subject to the provisions of § 160.40 of this part. Amounts in excess of 30% of assets, in the aggregate, may be invested only in obligations purchased by the association directly from the original obligor and for which no finder's or referral fees have been paid.

[4] The 2% of assets limitation is a sublimit for investments within the overall 5% of assets limitation on community development loans and investments. The qualitative standards for such loans and investments are set forth in HOLA section 5(c)(3)(A) (formerly 5(c)(3)(B)), as explained in an opinion of the Office of Thrift Supervision Chief Counsel dated May 10, 1995.

[5] Amounts in excess of 30% of assets, in the aggregate, may be invested only in loans made by the association directly to the original obligor and for which no finder's or referral fees have been paid. A Federal savings association may include loans to dealers in consumer goods to finance inventory and floor planning in the total investment made under this section.

[6] While there is no statutory limit on certain categories of loans and investments, including credit card loans, home improvement loans, education loans, and deposit account loans, the OCC may establish an individual limit on such loans or investments if the association's concentration in such loans or investments presents a safety and soundness concern.

[7] A Federal savings association may engage in leasing activities subject to the provisions of § 160.41 of this part.

[8] This 1% of assets limitation applies to the aggregate outstanding investments made under the Foreign Assistance Act and in the capital of the Inter-American Savings and Loan Bank. Such investments may be made subject to the provisions of § 160.43 of this part.

[9] A home (or residential) loan includes loans secured by one-to-four family dwellings, multi-family residential property, and loans secured by a unit or units of a condominium or housing cooperative.

[10] A Federal savings association may make home loans subject to the provisions of §§ 160.33, 160.34, and 160.35 of this part.

[11] Loans secured by savings accounts and other time deposits may be made without limitation, provided the Federal savings association obtains a lien on, or a pledge of, such accounts. Such loans may not exceed the withdrawable amount of the account.

[12] A Federal savings association may only invest in these loans if they are secured by obligations of, or by obligations fully guaranteed as to principal and interest by, the United States or any of its agencies or instrumentalities, the borrower is a financial institution insured by the Federal Deposit Insurance Corporation or is a broker or dealer registered with the Securities and Exchange Commission, and the market value of the securities for each loan at least equals the amount of the loan at the time it is made.

[13] If the wheels and axles of the manufactured home have been removed and it is permanently affixed to a foundation, a loan secured by a combination of a manufactured home and developed residential lot on which it sits may be treated as a home loan.

[14] Without regard to any limitations of this part, a Federal savings association may make or invest in the fully insured or guaranteed portion of nonresidential real estate loans insured or guaranteed by the Economic Development Administration, the Farmers Home Administration, or the Small Business Administration. Unguaranteed portions of guaranteed loans must be aggregated with uninsured loans when determining an association's compliance with the 400% of capital limitation for other real estate loans.

[15] This authority is limited to investments in open-end management investment companies that are registered with the Securities and Exchange Commission under the Investment Company Act of 1940. The portfolio of the investment company must be restricted by the company's investment policy (changeable only if authorized by shareholder vote) solely to investments that a Federal savings association may, without limitation as to percentage of assets, invest in, sell, redeem, hold, or otherwise deal in. Separate and apart from this authority, a Federal savings association may make pass-through investments to the extent authorized by § 160.32 of this part.

[16] A Federal savings association may invest in service corporations subject to the provisions of part 159 of this chapter.

[17] This category includes obligations issued by any state, territory, or possession of the United States or political subdivision thereof (including any agency, corporation, or instrumentality of a state or political subdivision), subject to § 160.42 of this part.

[18] A Federal savings association may invest in state housing corporations subject to the provisions of § 160.121 of this part.

[19] Payments on accounts in excess of the account balance (overdrafts) on commercial deposit or transaction accounts shall be considered commercial loans for purposes of determining the association's percentage of assets limitation.

§ 160.31 Election regarding categorization of loans or investments and related calculations.

(a) If a loan or other investment is authorized under more than one section of the HOLA, as amended, or this part, a Federal savings association may designate under which section the loan or investment has been made. Such a loan or investment may be apportioned among appropriate categories, and may be moved, in whole or part, from one category to another. A loan commitment shall be counted as an investment and included in total assets of a Federal savings association for purposes of calculating compliance with HOLA section 5(c)'s investment limitations only to the extent that funds have been advanced and not repaid pursuant to the commitment.

(b) Loans or portions of loans sold to a third party shall be included in the calculation of a percentage-of-assets or percentage-of-capital investment limitation only to the extent they are sold with recourse.

(c) A Federal savings association may make a loan secured by an assignment of loans to the extent that it could, under applicable law and regulations, make or purchase the underlying assigned loans.

§ 160.32 Pass-through investments.

(a) A Federal savings association (''you'') may make pass-through investments. A pass-through investment occurs when you invest in an entity (''company'') that engages only in activities that you may conduct directly and the investment meets the requirements of this section. If an investment is authorized under both this section and some other provision of law, you may designate under which authority or authorities the investment is made. When making a pass-through investment, you must comply with all the statutes and regulations that would apply if you were engaging in the activity directly. For example, your proportionate share of the company's assets will be aggregated with the assets you hold directly in calculating investment limits (*e.g.,* no more than 400% of total capital may be invested in nonresidential real property loans).

(b) You may make a pass-through investment without prior notice to the OCC if all of the following conditions are met:

(1) You do not invest more than 15% of your total capital in one company;

(2) The book value of your aggregate pass-through investments does not exceed 50% of your total capital after making the investment;

(3) Your investment would not give you direct or indirect control of the company;

(4) Your liability is limited to the amount of your investment; and

(5) The company falls into one of the following categories:

(i) A limited partnership;

(ii) An open-end mutual fund;

(iii) A closed-end investment trust;

(iv) A limited liability company; or

(v) An entity in which you are investing primarily to use the company's services (*e.g.,* data processing).

(c) If you want to make other pass-through investments, you must provide the OCC with 30 days' advance notice. If within that 30-day period the OCC notifies you that an investment presents supervisory, legal, or safety and soundness concerns, you must apply for and receive the OCC's prior written approval under the standard treatment processing procedures at part 116, subparts A and E of this chapter before making the investment. Notices under this section are deemed to be applications for purposes of statutory and regulatory references to ''applications.'' Any conditions that the OCC imposes on any pass-through investment shall be enforceable as a condition imposed in writing by the OCC in connection with the granting of a request by a Federal savings association within the meaning of 12 U.S.C. 1818(b) or 1818(i).

§ 160.33 Late charges.

A Federal savings association may include in a home loan contract a provision authorizing the imposition of a late charge with respect to the payment of any delinquent periodic payment. With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no late charge, regardless of form, shall be assessed or collected by a Federal savings association, unless any billing, coupon, or notice the Federal savings association may provide regarding installment payments due on the loan discloses the date after which the charge may be assessed. A Federal savings association may not impose a late charge more than one time for late payment of the same installment, and any installment payment made by the borrower shall be applied to the longest outstanding installment due. A Federal savings association shall not assess a late charge as to any payment received by it within fifteen days after the due date of such payment. No form of such late charge permitted by this paragraph shall be considered as interest to the Federal savings association and the Federal savings association shall not deduct late charges from the regular periodic installment payments on the loan, but must collect them as such from the borrower.

§ 160.34 Prepayments.

Any prepayment on a real estate loan must be applied directly to reduce the principal balance on the loan unless the loan contract or the borrower specifies otherwise. Subject to the terms of the loan contract, a Federal savings association may impose a fee for any prepayment of a loan.

§ 160.35 Adjustments to home loans.

(a) For any home loan secured by borrower-occupied property, or property to be occupied by the borrower, adjustments to the interest rate, payment, balance, or term to maturity must comply with the limitations of this section and the disclosure and notice requirements of 560.210 until superseding regulations are issued by the Consumer Financial Protection Bureau.

(b) Adjustments to the interest rate shall correspond directly to the movement of an index satisfying the requirements of paragraph (d) of this section. A Federal savings association also may increase the interest rate pursuant to a formula or schedule that specifies the amount of the increase, the time at which it may be made, and which is set forth in the loan contract. A Federal savings association may decrease the interest rate at any time.

(c) Adjustments to the payment and the loan balance that do not reflect an interest-rate adjustment may be made if:

(1) The adjustments reflect a change in an index that may be used pursuant to paragraph (d) of this section;

(2) In the case of a payment adjustment, the adjustment reflects a change in the loan balance or is made pursuant to a formula, or to a schedule specifying the percentage or dollar change in the payment as set forth in the loan contract; or

(3) In the case of an open-end line-of-credit loan, the adjustment reflects an advance taken by the borrower under the line-of-credit and is permitted by the loan contract.

(d)(1) Any index used must be readily available and independently verifiable. If set forth in the loan contract, an association may use any combination of indices, a moving average of index values, or more than one index during the term of a loan.

(2) Except as provided in paragraph (d)(3) of this section, any index used must be a national or regional index.

(3) A Federal savings association may use an index not satisfying the requirements of paragraph (d)(2) of this section 30 days after filing a notice unless, within that 30-day period, the OCC has notified the association that the notice presents supervisory concerns or raises significant issues of law or policy. If the OCC notifies the association of such concerns or issues, the Federal savings association may not use such an index unless it applies for and receives the OCC's prior written approval under the standard treatment processing procedures at part 116, subparts A and E of this chapter.

§ 160.36 De minimis investments.

A Federal savings association may invest in the aggregate up to the greater of 1% of its total capital or $250,000 in community development investments of the type permitted for a national bank under 12 CFR part 24.

§ 160.37 Real estate for office and related facilities.

A Federal savings association may invest in real estate (improved or unimproved) to be used for office and related facilities of the association, or for such office and related facilities and for rental or sale, if such investment is made and maintained under a prudent program of property acquisition to meet the Federal savings association's present needs or its reasonable future needs for office and related facilities. A Federal savings association may not make an investment that would cause the outstanding book value of all such investments (including investments under § 159.4(e)(2) of this chapter) to exceed its total capital.

§ 160.40 Commercial paper and corporate debt securities.

Pursuant to HOLA section 5(c)(2)(D), a Federal savings association may invest in, sell, or hold commercial paper and corporate debt securities subject to the provisions of this section.

(a) *Limitations.* (1) Commercial paper must be:

(i) As of the date of purchase, rated in either one of the two highest categories by at least two nationally recognized investment ratings services as shown by the most recently published rating made of such investments; or

(ii) If unrated, guaranteed by a company having outstanding paper that is rated as provided in paragraph (a)(1)(i) of this section.

(2) Corporate debt securities must be:

(i) Securities that may be sold with reasonable promptness at a price that corresponds reasonably to their fair value; and

(ii) Rated in one of the four highest categories as to the portion of the security in which the association is investing by a nationally recognized investment ratings service at its most recently published rating before the date of purchase of the security.

(3) A Federal savings association's total investment in the commercial paper and corporate debt securities of any one issuer, or issued by any one person or entity affiliated with such issuer, together with other loans, shall not exceed the general lending limitations contained in § 160.93(c) of this part.

(4) Investments in corporate debt securities convertible into stock are subject to the following additional limitations:

(i) The purchase of securities convertible into stock at the option of the issuer is prohibited;

(ii) At the time of purchase, the cost of such securities must be written down to an amount that represents the investment value of the securities considered independently of the conversion feature; and

(iii) Federal savings associations are prohibited from exercising the conversion feature.

(5) A Federal savings association shall maintain information in its files adequate to demonstrate that it has exercised prudent judgment in making investments under this section.

(b) Notwithstanding the limitations contained in this section, the OCC may permit investment in corporate debt securities of another savings association in connection with the purchase or sale of a branch office or in connection with a supervisory merger or acquisition.

(c) *Underwriting.* Before committing to acquire any investment security, a Federal savings association must determine whether the investment is safe and sound and suitable for the association. The Federal savings association must consider, as appropriate, the interest rate, credit, liquidity, price, transaction, and other risks associated with the investment activity. The Federal savings association must also determine that the issuer has adequate resources and the willingness to provide for all required payments on its obligations in a timely manner.

§ 160.41 Leasing.

(a) *Permissible activities.* Subject to the limitations of this section, a Federal savings association may engage in leasing activities. These activities include becoming the legal or beneficial owner of tangible personal property or real property for the purpose of leasing such property, obtaining an assignment of a lessor's interest in a lease of such property, and incurring obligations incidental to its position as the legal or beneficial owner and lessor of the leased property.

(b) *Definitions.* For the purposes of this section:

(1) The term *net lease* means a lease under which the Federal savings association will not, directly or indirectly, provide or be obligated to provide for:

(i) The servicing, repair or maintenance of the leased property during the lease term;

(ii) The purchasing of parts and accessories for the leased property, except that improvements and additions to the leased property may be leased to the lessee upon its request in accordance with the full-payout requirements of paragraph (c)(2)(i) of this section;

(iii) The loan of replacement or substitute property while the leased property is being serviced;

(iv) The purchasing of insurance for the lessee, except where the lessee has failed to discharge a contractual

obligation to purchase or maintain insurance; or

(v) The renewal of any license, registration, or filing for the property unless such action by the Federal savings association is necessary to protect its interest as an owner or financier of the property.

(2) The term *full-payout lease* means a lease transaction in which any unguaranteed portion of the estimated residual value relied on by the association to yield the return of its full investment in the leased property, plus the estimated cost of financing the property over the term of the lease, does not exceed 25% of the original cost of the property to the lessor. In general, a lease will qualify as a full-payout lease if the scheduled payments provide at least 75% of the principal and interest payments that a lessor would receive if the finance lease were structured as a market-rate loan.

(3) The term *realization of investment* means that a Federal savings association that enters into a lease financing transaction must reasonably expect to realize the return of its full investment in the leased property, plus the estimated cost of financing the property over the term of the lease from:

(i) Rentals;

(ii) Estimated tax benefits, if any; and

(iii) The estimated residual value of the property at the expiration of the term of the lease.

(c) *Finance leasing*—(1) *Investment limits.* A Federal savings association may exercise its authority under HOLA sections 5(c)(1)(B) (residential real estate loans), 5(c)(2)(A) (commercial, business, corporate or agricultural loans), 5(c)(2)(B) (nonresidential real estate loans), and 5(c)(2)(D) (consumer loans) by conducting leasing activities that are the functional equivalent of loans made under those HOLA sections. These activities are commonly referred to as financing leases. Such financing leases are subject to the same investment limits that apply to loans made under those sections. For example, a financing lease of tangible personal property made to a natural person for personal, family or household purposes is subject to all limitations applicable to the amount of a Federal savings association's investment in consumer loans. A financing lease made for commercial, corporate, business, or agricultural purposes is subject to all limitations applicable to the amount of a Federal savings association's investment in commercial loans. A financing lease of residential or nonresidential real property is subject to all limitations applicable to the amount of a Federal savings association's investment in these types of real estate loans.

(2) *Functional equivalent of lending.* To qualify as the functional equivalent of a loan:

(i) The lease must be a net, full-payout lease representing a non-cancelable obligation of the lessee, notwithstanding the possible early termination of the lease;

(ii) The portion of the estimated residual value of the property relied upon by the lessor to satisfy the requirements of a full-payout lease must be reasonable in light of the nature of the leased property and all relevant circumstances so that realization of the lessor's full investment plus the cost of financing the property depends primarily on the creditworthiness of the lessee, and not on the residual market value of the leased property; and

(iii) At the termination of a financing lease, either by expiration or default, property acquired must be liquidated or released on a net basis as soon as practicable. Any property held in anticipation of re-leasing must be reevaluated and recorded at the lower of fair market value or book value.

(d) *General leasing.* Pursuant to section 5(c)(2)(C) of the HOLA, a Federal savings association may invest in tangible personal property, including vehicles, manufactured homes, machinery, equipment, or furniture, for the purpose of leasing that property. In contrast to financing leases, lease investments made under this authority need not be the functional equivalent of loans.

(e) *Leasing salvage powers.* If, in good faith, a Federal savings association believes that there has been an unanticipated change in conditions that threatens its financial position by significantly increasing its exposure to loss, it may:

(1) As the owner and lessor, take reasonable and appropriate action to salvage or protect the value of the property or its interest arising under the lease;

(2) As the assignee of a lessor's interest in a lease, become the owner and lessor of the leased property pursuant to its contractual right, or take any reasonable and appropriate action to salvage or protect the value of the property or its interest arising under the lease; or

(3) Include any provisions in a lease, or make any additional agreements, to protect its financial position or investment in the circumstances set forth in paragraphs (e)(1) and (e)(2) of this section.

§ 160.42 State and local government obligations.

(a) *What limitations apply?* Pursuant to HOLA section 5(c)(1)(H), a Federal savings association (''you'') may invest in obligations issued by any state, territory, possession, or political subdivision thereof (''governmental entity''), subject to appropriate underwriting and the following conditions:

	Aggregate limitation	Per-issuer limitation
(1) General obligations	None	None.
(2) Other obligations of a governmental entity (*e.g.,* revenue bonds) that hold one of the four highest investment grade ratings by a nationally recognized rating agency or that are nonrated but of investment quality.	None	10% of total capital.
(3) Obligations of a governmental entity that do not qualify under any other paragraph but are approved by the OCC.	As approved by the OCC	10% of total capital.

(b) *What is a political subdivision? Political subdivision* means a county, city, town, or other municipal corporation, a public authority, or a publicly-owned entity that is an instrumentality of a state or a municipal corporation.

(c) *What is a general obligation of a state or political subdivision?* A *general obligation* is an obligation that is guaranteed by the full faith and credit of a state or political subdivision that has the power to tax. Indirect payments, such as through a special fund, may qualify as general obligations if a state or political subdivision with taxing authority has unconditionally agreed to provide funds to cover payments.

(d) *What is appropriate underwriting for this type of investment?* In the case of a security rated in one of the four highest investment grades by a nationally recognized rating agency, your assessment of the obligor's credit quality may be based, in part, on reliable rating agency estimates of the obligor's performance. For all other

securities, you must perform your own detailed analysis of credit quality. In doing so, you must consider, as appropriate, the interest rate, credit, liquidity, price, transaction, and other risks associated with the investment activity and determine that such investment is appropriate for your institution. You must also determine that the obligor has adequate resources and willingness to provide for all required payments on its obligations in a timely manner.

§ 160.43 Foreign assistance investments.

Pursuant to HOLA section 5(c)(4)(C), a Federal savings association may make foreign assistance investments in an aggregate amount not to exceed one percent of its assets, subject to the following conditions:

(a) For any investment made under the Foreign Assistance Act, the loan agreement shall specify what constitutes an event of default, and provide that upon default in payment of principal or interest under such agreement, the entire amount of outstanding indebtedness thereunder shall become immediately due and payable, at the lender's option. Additionally, the contract of guarantee shall cover 100% of any loss of investment thereunder, except for any portion of the loan arising out of fraud or misrepresentation for which the party seeking payment is responsible, and provide that the guarantor shall pay for any such loss in U.S. dollars within a specified reasonable time after the date of application for payment.

(b) To make any investments in the share capital and capital reserve of the Inter-American Savings and Loan Bank, a Federal savings association must be adequately capitalized and have adequate allowances for loan and lease losses. The Federal savings association's aggregate investment in such capital or capital reserve, including the amount of any obligations undertaken to provide said Bank with reserve capital in the future (call-able capital), must not, as a result of such investment, exceed the lesser of one-quarter of 1% of its assets or $100,000.

§ 160.50 Letters of credit and other independent undertakings—authority.

A Federal savings association may issue letters of credit and may issue such other independent undertakings as are approved by the OCC, subject to the restrictions in § 160.120.

§ 160.60 Suretyship and guaranty.

Pursuant to section 5(b)(2) of the HOLA, a Federal savings association may enter into a repayable suretyship or guaranty agreement, subject to the conditions in this section.

(a) *What is a suretyship or guaranty agreement?* Under a suretyship, a Federal savings association is bound with its principal to pay or perform an obligation to a third person. Under a guaranty agreement, a Federal savings association agrees to satisfy the obligation of the principal only if the principal fails to pay or perform.

(b) *What requirements apply to suretyship and guaranty agreements under this section?* A Federal savings association may enter into a suretyship or guaranty agreement under this section, subject to each of the following requirements:

(1) The Federal savings association must limit its obligations under the agreement to a fixed dollar amount and a specified duration.

(2) The Federal savings association's performance under the agreement must create an authorized loan or other investment.

(3) The Federal savings association must treat its obligation under the agreement as a loan to the principal for purposes of §§ 160.93 and 163.43 of this chapter.

(4) The Federal savings association must take and maintain a perfected security interest in collateral sufficient to cover its total obligation under the agreement.

(c) *What collateral is sufficient?* (1) The Federal savings association must take and maintain a perfected security interest in real estate or marketable securities equal to at least 110 percent of its obligation under the agreement, except as provided in paragraph (c)(2) of this section.

(i) If the collateral is real estate, the Federal savings association must establish the value by a signed appraisal or evaluation in accordance with part 164 of this chapter. In determining the value of the collateral, the Federal savings association must factor in the value of any existing senior mortgages, liens or other encumbrances on the property, except those held by the principal to the suretyship or guaranty agreement.

(ii) If the collateral is marketable securities, the Federal savings association must be authorized to invest in that security taken as collateral. The Federal savings association must ensure that the value of the security is 110 percent of the obligation at all times during the term of agreement.

(2) The Federal savings association may take and maintain a perfected security interest in collateral which is at all times equal to at least 100 percent of its obligation, if the collateral is:

(i) Cash;

(ii) Obligations of the United States or its agencies;

(iii) Obligations fully guarantied by the United States or its agencies as to principal and interest; or

(iv) Notes, drafts, or bills of exchange or bankers' acceptances that are eligible for rediscount or purchase by a Federal Reserve Bank.

§ 160.93 Lending limitations.

(a) *Scope.* This section applies to all loans and extensions of credit to third parties made by a savings association and its subsidiaries. This section does not apply to loans made by a savings association or a GAAP-consolidated subsidiary to subordinate organizations or affiliates of the savings association. The terms *subsidiary, GAAP-consolidated subsidiary,* and *subordinate organization* have the same meanings as specified in § 159.2 of this chapter. The term *affiliate* has the same meaning as specified in 12 CFR 563.41 until superseded by regulations of the Board of Governors of the Federal Reserve System regarding transactions with affiliates.

(b) *Definitions.* In applying these lending limitations, savings associations shall apply the definitions and interpretations promulgated by the OCC consistent with 12 U.S.C. 84. See 12 CFR part 32. In applying these definitions, pursuant to 12 U.S.C. 1464, savings associations shall use the terms *savings association, savings associations,* and *savings association's* in place of the terms *national bank* and *bank, banks, and bank's,* respectively. For purposes of this section:

(1) The term *one borrower* has the same meaning as the term *person* set forth at 12 CFR part 32. It also includes, in addition to the definition cited therein, a *financial institution* as defined at § 161.19 of this chapter.

(2) The term *company* means a corporation, partnership, business trust, association, or similar organization and, unless specifically excluded, the term *company* includes a *savings association* and a *bank.*

(3) *Contractual commitment to advance funds* has the meaning set forth in 12 CFR part 32.

(4) *Loans and extensions of credit* has the meaning set forth in 12 CFR part 32, and includes investments in commercial paper and corporate debt securities. The appropriate Federal banking agency expressly reserves its authority to deem other arrangements that are, in substance, *loans and extensions of credit* to be encompassed by this term.

(5) The term *loans* as used in the phrase *Loans to one borrower to finance*

the sale of real property acquired in satisfaction of debts previously contracted for in good faith does not include an association's taking of a purchase money mortgage note from the purchaser *provided that:*

(i) No new funds are advanced by the association to the borrower; and

(ii) The association is not placed in a more detrimental position as a result of the sale.

(6) [Reserved]

(7) *Readily marketable collateral* has the meaning set forth in 12 CFR part 32.

(8) *Residential housing units* has the same meaning as the term *residential real estate* set forth in § 141.23 of this chapter. The term *to develop* includes the various phases necessary to produce housing units as an end product, to include: Acquisition, development and construction; development and construction; construction; rehabilitation; or conversion. The term *domestic* includes units within the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Pacific Islands.

(9) *Single family dwelling unit* has the meaning set forth in § 141.25 of this chapter.

(10) A *standby letter of credit* has the meaning set forth in 12 CFR part 32.

(11) *Unimpaired capital and unimpaired surplus* means—

(i) A savings association's core capital and supplementary capital included in its total capital under part 167 of this chapter; plus

(ii) The balance of a savings association's allowance for loan and lease losses not included in supplementary capital under part 167 of this chapter; plus

(iii) The amount of a savings association's loans to, investments in, and advances to subsidiaries not included in calculating core capital under part 167 of this chapter.

(c) *General limitation.* Section 5200 of the Revised Statutes (12 U.S.C. 84) shall apply to savings associations in the same manner and to the same extent as it applies to national banks. This statutory provision and lending limit regulations and interpretations promulgated by the OCC pursuant to a rulemaking conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* (including the regulations appearing at 12 CFR part 32) shall apply to savings associations in the same manner and to the same extent as these provisions apply to national banks:

(1) The total loans and extensions of credit by a savings association to one borrower outstanding at one time and not fully secured, as determined in the same manner as determined under 12 U.S.C. 84(a)(2), by collateral having a market value at least equal to the amount of the loan or the extension of credit shall not exceed 15 percent of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a savings association to one borrower outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (c)(1) of this section.

(d) *Exceptions to the general limitation*—(1) *$500,000 exception.* If a savings association's aggregate lending limitation calculated under paragraphs (c)(1) and (c)(2) of this section is less than $500,000, notwithstanding this aggregate limitation in paragraphs (c)(1) and (c)(2) of this section, such savings association may have total loans and extensions of credit, for any purpose, to one borrower outstanding at one time not to exceed $500,000.

(2) *Statutory exceptions.* The exceptions to the lending limits set forth in 12 U.S.C. 84 and 12 CFR part 32 are applicable to savings associations in the same manner and to the extent as they apply to national banks.

(3) *Loans to develop domestic residential housing units.* Subject to paragraph (d)(4) of this section, a savings association may make loans to one borrower to develop domestic residential housing units, not to exceed the lesser of $30,000,000 or 30 percent of the savings association's unimpaired capital and unimpaired surplus, including all amounts loaned under the authority of the General Limitation set forth under paragraphs (c)(1) and (c)(2) of this section, *provided that:*

(i) The final purchase price of each single family dwelling unit the development of which is financed under this paragraph (d)(3) does not exceed $500,000;

(ii) The savings association is, and continues to be, in compliance with its capital requirements under part 167 of this chapter.

(iii) The appropriate Federal banking agency permits, subject to conditions it may impose, the savings association to use the higher limit set forth under this paragraph (d)(3). A savings association that meets the requirements of paragraphs (d)(3)(i), (ii), (iv) and (v) of this section and that meets the requirements for ''expedited treatment'' under § 116.5 of this chapter may use the higher limit set forth under this paragraph (d)(3) if the savings association has filed a notice with the appropriate Federal banking agency that it intends to use the higher limit at least 30 days prior to the proposed use. A savings association that meets the requirements of paragraphs (d)(3)(i), (ii), (iv), and (v) of this section and that meets the requirements for ''standard treatment'' under § 116.5 of this chapter may use the higher limit set forth under this paragraph (d)(3) if the savings association has filed an application with the appropriate Federal banking agency and the agency has approved the use the higher limit;

(iv) Loans made under this paragraph (d)(3) to all borrowers do not, in aggregate, exceed 150 percent of the savings association's unimpaired capital and unimpaired surplus; and

(v) Such loans comply with the applicable loan-to-value requirements that apply to Federal savings associations.

(4) The authority of a savings association to make a loan or extension of credit under the exception in paragraph (d)(3) of this section ceases immediately upon the association's failure to comply with any one of the requirements set forth in paragraph (d)(3) of this section or any condition(s) set forth in an order issued by the appropriate Federal banking agency under paragraph (d)(3)(iii) of this section.

(5) Notwithstanding the limit set forth in paragraphs (c)(1) and (c)(2) of this section, a savings association may invest up to 10 percent of unimpaired capital and unimpaired surplus in the obligations of one issuer evidenced by:

(i) Commercial paper rated, as of the date of purchase, as shown by the most recently published rating by at least two nationally recognized investment rating services in the highest category; or

(ii) Corporate debt securities that may be sold with reasonable promptness at a price that corresponds reasonably to their fair value, and that are rated in one of the two highest categories by a nationally recognized investment rating service in its most recently published ratings before the date of purchase of the security.

(e) *Loans to finance the sale of REO.* A savings association's loans to one borrower to finance the sale of real property acquired in satisfaction of debts previously contracted for in good faith shall not, when aggregated with all other loans to such borrower, exceed the

General Limitation in paragraph (c)(1) of this section.

(f) *Calculating compliance and recordkeeping.* (1) The amount of an association's unimpaired capital and unimpaired surplus pursuant to paragraph (b)(11) of this section shall be calculated as of the association's most recent periodic report required to be filed with the appropriate Federal banking agency prior to the date of granting or purchasing the loan or otherwise creating the obligation to repay funds, unless the association knows, or has reason to know, based on transactions or events actually completed, that such level has changed significantly, upward or downward, subsequent to filing of such report.

(2) If a savings association or subsidiary thereof makes a loan or extension of credit to any one borrower, as defined in paragraph (b)(1) of this section, in an amount that, when added to the total balances of all outstanding loans owed to such association and its subsidiary by such borrower, exceeds the greater of $500,000 or 5 percent of unimpaired capital and unimpaired surplus, the records of such association or its subsidiary with respect to such loan shall include documentation showing that such loan was made within the limitations of paragraphs (c) and (d) of this section; for the purpose of such documentation such association or subsidiary may require, and may accept in good faith, a certification by the borrower identifying the persons, entities, and interests described in the definition of one borrower in paragraph (b)(1) of this section.

(g) [Reserved]

(h) *More stringent restrictions for Federal savings associations.* The Comptroller may impose more stringent restrictions on a Federal savings association's loans to one borrower if the Comptroller determines that such restrictions are necessary to protect the safety and soundness of the savings association.

Appendix to § 160.93—Interpretations

Section 160.93–100 Interrelation of General Limitation With Exception for Loans To Develop Domestic Residential Housing Units

1. The § 160.93(d)(3) exception for loans to one person to develop domestic residential housing units is characterized in the regulation as an ''alternative'' limit. This exceptional $30,000,000 or 30 percent limitation does not operate *in addition to* the 15 percent General Limitation or the 10 percent additional amount an association may loan to one borrower secured by readily marketable collateral, but serves as the uppermost limitation on a savings association's lending to any one person once an association employs this exception.

Example: Savings Associations A's lending limitation as calculated under the 15 percent General Limitation is $800, 0. If Association A lends Y $800,000 for commercial purposes, Association A cannot lend Y *an additional* $1,600,000, or 30 percent of capital and surplus, to develop residential housing units under the paragraph (d)(3) exception. The (d)(3) exception operates as the uppermost limitation on all lending to one borrower (for associations that may employ this exception) *and includes any amounts loaned to the same borrower under the General Limitation.* Association A, therefore, may lend only an additional $800,000 to Y, provided the paragraph (d)(3) prerequisites have been met. The amount loaned under the authority of the General Limitation ($800,000), when added to the amount loaned under the exception ($800,000), yields a sum that does not exceed the 30 percent uppermost limitation ($1,600,000).

2. This result does not change even if the facts are altered to assume that some or all of the $800,000 amount of lending permissible under the General Limitation's 15 percent basket is not used, or is devoted to the development of domestic residential housing units.

In other words, using the above example, if Association A lends Y $400,000 for commercial purposes and $300,000 for residential purposes—both of which would be permitted under the Association's $800,000 General Limitation—Association A's remaining permissible lending to Y would be: First, an additional $100,000 under the General Limitation, and then another $800,000 to develop domestic residential housing units if the Association meets the paragraph (d)(3) prerequisites. (The latter is $800,000 because in no event may the total lending to Y exceed 30 percent of unimpaired capital and unimpaired surplus). If Association A did not lend Y the remaining $100,000 permissible under the General Limitation, its permissible loans to develop domestic residential housing units under paragraph (d)(3) would be $900,000 instead of $800,000 (the total loans to Y would still equal $1,600,000).

3. In short, under the paragraph (d)(3) exception, the 30 percent or $30,000,000 limit will always operate as the uppermost limitation, unless of course the association does not avail itself of the exception and merely relies upon its General Limitation.

Section 160.93–101 Interrelationship Between the General Limitation and the 150 Percent Aggregate Limit on Loans to all Borrowers To Develop Domestic Residential Housing Units

1. Numerous questions have been received regarding the allocation of loans between the different lending limit ''baskets,'' *i.e.,* the 15 percent General Limitation basket and the 30 percent Residential Development basket. In general, the inquiries concern the manner in which an association may ''move'' a loan from the General Limitation basket to the Residential Development basket. The following example is intended to provide guidance:

Example: Association A's General Limitation under section 5(u)(1) is $15 million. In January, Association A makes a $10 million loan to Borrower to develop domestic residential housing units. At the time the loan was made, Association A had not received approval under an order issued by the appropriate Federal banking agency to avail itself of the residential development exception to lending limits. Therefore, the $10 million loan is made under Association A's General Limitation.

2. In June, Association A receives authorization to lend under the Residential Development exception. In July, Association A lends $3 million to Borrower to develop domestic residential housing units. In August, Borrower seeks an additional $12 million commercial loan from Association A. Association A cannot make the loan to Borrower, however, because it already has an outstanding $10 million loan to Borrower that counts against Association A's General Limitation of $15 million. Thus, Association A may lend only up to an additional $5 million to Borrower under the General Limitation.

3. However, Association A may be able to reallocate the $10 million loan it made to Borrower in January to its Residential Development basket provided that: (1) Association A has obtained authority under an order issued by the appropriate Federal banking agency to avail itself of the additional lending authority for residential development and maintains compliance with all prerequisites to such lending authority; (2) the original $10 million loan made in January constitutes a loan to develop domestic residential housing units as defined; and (3) the housing unit(s) constructed with the funds from the January loan remain in a stage of ''development'' at the time Association A reallocates the loan to the domestic residential housing basket. The project must be in a stage of acquisition, development, construction, rehabilitation, or conversion in order for the loan to be reallocated.

4. If Association A is able to reallocate the $10 million loan made to Borrower in January to its Residential Development basket, it may make the $12 million commercial loan requested by Borrower in August. Once the January loan is reallocated to the Residential Development basket, however, the $10 million loan counts towards Association's 150 percent aggregate limitation on loans to all borrowers under the residential development basket (section 5(u)(2)(A)(ii)(IV)).

5. If Association A reallocates the January loan to its domestic residential housing basket and makes an additional $12 million commercial loan to Borrower, Association A's totals under the respective limitations would be: $12 million under the General Limitation; and $13 million under the Residential Development limitation. The full $13 million residential development loan counts toward Association A's aggregate 150 percent limitation.

§ 160.100 Real estate lending standards; purpose and scope.

This section, and § 160.101 of this subpart, issued pursuant to section 304 of the Federal Deposit Insurance

Corporation Improvement Act of 1991, 12 U.S.C. 1828(o), prescribe standards for real estate lending to be used by Federal savings associations and all their includable subsidiaries, as defined in 12 CFR 167.1, over which the savings associations exercise control, in adopting internal real estate lending policies.

§ 160.101 Real estate lending standards.

(a) Each Federal savings association shall adopt and maintain written policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing permanent improvements to real estate.

(b)(1) Real estate lending policies adopted pursuant to this section must:

(i) Be consistent with safe and sound banking practices;

(ii) Be appropriate to the size of the institution and the nature and scope of its operations; and

(iii) Be reviewed and approved by the savings association's board of directors at least annually.

(2) The lending policies must establish:

(i) Loan portfolio diversification standards;

(ii) Prudent underwriting standards, including loan-to-value limits, that are clear and measurable;

(iii) Loan administration procedures for the savings association's real estate portfolio; and

(iv) Documentation, approval, and reporting requirements to monitor compliance with the savings association's real estate lending policies.

(c) Each Federal savings association must monitor conditions in the real estate market in its lending area to ensure that its real estate lending policies continue to be appropriate for current market conditions.

(d) The real estate lending policies adopted pursuant to this section should reflect consideration of the Interagency Guidelines for Real Estate Lending Policies established by the Federal bank and thrift supervisory agencies.

Appendix to § 160.101—Interagency Guidelines for Real Estate Lending Policies

The agencies' regulations require that each insured depository institution adopt and maintain a written policy that establishes appropriate limits and standards for all extensions of credit that are secured by liens on or interests in real estate or made for the purpose of financing the construction of a building or other improvements.[1] These guidelines are intended to assist institutions in the formulation and maintenance of a real estate lending policy that is appropriate to the size of the institution and the nature and scope of its individual operations, as well as satisfies the requirements of the regulation.

Each institution's policies must be comprehensive, and consistent with safe and sound lending practices, and must ensure that the institution operates within limits and according to standards that are reviewed and approved at least annually by the board of directors. Real estate lending is an integral part of many institutions' business plans and, when undertaken in a prudent manner, will not be subject to examiner criticism.

Loan Portfolio Management Considerations

The lending policy should contain a general outline of the scope and distribution of the institution's credit facilities and the manner in which real estate loans are made, serviced, and collected. In particular, the institution's policies on real estate lending should:

- Identify the geographic areas in which the institution will consider lending.
- Establish a loan portfolio diversification policy and set limits for real estate loans by type and geographic market (*e.g.,* limits on higher risk loans).
- Identify appropriate terms and conditions by type of real estate loan.
- Establish loan origination and approval procedures, both generally and by size and type of loan.
- Establish prudent underwriting standards that are clear and measurable, including loan-to-value limits, that are consistent with these supervisory guidelines.
- Establish review and approval procedures for exception loans, including loans with loan-to-value percentages in excess of supervisory limits.
- Establish loan administration procedures, including documentation, disbursement, collateral inspection, collection, and loan review.
- Establish real estate appraisal and evaluation programs.
- Require that management monitor the loan portfolio and provide timely and adequate reports to the board of directors.

The institution should consider both internal and external factors in the formulation of its loan policies and strategic plan. Factors that should be considered include:

- The size and financial condition of the institution.
- The expertise and size of the lending staff.
- The need to avoid undue concentrations of risk.
- Compliance with all real estate related laws and regulations, including the Community Reinvestment Act, anti-discrimination laws, and for savings associations, the Qualified Thrift Lender test.
- Market conditions.

The institution should monitor conditions in the real estate markets in its lending area so that it can react quickly to changes in market conditions that are relevant to its lending decisions. Market supply and demand factors that should be considered include:

- Demographic indicators, including population and employment trends.
- Zoning requirements.
- Current and projected vacancy, construction, and absorption rates.
- Current and projected lease terms, rental rates, and sales prices, including concessions.
- Current and projected operating expenses for different types of projects.
- Economic indicators, including trends and diversification of the lending area.
- Valuation trends, including discount and direct capitalization rates.

Underwriting Standards

Prudently underwritten real estate loans should reflect all relevant credit factors, including:

- The capacity of the borrower, or income from the underlying property, to adequately service the debt.
- The value of the mortgaged property.
- The overall creditworthiness of the borrower.
- The level of equity invested in the property.
- Any secondary sources of repayment.
- Any additional collateral or credit enhancements (such as guarantees, mortgage insurance or takeout commitments).

The lending policies should reflect the level of risk that is acceptable to the board of directors and provide clear and measurable underwriting standards that enable the institution's lending staff to evaluate these credit factors. The underwriting standards should address:

- The maximum loan amount by type of property.
- Maximum loan maturities by type of property.
- Amortization schedules.
- Pricing structure for different types of real estate loans.
- Loan-to-value limits by type of property.

For development and construction projects, and completed commercial properties, the policy should also establish, commensurate with the size and type of the project or property:

- Requirements for feasibility studies and sensitivity and risk analyses (*e.g.,* sensitivity of income projections to changes in economic variables such as interest rates, vacancy rates, or operating expenses).
- Minimum requirements for initial investment and maintenance of hard equity by the borrower (*e.g.,* cash or unencumbered investment in the underlying property).
- Minimum standards for net worth, cash flow, and debt service coverage of the borrower or underlying property.
- Standards for the acceptability of and limits on non-amortizing loans.
- Standards for the acceptability of and limits on the use of interest reserves.
- Pre-leasing and pre-sale requirements for income-producing property.
- Pre-sale and minimum unit release requirements for non-income-producing property loans.

[1] The agencies have adopted a uniform rule on real estate lending. See 12 CFR part 365 (FDIC); 12 CFR part 208, subpart C (Board); 12 CFR part 34, subpart D and 12 CFR 160.100–160.101 (OCC).

• Limits on partial recourse or nonrecourse loans and requirements for guarantor support.
• Requirements for takeout commitments.
• Minimum covenants for loan agreements.

Loan Administration

The institution should also establish loan administration procedures for its real estate portfolio that address:
• Documentation, including:
Type and frequency of financial statements, including requirements for verification of information provided by the borrower;
Type and frequency of collateral evaluations (appraisals and other estimates of value).
• Loan closing and disbursement.
• Payment processing.
• Escrow administration.
• Collateral administration.
• Loan payoffs.
• Collections and foreclosure, including:
Delinquency follow-up procedures;
Foreclosure timing;
Extensions and other forms of forbearance;
Acceptance of deeds in lieu of foreclosure.
• Claims processing (*e.g.,* seeking recovery on a defaulted loan covered by a government guaranty or insurance program).
• Servicing and participation agreements.

Supervisory Loan-to-Value Limits

Institutions should establish their own internal loan-to-value limits for real estate loans. These internal limits should not exceed the following supervisory limits:

Loan category	Loan-to-value limit (percent)
Raw land	65
Land development	75
Construction:	
Commercial, multifamily,[1] and other nonresidential	80
1- to 4-family residential	85
Improved property	85
Owner-occupied 1- to 4-family and home equity	([2])

[1] Multifamily construction includes condominiums and cooperatives.
[2] A loan-to-value limit has not been established for permanent mortgage or home equity loans on owner-occupied, 1- to 4-family residential property. However, for any such loan with a loan-to-value ratio that equals or exceeds 90 percent at origination, an institution should require appropriate credit enhancement in the form of either mortgage insurance or readily marketable collateral.

The supervisory loan-to-value limits should be applied to the underlying property that collateralizes the loan. For loans that fund multiple phases of the same real estate project (*e.g.,* a loan for both land development and construction of an office building), the appropriate loan-to-value limit is the limit applicable to the final phase of the project funded by the loan; however, loan disbursements should not exceed actual development or construction outlays. In situations where a loan is fully cross-collateralized by two or more properties or is secured by a collateral pool of two or more properties, the appropriate maximum loan amount under supervisory loan-to-value limits is the sum of the value of each property, less senior liens, multiplied by the appropriate loan-to-value limit for each property. To ensure that collateral margins remain within the supervisory limits, lenders should redetermine conformity whenever collateral substitutions are made to the collateral pool.

In establishing internal loan-to-value limits, each lender is expected to carefully consider the institution-specific and market factors listed under ''Loan Portfolio Management Considerations,'' as well as any other relevant factors, such as the particular subcategory or type of loan. For any subcategory of loans that exhibits greater credit risk than the overall category, a lender should consider the establishment of an internal loan-to-value limit for that subcategory that is lower than the limit for the overall category.

The loan-to-value ratio is only one of several pertinent credit factors to be considered when underwriting a real estate loan. Other credit factors to be taken into account are highlighted in the ''Underwriting Standards'' section above. Because of these other factors, the establishment of these supervisory limits should not be interpreted to mean that loans at these levels will automatically be considered sound.

Loans in Excess of the Supervisory Loan-to-Value Limits

The agencies recognize that appropriate loan-to-value limits vary not only among categories of real estate loans but also among individual loans. Therefore, it may be appropriate in individual cases to originate or purchase loans with loan-to-value ratios in excess of the supervisory loan-to-value limits, based on the support provided by other credit factors. Such loans should be identified in the institutions' records, and their aggregate amount reported at least quarterly to the institution's board of directors. (*see* additional reporting requirements described under ''Exceptions to the General Policy.'') The aggregate amount of all loans in excess of the supervisory loan-to-value limits should not exceed 100 percent of total capital.[2] Moreover, within the aggregate limit, total loans for all commercial, agricultural, multifamily or other non-1-to-4 family residential properties should not exceed 30 percent of total capital. An institution will come under increased supervisory scrutiny as the total of such loans approaches these levels.

In determining the aggregate amount of such loans, institutions should: (a) Include all loans secured by the same property if any one of those loans exceeds the supervisory loan-to-value limits; and (b) include the recourse obligation of any such loan sold with recourse. Conversely, a loan should no longer be reported to the directors as part of aggregate totals when reduction in principal or senior liens, or additional contribution of collateral or equity (*e.g.,* improvements to the real property securing the loan), bring the loan-to-value ratio into compliance with supervisory limits.

Excluded Transactions

The agencies also recognize that there are a number of lending situations in which other factors significantly outweigh the need to apply the supervisory loan-to-value limits. These include:
• Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.
• Loans backed by the full faith and credit of a state government, provided that the amount of the assurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit.
• Loans guaranteed or insured by a state, municipal or local government, or an agency thereof, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the supervisory loan-to-value limit, and provided that the lender has determined that the guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.
• Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.
• Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs), or loans that are renewed, refinanced, or restructured in connection with a workout situation, either with or without the advancement of new funds, where consistent with safe and

[2] For the state member banks, the term ''total capital'' means ''total risk-based capital'' as defined in Appendix A to 12 part 208. For insured state non-member banks, ''total capital'' refers to that term described in table I of Appendix A to 12 CFR part 325. For national banks, the term ''total capital'' is defined at 12 CFR 3.2(e). For savings associations, the term ''total capital'' as described in part 167 of this chapter.

sound banking practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.

• Loans that facilitate the sale of real estate acquired by the lender in the ordinary course of collecting a debt previously contracted in good faith.

• Loans for which a lien on or interest in real property is taken as additional collateral through an abundance of caution by the lender *(e.g.,* the institution takes a blanket lien on all or substantially all of the assets of the borrower, and the value of the real property is low relative to the aggregate value of all other collateral).

• Loans, such as working capital loans, where the lender does not rely principally on real estate as security and the extension of credit is not used to acquire, develop, or construct permanent improvements on real property.

• Loans for the purpose of financing permanent improvements to real property, but not secured by the property, if such security interest is not required by prudent underwriting practice.

Exceptions to the General Lending Policy

Some provision should be made for the consideration of loan requests from creditworthy borrowers whose credit needs do not fit within the institution's general lending policy. An institution may provide for prudently underwritten exceptions to its lending policies, including loan-to-value limits, on a loan-by-loan basis. However, any exceptions from the supervisory loan-to-value limits should conform to the aggregate limits on such loans discussed above.

The board of directors is responsible for establishing standards for the review and approval of exception loans. Each institution should establish an appropriate internal process for the review and approval of loans that do not conform to its own internal policy standards. The approval of any such loan should be supported by a written justification that clearly sets forth all of the relevant credit factors that support the underwriting decision. The justification and approval documents for such loans should be maintained as a part of the permanent loan file. Each institution should monitor compliance with its real estate lending policy and individually report exception loans of a significant size to its board of directors.

Supervisory Review of Real Estate Lending Policies and Practices

The real estate lending policies of institutions will be evaluated by examiners during the course of their examinations to determine if the policies are consistent with safe and sound lending practices, these guidelines, and the requirements of the regulation. In evaluating the adequacy of the institution's real estate lending policies and practices, examiners will take into consideration the following factors:

• The nature and scope of the institution's real estate lending activities.

• The size and financial condition of the institution.

• The quality of the institution's management and internal controls.

• The expertise and size of the lending and loan administration staff.

• Market conditions.

Lending policy exception reports will also be reviewed by examiners during the course of their examinations to determine whether the institutions' exceptions are adequately documented and appropriate in light of all of the relevant credit considerations. An excessive volume of exceptions to an institution's real estate lending policy may signal a weakening of its underwriting practices, or may suggest a need to revise the loan policy.

Definitions

For the purposes of these Guidelines:

Construction loan means an extension of credit for the purpose of erecting or rehabilitating buildings or other structures, including any infrastructure necessary for development.

Extension of credit or loan means:

(1) The total amount of any loan, line of credit, or other legally binding lending commitment with respect to real property; and

(2) The total amount, based on the amount of consideration paid, of any loan, line of credit, or other legally binding lending commitment acquired by a lender by purchase, assignment, or otherwise.

Improved property loan means an extension of credit secured by one of the following types of real property:

(1) Farmland, ranchland or timberland committed to ongoing management and agricultural production;

(2) 1- to 4-family residential property that is not owner-occupied;

(3) Residential property containing five or more individual dwelling units;

(4) Completed commercial property; or

(5) Other income-producing property that has been completed and is available for occupancy and use, except income-producing owner-occupied 1- to 4-family residential property.

Land development loan means an extension of credit for the purpose of improving unimproved real property prior to the erection of structures. The improvement of unimproved real property may include the laying or placement of sewers, water pipes, utility cables, streets, and other infrastructure necessary for future development.

Loan origination means the time of inception of the obligation to extend credit (*i.e.,* when the last event or prerequisite, controllable by the lender, occurs causing the lender to become legally bound to fund an extension of credit).

Loan-to-value or *loan-to-value ratio* means the percentage or ratio that is derived at the time of loan origination by dividing an extension of credit by the total value of the property(ies) securing or being improved by the extension of credit plus the amount of any readily marketable collateral and other acceptable collateral that secures the extension of credit. The total amount of all senior liens on or interests in such property(ies) should be included in determining the loan-to-value ratio. When mortgage insurance or collateral is used in the calculation of the loan-to-value ratio, and such credit enhancement is later released or replaced, the loan-to-value ratio should be recalculated.

Other acceptable collateral means any collateral in which the lender has a perfected security interest that has a quantifiable value, and is accepted by the lender in accordance with safe and sound lending practices. Other acceptable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral. Other acceptable collateral includes, among other items, unconditional irrevocable standby letters of credit for the benefit of the lender.

Owner-occupied, when used in conjunction with the term *1- to 4-family residential property* means that the owner of the underlying real property occupies at least one unit of the real property as a principal residence of the owner.

Readily marketable collateral means insured deposits, financial instruments, and bullion in which the lender has a perfected interest. Financial instruments and bullion must be salable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market. Readily marketable collateral should be appropriately discounted by the lender consistent with the lender's usual practices for making loans secured by such collateral.

Value means an opinion or estimate, set forth in an appraisal or evaluation, whichever may be appropriate, of the market value of real property, prepared in accordance with the agency's appraisal regulations and guidance. For loans to purchase an existing property, the term ''value'' means the lesser of the actual acquisition cost or the estimate of value.

1- to 4-family residential property means property containing fewer than five individual dwelling units, including manufactured homes permanently affixed to the underlying property (when deemed to be real property under state law).

§ 160.110 Most favored lender usury preemption for all savings associations.

(a) *Definition.* The term ''interest'' as used in 12 U.S.C. 1463(g) includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) *Authority.* A savings association located in a state may charge interest at

the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. If state law permits different interest charges on specified classes of loans, a Federal savings association making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a Federal savings association may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies. State supervisors determine the degree to which state-chartered savings associations must comply with state laws other than those imposing restrictions on interest, as defined in paragraph (a) of this section.

(c) *Effect on state definitions of interest.* The Federal definition of the term ''interest'' in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not ''interest'' under state law where a savings association is located but state law permits its most favored lender to charge late fees, then a savings association located in that state may charge late fees to its intrastate customers. The savings association may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the savings association is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

§ 160.120 Letters of credit and other independent undertakings to pay against documents.

(a) *General authority.* A Federal savings association may issue and commit to issue letters of credit within the scope of applicable laws or rules of practice recognized by law. It may also issue other independent undertakings within the scope of such laws or rules of practice recognized by law, that have been approved by the OCC (approved undertaking).[1] Under such letters of credit and approved undertakings, the savings association's obligation to honor depends upon the presentation of specified documents and not upon nondocumentary conditions or resolution of questions of fact or law at issue between the account party and the beneficiary. A savings association may also confirm or otherwise undertake to honor or purchase specified documents upon their presentation under another person's independent undertaking within the scope of such laws or rules.

(b) *Safety and soundness considerations*—(1) *Terms.* As a matter of safe and sound banking practice, Federal savings associations that issue letters of credit or approved undertakings should not be exposed to undue risk. At a minimum, savings associations should consider the following:

(i) The independent character of the letter of credit or approved undertaking should be apparent from its terms (such as terms that subject it to laws or rules providing for its independent character);

(ii) The letter of credit or approved undertaking should be limited in amount;

(iii) The letter of credit or approved undertaking should:

(A) Be limited in duration; or

(B) Permit the savings association to terminate the letter of credit or approved undertaking, either on a periodic basis (consistent with the savings association's ability to make any necessary credit assessments) or at will upon either notice or payment to the beneficiary; or

(C) Entitle the savings association to cash collateral from the account party on demand (with a right to accelerate the customer's obligations, as appropriate); and

(iv) The savings association either should be fully collateralized or have a post-honor right of reimbursement from its customer or from another issuer of a letter of credit or an independent undertaking. Alternatively, if the savings association's undertaking is to purchase documents of title, securities, or other valuable documents, it should obtain a first priority right to realize on the documents if the savings association is not otherwise to be reimbursed.

(2) *Additional considerations in special circumstances.* Certain letters of credit and approved undertakings require particular protections against credit, operational, and market risk:

(i) In the event that the undertaking is to honor by delivery of an item of value other than money, the savings association should ensure that market fluctuations that affect the value of the item will not cause the savings association to assume undue market risk;

(ii) In the event that the undertaking provides for automatic renewal, the terms for renewal should allow the savings association to make any necessary credit assessment prior to renewal;

(iii) In the event that a savings association issues an undertaking for its own account, the underlying transaction for which it is issued must be within the savings association's authority and comply with any safety and soundness requirements applicable to that transaction.

(3) *Operational expertise.* The savings association should possess operational expertise that is commensurate with the sophistication of its letter of credit or independent undertaking activities.

(4) *Documentation.* The savings association must accurately reflect its letters of credit or approved undertakings in its records, including any acceptance or deferred payment or other absolute obligation arising out of its contingent undertaking.

§ 160.121 Investment in state housing corporations.

(a) Any Federal savings association to the extent it has legal authority to do so, may make investments in, commitments to invest in, loans to, or commitments to lend to any state housing corporation; provided, that such obligations or loans are secured directly, or indirectly through a fiduciary, by a first lien on improved real estate which is insured under the National Housing Act, as amended, and that in the event of default, the holder of such obligations or loans has the right directly, or indirectly through a fiduciary, to subject to the satisfaction of such obligations or loans the real estate described in the first lien, or the insurance proceeds.

(b) Any Federal savings association that is adequately capitalized may, to the extent it has legal authority to do so, invest in obligations (including loans) of, or issued by, any state housing corporation incorporated in the state in which such savings association has its

[1] Samples of laws or rules of practice applicable to letters of credit and other independent undertakings include, but are not limited to: the applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995) (available from West Publishing Co.); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 500) (available from ICC Publishing, Inc.; the United Nations Convention on Independent Guarantees and Standby Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997) (available from the U.N. Commission on International Trade Law); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 525) (available from ICC Publishing, Inc.).

home or a branch office; provided (except with respect to loans), that:

(1) The obligations are rated in one of the four highest grades as shown by the most recently published rating made of such obligations by a nationally recognized rating service; or

(2) The obligations, if not rated, are approved by the OCC. The aggregate outstanding direct investment in obligations under paragraph (b) of this section shall not exceed the amount of the savings association's total capital.

(c) Each state housing corporation in which a savings association invests under the authority of paragraph (b) of this section shall agree, before accepting any such investment (including any loan or loan commitment), to make available at any time to the OCC such information as the OCC may consider to be necessary to ensure that investments are properly made under this section.

§ 160.130 Prohibition on loan procurement fees.

If you are a director, officer, or other natural person having the power to direct the management or policies of a Federal savings association, you must not receive, directly or indirectly, any commission, fee, or other compensation in connection with the procurement of any loan made by the savings association or a subsidiary of the savings association.

§ 160.160 Asset classification.

(a)(1) Each savings association must evaluate and classify its assets on a regular basis in a manner consistent with, or reconcilable to, the asset classification system used by the OCC.

(2) In connection with the examination of a savings association or its affiliates, OCC examiners may identify problem assets and classify them, if appropriate. The association must recognize such examiner classifications in its subsequent reports to the OCC.

(b) Based on the evaluation and classification of its assets, each savings association shall establish adequate valuation allowances or charge-offs, as appropriate, consistent with generally accepted accounting principles and the practices of the Federal banking agencies.

§ 160.170 Records for lending transactions.

In establishing and maintaining its records pursuant to § 163.170 of this chapter, each Federal savings association and service corporation should establish and maintain loan documentation practices that:

(a) Ensure that the institution can make an informed lending decision and can assess risk on an ongoing basis;

(b) Identify the purpose and all sources of repayment for each loan, and assess the ability of the borrower(s) and any guarantor(s) to repay the indebtedness in a timely manner;

(c) Ensure that any claims against a borrower, guarantor, security holders, and collateral are legally enforceable;

(d) Demonstrate appropriate administration and monitoring of its loans; and

(e) Take into account the size and complexity of its loans.

§ 160.172 Re-evaluation of real estate owned.

A Federal savings association shall appraise each parcel of real estate owned at the earlier of in-substance foreclosure or at the time of the savings association's acquisition of such property, and at such times thereafter as dictated by prudent management policy; such appraisals shall be consistent with the requirements of part 164 of this chapter. The Comptroller or his or her designee may require subsequent appraisals if, in his or her discretion, such subsequent appraisal is necessary under the particular circumstances. The foregoing requirement shall not apply to any parcel of real estate that is sold and reacquired less than 12 months subsequent to the most recent appraisal made pursuant to this part. A dated, signed copy of each report of appraisal made pursuant to any provisions of this part shall be retained in the savings association's records.

Subpart C—[Reserved]

§ 160.210 [Reserved]

§ 160.220 [Reserved]

PART 161—DEFINITIONS FOR REGULATIONS AFFECTING ALL SAVINGS ASSOCIATIONS

Sec.

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Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 5412(b)(2)(B).

§ 161.1 When do the definitions in this part apply?

The definitions in this part and in 12 CFR part 141 apply throughout parts 100–199 of this chapter, unless another definition is specifically provided.

§ 161.2 Account.

The term *account* means any savings account, demand account, certificate account, tax and loan account, note account, United States Treasury general account or United States Treasury time deposit-open account, whether in the form of a deposit or a share, held by an accountholder in a savings association.

§ 161.3 Accountholder.

The term *accountholder* means the holder of an account or accounts in a savings association insured by the Deposit Insurance Fund. The term does not include the holder of any subordinated debt security or any mortgage-backed bond issued by the savings association.

§ 161.4 Affiliate.

The term *affiliate* of a savings association, unless otherwise defined, means any corporation, business trust, association, or other similar organization:

(a) Of which a savings association, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its

directors, trustees, or other persons exercising similar functions; or

(b) Of which control is held, directly or indirectly through stock ownership or in any other manner, by the shareholders of a savings association who own or control either a majority of the shares of such savings association or more than 50 per centum of the number of shares voted for the election of directors of such savings association at the preceding election, or by trustees for the benefit of the shareholders of any such savings association; or

(c) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one savings association.

§ 161.5 Affiliated person.

The term *affiliated person* of a savings association means the following:

(a) A director, officer, or controlling person of such association;

(b) A spouse of a director, officer, or controlling person of such association;

(c) A member of the immediate family of a director, officer, or controlling person of such association, who has the same home as such person or who is a director or officer of any subsidiary of such association or of any holding company affiliate of such association;

(d) Any corporation or organization (other than the savings association or a corporation or organization through which the savings association operates) of which a director, officer or the controlling person of such association:

(1) Is chief executive officer, chief financial officer, or a person performing similar functions;

(2) Is a general partner;

(3) Is a limited partner who, directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns an interest of 10 percent or more in the partnership (based on the value of his or her contribution) or who, directly or indirectly with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, owns an interest of 25 percent or more in the partnership; or

(4) Directly or indirectly either alone or with his or her spouse and the members of his or her immediate family who are also affiliated persons of the association, owns or controls 10 percent or more of any class of equity securities or owns or controls, with other directors, officers, and controlling persons of such association and their spouses and their immediate family members who are also affiliated persons of the association, 25 percent or more of any class of equity securities; and

(5) Any trust or other estate in which a director, officer, or controlling person of such association or the spouse of such person has a substantial beneficial interest or as to which such person or his or her spouse serves as trustee or in a similar fiduciary capacity.

§ 161.6 Audit period.

The *audit period* of a savings association means the twelve month period (or other period in the case of a change in audit period) covered by the annual audit conducted to satisfy § 163.170 of this chapter.

§ 161.7 Appropriate Federal banking agency.

The term *appropriate Federal banking agency* means appropriate Federal banking agency as that term is defined in 12 U.S.C. 1813(q).

§ 161.8 [Reserved]

§ 161.9 Certificate account.

The term *certificate account* means a savings account evidenced by a certificate that must be held for a fixed or minimum term.

§ 161.10 Comptroller.

The term *Comptroller* means the Comptroller of the Currency.

§ 161.12 Consumer credit.

The term *consumer credit* means credit extended to a natural person for personal, family, or household purposes, including loans secured by liens on real estate and chattel liens secured by mobile homes and leases of personal property to consumers that may be considered the functional equivalent of loans on personal security: *Provided,* the savings association relies substantially upon other factors, such as the general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan. Appropriate evidence to demonstrate justification for such reliance should be retained in a savings association's files. Among the types of credit included within this term are consumer loans; educational loans; unsecured loans for real property alteration, repair or improvement, or for the equipping of real property; loans in the nature of overdraft protection; and credit extended in connection with credit cards.

§ 161.14 Controlling person.

The term *controlling person* of a savings association means any person or entity which, either directly or indirectly, or acting in concert with one or more other persons or entities, owns, controls, or holds with power to vote, or holds proxies representing, ten percent or more of the voting shares or rights of such savings association; or controls in any manner the election or appointment of a majority of the directors of such savings association. However, a director of a savings association will not be deemed to be a controlling person of such savings association based upon his or her voting, or acting in concert with other directors in voting, proxies:

(a) Obtained in connection with an annual solicitation of proxies, or

(b) Obtained from savings account holders and borrowers if such proxies are voted as directed by a majority vote of the entire board of directors of such association, or of a committee of such directors if such committee's composition and authority are controlled by a majority vote of the entire board and if its authority is revocable by such a majority.

§ 161.15 Corporation.

The terms *Corporation* and *FDIC* mean the Federal Deposit Insurance Corporation.

§ 161.16 Demand accounts.

The term *demand accounts* means non-interest-bearing demand deposits that are subject to check or to withdrawal or transfer on negotiable or transferable order to the savings association and that are permitted to be issued by statute, regulation, or otherwise and are payable on demand.

§ 161.18 Director.

(a) The term *director* means any director, trustee, or other person performing similar functions with respect to any organization whether incorporated or unincorporated. Such term does not include an advisory director, honorary director, director emeritus, or similar person, unless the person is otherwise performing functions similar to those of a director.

(b) [Reserved]

§ 161.19 Financial institution.

The term *financial institution* has the same meaning as the term *depository institution* set forth in 12 U.S.C. 1813(c)(1).

§ 161.24 Immediate family.

The term *immediate family* of any natural person means the following (whether by the full or half blood or by adoption):

(a) Such person's spouse, father, mother, children, brothers, sisters, and grandchildren;

(b) The father, mother, brothers, and sisters of such person's spouse; and

(c) The spouse of a child, brother, or sister of such person.

§ 161.26 Land loan.

The term *land loan* means a loan:

(a) Secured by real estate upon which all facilities and improvements have been completely installed, as required by local regulations and practices, so that it is entirely prepared for the erection of structures;

(b) To finance the purchase of land and the accomplishment of all improvements required to convert it to developed building lots; or

(c) Secured by land upon which there is no structure.

§ 161.27 Low-rent housing.

The term *low-rent housing* means real estate which is, or which is being constructed, remodeled, rehabilitated, modernized, or renovated to be, the subject of an annual contributions contract for low-rent housing under the provisions of the United States Housing Act of 1937, as amended.

§ 161.28 Money Market Deposit Accounts.

(a) Money Market Deposit Accounts (MMDAs) offered by Federal savings associations in accordance with 12 U.S.C. 1464(b)(1) and by state-chartered savings associations in accordance with applicable state law are savings accounts on which interest may be paid if issued subject to the following limitations:

(1) The savings association shall reserve the right to require at least seven days' notice prior to withdrawal or transfer of any funds in the account; and

(2)(i) The depositor is authorized by the savings association to make no more than six transfers per calendar month or statement cycle (or similar period) of at least four weeks by means of preauthorized, automatic, telephonic, or data transmission agreement, order, or instruction to another account of the depositor at the same savings association to the savings association itself, or to a third party.

(ii) Savings associations may permit holders of MMDAs to make unlimited transfers for the purpose of repaying loans (except overdraft loans on the depositor's demand account) and associated expenses at the same savings association (as originator or servicer), to make unlimited transfers of funds from this account to another account of the same depositor at the same savings association or to make unlimited payments directly to the depositor from the account when such transfers or payments are made by mail, messenger, automated teller machine, or in person, or when such payments are made by telephone (via check mailed to the depositor).

(3) In order to ensure that no more than the number of transfers specified in paragraph (a)(2)(i) of this section are made, a savings association must either:

(i) Prevent transfers of funds in excess of the limitations; or

(ii) Adopt procedures to monitor those transfers on an after-the-fact basis and contact customers who exceed the limits on more than an occasional basis. For customers who continue to violate those limits after being contacted by the depository savings association the depository savings association must either place funds in another account that the depositor is eligible to maintain or take away the account's transfer and draft capacities.

(iii) Insured savings association at their option, may use on a consistent basis either the date on a check or the date it is paid in determining whether the transfer limitations within the specified interval are exceeded.

(b) Federal savings associations may offer MMDAs to any depositor, and state-chartered savings associations may offer MMDAs to any depositor not inconsistent with applicable state law.

§ 161.29 Negotiable Order of Withdrawal Accounts.

(a) Negotiable Order of Withdrawal (NOW) accounts are savings accounts authorized by 12 U.S.C. 1832 on which the savings association reserves the right to require at least seven days' notice prior to withdrawal or transfer of any funds in the account.

(b) For purposes of 12 U.S.C. 1832:

(1) An organization shall be deemed ''operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and * * * not * * * for profit'' if it is described in sections 501(c)(3) through (13), 501(c)(19), or 528 of the Internal Revenue Code; and

(2) The funds of a sole proprietorship or unincorporated business owned by a husband and wife shall be deemed beneficially owned by ''one or more individuals.''

§ 161.30 Nonresidential construction loan.

The term *nonresidential construction loan* means a loan for construction of other than one or more dwelling units.

§ 161.31 Nonwithdrawable account.

The term *nonwithdrawable account* means an account which by the terms of the contract of the accountholder with the savings association or by provisions of state law cannot be paid to the accountholder until all liabilities, including other classes of share liability of the savings association have been fully liquidated and paid upon the winding up of the savings association is referred to as a *nonwithdrawable account.*

§ 161.33 Note account.

The term *note account* means a note, subject to the right of immediate call, evidencing funds held by depositories electing the note option under applicable United States Treasury Department regulations. Note accounts are not savings accounts or savings deposits.

§ 161.34 OCC.

The term *OCC* means Office of the Comptroller of the Currency.

§ 161.35 Officer.

The term *Officer* means the president, any vice-president (but not an assistant vice-president, second vice-president, or other vice president having authority similar to an assistant or second vice-president), the secretary, the treasurer, the comptroller, and any other person performing similar functions with respect to any organization whether incorporated or unincorporated. The term *officer* also includes the chairman of the board of directors if the chairman is authorized by the charter or by-laws of the organization to participate in its operating management or if the chairman in fact participates in such management.

§ 161.37 Parent company; subsidiary.

The term *parent company* means any company which directly or indirectly controls any other company or companies. The term *subsidiary* means any company which is owned or controlled directly or indirectly by a person, and includes any service corporation owned in whole or in part by a savings association, or a subsidiary of such service corporation.

§ 161.38 Political subdivision.

The term *political subdivision* includes any subdivision of a public unit, any principal department of such public unit:

(a) The creation of which subdivision or department has been expressly authorized by state statute,

(b) To which some functions of government have been delegated by state statute, and

(c) To which funds have been allocated by statute or ordinance for its exclusive use and control. It also includes drainage, irrigation, navigation, improvement, levee, sanitary, school or power districts and bridge or port

authorities and other special districts created by state statute or compacts between the states. Excluded from the term are subordinate or nonautonomous divisions, agencies or boards within principal departments.

§ 161.39 Principal office.

The term *principal office* means the home office of a savings association established as such in conformity with the laws under which the savings association is organized.

§ 161.40 Public unit.

The term *public unit* means the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, the Virgin Islands, any county, any municipality or any political subdivision thereof.

§ 161.41 [Reserved]

§ 161.42 Savings account.

The term *savings account* means any withdrawable account, except a demand account as defined in § 161.16 of this chapter, a tax and loan account, a note account, a United States Treasury general account, or a United States Treasury time deposit-open account.

§ 161.43 Savings association.

The term *savings association* means a savings association as defined in section 3 of the Federal Deposit Insurance Act, the deposits of which are insured by the Corporation. It includes a Federal savings association or Federal savings bank, chartered under section 5 of the Act, or a building and loan, savings and loan, or homestead association, or a cooperative bank (other than a cooperative bank which is a state bank as defined in section 3(a)(2) of the Federal Deposit Insurance Act) organized and operating according to the laws of the state in which it is chartered or organized, or a corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act) that the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller jointly determine to be operating substantially in the same manner as a savings association.

§ 161.44 Security.

The term *security* means any non-withdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or, in general, any interest or instrument commonly known as a *security,* or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing, except that a *security* shall not include an account or deposit insured by the Federal Deposit Insurance Corporation.

§ 161.45 Service corporation.

The term *service corporation* means any corporation, the majority of the capital stock of which is owned by one or more savings associations and which engages, directly or indirectly, in any activities similar to activities which may be engaged in by a service corporation in which a Federal savings association may invest under part 159 of this chapter.

§ 161.50 State.

The term *state* means a state, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands of the United States.

§ 161.51 Subordinated debt security.

The term *subordinated debt security* means any unsecured note, debenture, or other debt security issued by a savings association and subordinated on liquidation to all claims having the same priority as account holders or any higher priority.

§ 161.52 Tax and loan account.

The term *tax and loan account* means an account, the balance of which is subject to the right of immediate withdrawal, established for receipt of payments of Federal taxes and certain United States obligations. Such accounts are not savings accounts or savings deposits.

§ 161.53 United States Treasury General Account.

The term *United States Treasury General Account* means an account maintained in the name of the United States Treasury the balance of which is subject to the right of immediate withdrawal, except in the case of the closure of the member, and in which a zero balance may be maintained. Such accounts are not savings accounts or savings deposits.

§ 161.54 United States Treasury Time Deposit Open Account.

The term *United States Treasury Time Deposit Open Account* means a non-interest-bearing account maintained in the name of the United States Treasury which may not be withdrawn prior to the expiration of 30 days' written notice from the United States Treasury, or such other period of notice as the Treasury may require. Such accounts are not savings accounts or savings deposits.

§ 161.55 With recourse.

(a) The term *with recourse* means, in connection with the sale of a loan or a participation interest in a loan, an agreement or arrangement under which the purchaser is to be entitled to receive from the seller a sum of money or thing of value, whether tangible or intangible (including any substitution), upon default in payment of any loan involved or any part thereof or to withhold or to have withheld from the seller a sum of money or anything of value by way of security against default. The recourse liability resulting from a sale with recourse shall be the total book value of any loan sold with recourse less:

(1) The amount of any insurance or guarantee against loss in the event of default provided by a third party,

(2) The amount of any loss to be borne by the purchaser in the event of default, and

(3) The amount of any loss resulting from a recourse obligation entered on the books and records of the savings association.

(b) The term *with recourse* does not include loans or interests therein where the agreement of sale provides for the savings association directly or indirectly:

(1) To hold or retain a subordinate interest in a specified percentage of the loans or interests; or

(2) To guarantee against loss up to a specified percentage of the loans or interests, which specified percentage shall not exceed ten percent of the outstanding balance of the loans or interests at the time of sale: *Provided,* That the savings association designates adequate reserves for the subordinate interest or guarantee.

(c) This definition does not apply for purposes of determining the capital adequacy requirements under part 167 of this chapter.

PART 162—REGULATORY REPORTING STANDARDS

Sec.
162.1 Regulatory reporting requirements.
162.2 Regulatory reports.
162.4 Audit of Federal savings associations.

Authority: 12 U.S.C. 1463, 5412(b)(2)(B).

§ 162.1 Regulatory reporting requirements.

(a) *Authority and scope.* This part is issued by the Office of the Comptroller of the Currency (OCC) pursuant to section 4(b) and 4(c) of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1463(b) and 1463(c)). It applies to all Federal savings associations regulated by the OCC.

(b) *Records and reports—general*—(1) *Records.* Each savings association and its affiliates shall maintain accurate and complete records of all business transactions. Such records shall support and be readily reconcilable to any regulatory reports submitted to the OCC and financial reports prepared in accordance with GAAP. The records shall be maintained in the United States and be readily accessible for examination and other supervisory purposes within 5 business days upon request by the OCC, at a location acceptable to the OCC.

(2) *Reports.* For purposes of examination by and regulatory reports to the OCC and compliance with this chapter, all savings associations shall use such forms and follow such regulatory reporting requirements as the OCC may require by regulation or otherwise.

§ 162.2 Regulatory reports.

(a) *Definition and scope.* This section applies to all regulatory reports, as defined herein. A regulatory report is any report that the OCC prepares, or is submitted to, or is used by the OCC, to determine compliance with its rules and regulations, and to evaluate the safe and sound condition and operation of savings associations. The Report of Examination is an example of a regulatory report. Regulatory reports are regulatory documents, not accounting documents.

(b) *Regulatory reporting requirements*—(1) *General.* The instructions to regulatory reports are referred to as ''regulatory reporting requirements.'' Regulatory reporting requirements include, but are not limited to, guidance contained in OCC regulations, bulletins, and examination handbooks; and safe and sound practices. Regulatory reporting requirements are not limited to the minimum requirements under generally accepted accounting principles (GAAP) because of the special supervisory, regulatory, and economic policy needs served by such reports. Regulatory reporting by savings associations that purports to comply with GAAP shall incorporate the GAAP that best reflects the underlying economic substance of the transaction at issue. Regulatory reporting requirements shall, at a minimum:

(i) Incorporate GAAP whenever GAAP is the referenced accounting instruction for regulatory reports to the Federal banking agencies;

(ii) Incorporate safe and sound practices contained in OCC regulations, bulletins, examination handbooks and instructions to regulatory reports. Such safety and soundness requirements shall be no less stringent than those applied by the Comptroller of the Currency for national banks; and

(iii) Incorporate additional safety and soundness requirements more stringent than GAAP, as the Comptroller may prescribe.

(2) *Exceptions.* Regulatory reporting requirements that are not consistent with GAAP, if any, are not required to be reflected in audited financial statements, including financial statements contained in securities filings submitted to the OCC pursuant to the Securities and Exchange Act of 1934 or parts 192, 194, or 197 of this chapter.

(3) *Compliance.* When the OCC determines that a savings association's regulatory reports did not conform to regulatory reporting requirements in previous reporting periods, the association shall correct its regulatory reports in accordance with the directions of the OCC.

§ 162.4 Audit of savings associations.

(a) *General.* The OCC may require, at any time, an independent audit of the financial statements of, or the application of procedures agreed upon by the OCC to a savings association or affiliate (as defined by 12 CFR 563.41, or upon issuance of superseding regulations by the Board of Governors of the Federal Reserve System, such superseding regulations) by qualified independent public accountants when needed for any safety and soundness reason identified by the OCC.

(b) *Audits required for safety and soundness purposes.* The OCC requires an independent audit for safety and soundness purposes if a savings association has received a composite rating of 3, 4 or 5, as defined at § 116.5(c) of this chapter.

(c) *Procedures.* (1) When the OCC requires an independent audit because such an audit is needed for safety and soundness purposes, the Comptroller shall determine whether the audit was conducted and filed in a manner satisfactory to the OCC.

(2) The Comptroller may waive the independent audit requirement described at paragraph (b)(1) of this section, if the Comptroller determines that an audit would not provide further information on safety and soundness issues relevant to the examination rating.

(3) When the OCC requires the application of procedures agreed upon for safety and soundness purposes, the Comptroller shall identify the procedures to be performed. The Comptroller shall also determine whether the agreed upon procedures were conducted and filed in a manner satisfactory to the OCC.

(d) *Qualifications for independent public accountants.* The audit shall be conducted by an independent public accountant who:

(1) Is registered or licensed to practice as a public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the savings association's or holding company's principal office is located;

(2) Agrees in the engagement letter to provide the OCC with access to and copies of any work papers, policies, and procedures relating to the services performed;

(3)(i) Is in compliance with the American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff; and

(4) Has received, or is enrolled in, a peer review program that meets guidelines acceptable to the OCC.

(e) *Voluntary audits.* When a savings association or affiliate (as defined by 12 CFR 563.41, or upon issuance of superseding regulations by the Board of Governors of the Federal Reserve System, such superseding regulations) obtains an independent audit voluntarily, it must be performed by an independent public accountant who satisfies the requirements of paragraphs (d)(1), (d)(2), and (d)(3)(i) of this section.

PART 163—SAVINGS ASSOCIATIONS—OPERATIONS

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Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1817, 1820, 1828, 1831o, 3806, 5101 *et seq.,* 5412(b)(2)(B)*;* 31 U.S.C. 5318; 42 U.S.C. 4106.

Subpart A—Accounts

§ 163.1 Chartering documents.

(a) *Submission for approval.* Any *de novo* Federal savings association prior to commencing operations shall file its charter and bylaws with the OCC for approval, together with a certification that such charter and bylaws are permissible under all applicable laws, rules and regulations.

(b) *Availability of chartering documents.* Each Federal savings association shall cause a true copy of its charter and bylaws and all amendments thereto to be available to accountholders at all times in each office of the savings association, and shall upon request deliver to any accountholders a copy of such charter and bylaws or amendments thereto.

§ 163.4 [Reserved]

§ 163.5 Securities: Statement of non-insurance.

Every security issued by a Federal savings association must include in its provisions a clear statement that the security is not insured by the Federal Deposit Insurance Corporation.

Subpart B—Operation and Structure

§ 163.22 Merger, consolidation, purchase or sale of assets, or assumption of liabilities.

(a) No Federal savings association may, without application to and approval by the OCC:

(1) Combine with any insured depository institution, if the acquiring or resulting institution is to be a Federal savings association; or

(2) Assume liability to pay any deposit made in, any insured depository institution.

(b)(1) No Federal savings association may, without notifying the OCC, as provided in paragraph (h)(1) of this section:

(i) Combine with another insured depository institution where a Federal savings association is not the resulting institution; or

(ii) In the case of a savings association that meets the conditions for expedited treatment under § 116.5 of this chapter, convert, directly or indirectly, to a national or state bank.

(2) A Federal savings association that does not meet the conditions for expedited treatment under § 116.5 of this chapter may not, directly or indirectly, convert to a national or state bank without prior application to and approval of the OCC, as provided in paragraph (h)(2)(ii) of this section.

(c) No Federal savings association may make any transfer (excluding transfers subject to paragraphs (a) or (b) of this section) without notice or application to the OCC, as provided in paragraph (h)(2) of this section. For purposes of this paragraph, the term ''transfer'' means purchases or sales of assets or liabilities in bulk not made in the ordinary course of business including, but not limited to, transfers of assets or savings account liabilities, purchases of assets, and assumptions of deposit accounts or other liabilities, and combinations with a depository institution other than an insured depository institution.

(d)(1) In determining whether to confer approval for a transaction under paragraphs (a), (b)(2), or (c) of this section, the OCC shall take into account the following:

(i) The capital level of any resulting Federal savings association;

(ii) The financial and managerial resources of the constituent institutions;

(iii) The future prospects of the constituent institutions;

(iv) The convenience and needs of the communities to be served;

(v) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(vi) Factors relating to the fairness of and disclosure concerning the transaction, including, but not limited to:

(A) *Equitable treatment.* The transaction should be equitable to all concerned—savings account holders, borrowers, creditors and stockholders (if any) of each Federal savings association—giving proper recognition of and protection to their respective legal rights and interests. The transaction will be closely reviewed for fairness where the transaction does not appear to be the result of arms' length bargaining or, in the case of a stock savings association, where controlling stockholders are receiving different consideration from other stockholders. No finder's or similar fee should be paid to any officer, director, or controlling person of a Federal savings association which is a party to the transaction.

(B) *Full disclosure.* The filing should make full disclosure of all written or oral agreements or understandings by which any person or company will receive, directly or indirectly, any money, property, service, release of pledges made, or other thing of value, whether tangible or intangible, in connection with the transaction.

(C) *Compensation to officers.* Compensation, including deferred compensation, to officers, directors and controlling persons of the disappearing Federal savings association by the resulting institution or an affiliate thereof should not be in excess of a reasonable amount, and should be commensurate with their duties and responsibilities. The filing should fully justify the compensation to be paid to such persons. The transaction will be particularly scrutinized where any of such persons is to receive a material increase in compensation above that

paid by the disappearing savings association prior to the commencement of negotiations regarding the proposed transaction. An increase in compensation in excess of the greater of 15% or $10,000 gives rise to presumptions of unreasonableness and sale of control. In the case of such an increase, evidence sufficient to rebut such presumptions should be submitted.

(D) *Advisory boards.* Advisory board members should be elected for a term not exceeding one year. No advisory board fees should be paid to salaried officers or employees of the resulting Federal savings association. The filing should describe and justify the duties and responsibilities and any compensation paid to any advisory board of the resulting Federal savings association that consists of officers, directors or controlling persons of the disappearing institution, particularly if the disappearing institution experienced significant supervisory problems prior to the transaction. No advisory board fees should exceed the director fees paid by the resulting savings association. Advisory board fees that are in excess of 115 percent of the director fees paid by the disappearing Federal savings association prior to commencement of negotiations regarding the transaction give rise to presumptions of unreasonableness and sale of control unless sufficient evidence to rebut such presumptions is submitted. Rebuttal evidence is not required if:

(*1*) The advisory board fees do not exceed the fee that advisory board members of the resulting institution receive for each monthly meeting attended or $150, whichever is greater; or

(*2*) The advisory board fees do not exceed $100 per meeting attended for disappearing Federal savings associations with assets greater than $10,000,000 or $50 per meeting attended for disappearing Federal savings associations with assets of $10,000,000 or less, based on a schedule of 12 meetings per year.

(E) The accounting and tax treatment of the transaction; and

(F) Fees paid and professional services rendered in connection with the transaction.

(2) In conferring approval of a transaction under paragraph (a) of this section, the OCC also will consider the competitive impact of the transaction, including whether:

(i) The transaction would result in a monopoly, or would be in furtherance of any monopoly or conspiracy to monopolize or to attempt to monopolize the savings association business in any part of the United States; or

(ii) The effect of the transaction on any section of the country may be substantially to lessen competition, or tend to create a monopoly, or in any other manner would be in restraint of trade, unless the OCC finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the communities to be served.

(3) Applications and notices filed under this section shall be upon forms prescribed by the OCC.

(4) Applications filed under paragraph (a) of this section must be processed in accordance with the time frames set forth in §§ 116.210 through 116.290 of this chapter, provided that the period for review may be extended only if the OCC determines that the applicant has failed to furnish all requested information or that the information submitted is substantially inaccurate, in which case the review period may be extended for up to 30 days.

(e)(1) The following procedures apply to applications described in paragraph (a) of this section, unless the OCC finds that it must act immediately to prevent the probable default of one of the depository institutions involved:

(i) The applicant must publish a public notice of the application in accordance with the procedures in subpart B of part 116 of this chapter. In addition to the initial publication, the applicant must also publish on a weekly basis during the public comment period.

(ii) Commenters may submit comments on an application in accordance with the procedures in subpart C of part 116 of this chapter. The public comment period is 30 calendar days after the date of publication of the initial public notice. However, if the OCC has advised the Attorney General that an emergency exists requiring expeditious action, the public comment period is 10 calendar days after the date of publication of the initial public notice.

(iii) The OCC may arrange a meeting in accordance with the procedures in subpart D of part 116 of this chapter.

(iv) The OCC will request the Attorney General to provide reports on the competitive impacts involved in the transaction.

(v) The OCC will immediately notify the Attorney General of the approval of the transaction. The applicant may not consummate the transaction before the date established under 12 U.S.C. 1828(c)(6).

(2) For applications described in § 163.22, certain savings associations described below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring Federal savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring Federal savings association. The following savings associations must provide the notices:

(i) A Federal savings association transferring account liabilities to an institution the accounts of which are not insured by the Deposit Insurance Fund or the National Credit Union Share Insurance Fund; and

(ii) Any mutual Federal savings association transferring account liabilities to a stock form depository institution.

(f) *Automatic approvals by the OCC.* Applications filed pursuant to paragraph (a) of this section shall be deemed to be approved automatically by the OCC 30 calendar days after the OCC sends written notice to the applicant that the application is complete, unless:

(1) The acquiring Federal savings association does not meet the criteria for expedited treatment under § 116.5 of this chapter;

(2) The OCC recommends the imposition of non-standard conditions prior to approving the application;

(3) The OCC suspends the applicable processing time frames under § 116.190 of this chapter;

(4) The OCC raises objections to the transaction;

(5) The resulting Federal savings association would be one of the 3 largest depository institutions competing in the relevant geographic area where before the transaction there were 5 or fewer depository institutions, the resulting savings association would have 25 percent or more of the total deposits held by depository institutions in the relevant geographic area, and the share of total deposits would have increased by 5 percent or more;

(6) The resulting Federal savings association would be one of the 2 largest depository institutions competing in the relevant geographic area where before the transaction there were 6 to 11 depository institutions, the resulting savings association would have 30 percent or more of the total deposits held by depositing institutions in the relevant geographic area, and the share of total deposits would have increased by 10 percent or more;

(7) The resulting Federal savings association would be one of the 2 largest

depository institutions competing in the relevant geographic area where before the transaction there were 12 or more depository institutions, the resulting savings association would have 35 percent or more of the total deposits held by the depository institutions in the relevant geographic area, and the share of total deposits would have increased by 15 percent or more;

(8) The Herfindahl-Hirschman Index (HHI) in the relevant geographic area was more than 1800 before the transaction, and the increase in the HHI caused by the transaction would be 50 or more;

(9) In a transaction involving potential competition, the OCC determines that the acquiring Federal savings association is one of three or fewer potential entrants into the relevant geographic area;

(10) The acquiring Federal savings association has assets of $1 billion or more and proposes to acquire assets of $1 billion or more;

(11) The Federal savings association that will be the resulting savings association in the transaction has a composite Community Reinvestment Act rating of less than satisfactory and the deficiencies have not been resolved to the satisfaction of the OCC;

(12) The transaction involves any supervisory or assistance agreement with the OCC, Office of Thrift Supervision, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation;

(13) The transaction is part of a conversion under part 192 of this chapter;

(14) The transaction raises a significant issue of law or policy; or

(15) The transaction is opposed by any constituent institution or contested by a competing acquiror.

(g) *Definitions.* (1) The terms used in this section shall have the same meaning as set forth in § 152.13(b) of this chapter.

(2) *Insured depository institution. Insured depository institution* has the same meaning as defined in section 3(c)(2) of the Federal Deposit Insurance Act.

(3) With regard to paragraph (f) of this section, the term *relevant geographic area* is used as a substitute for *relevant geographic market,* which means the area within which the competitive effects of a merger or other combination may be evaluated. The relevant geographic area shall be delineated as a county or similar political subdivision, an area smaller than a county, or an aggregation of counties within which the merging or combining insured depository institutions compete. In addition, the OCC may consider commuting patterns, newspaper and other advertising activities, or other factors as the OCC deems relevant.

(h) *Special requirements and procedures for transactions under paragraphs (b) and (c) of this section*—(1) *Certain transactions with no surviving Federal savings association.* (i) The OCC must be notified of any transaction under paragraph (b)(1) of this section. Such notification must be submitted to the OCC at least 30 days prior to the effective date of the transaction, but not later than the date on which an application relating to the proposed transaction is filed with the primary regulator of the resulting institution; the OCC may, upon request or on its own initiative, shorten the 30-day prior notification requirement. Notifications under this paragraph must demonstrate compliance with applicable stockholder or accountholder approval requirements. Where the Federal savings association submitting the notification maintains a liquidation account established pursuant to part 192 of this chapter, the notification must state that the resulting institution will assume such liquidation account.

(ii) The notification may be in the form of either a letter describing the material features of the transaction or a copy of a filing made with another Federal or state regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute. If the action contemplated by the notification is not completed within one year after the OCC's receipt of the notification, a new notification must be submitted to the OCC.

(2) *Other transfer transactions*—(i) *Expedited treatment.* A notice in conformity with § 116.25(a) of this chapter may be submitted to the OCC under § 116.40 of this chapter for any transaction under paragraph (c) of this section, provided all constituent Federal savings associations meet the conditions for expedited treatment under § 116.5 of this chapter. Notices submitted under this paragraph must be deemed approved automatically by the OCC 30 days after receipt, unless the OCC advises the applicant in writing prior to the expiration of such period that the proposed transaction may not be consummated without the OCC's approval of an application under paragraphs (h)(2)(ii) or (h)(2)(iii) of this section.

(ii) *Standard treatment.* An application in conformity with § 116.25(b) of this chapter and paragraph (d) of this section must be submitted to the OCC under § 116.40 by each Federal savings association participating in a transaction under paragraph (b)(2) or (c) of this section, where any constituent savings association does not meet the conditions for expedited treatment under § 116.5 of this chapter. Applications under this paragraph must be processed in accordance with the procedures in part 116, subparts A and E of this chapter.

§ 163.27 Advertising.

No Federal savings association shall use advertising (which includes print or broadcast media, displays or signs, stationery, and all other promotional materials), or make any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments, or financial condition.

§ 163.33 Directors, officers, and employees.

(a) *Directors*—(1) *Requirements.* The composition of the board of directors of a Federal savings association must be in accordance with the following requirements:

(i) A majority of the directors must not be salaried officers or employees of the savings association or of any subsidiary thereof.

(ii) Not more than two of the directors may be members of the same immediate family.

(iii) Not more than one director may be an attorney with a particular law firm.

(2) *Prospective application.* In the case of an association whose board of directors does not conform with any requirement set forth in paragraph (a)(1) of this section as of October 5, 1983, this paragraph (a) shall not prohibit the uninterrupted service, including re-election and re-appointment, of any person serving on the board of directors at that date.

(b) [Reserved]

§ 163.36 Tying restriction exception.

For applicable rules, see regulations of the Board of Governors of the Federal Reserve System.

§ 163.39 Employment contracts.

(a) *General.* A Federal savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such

an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) *Required provisions.* Each employment contract shall provide that:

(1) The Federal savings association's board of directors may terminate the officer or employee's employment at any time, but any termination by the association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the association's affairs by a notice served under section 8(e)(3) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818(e)(3) and (g)(1)), the association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the association may in its discretion (i) pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and (ii) reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the association's affairs by an order issued under section 8(e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818(e)(4) or (g)(1)), all obligations of the association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: *Provided,* that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the Comptroller or his or her designee.

(5) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary for the continued operation of the association;

(i) By the Comptroller, or his or her designee, at the time the Federal Deposit Insurance Corporation enters into an agreement to provide assistance to or on behalf of the association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(ii)(A) By the Comptroller or his or her designee, at the time the Comptroller, or his or her designee approves a supervisory merger to resolve problems related to operation of the association or when the association is determined by the Comptroller to be in an unsafe or unsound condition.

(B) Any rights of the parties that have already vested, however, shall not be affected by such action.

§ 163.41 Transactions with affiliates.

For applicable rules, see regulations of the Board of Governors of the Federal Reserve System.

§ 163.43 Loans by savings associations to their executive officers, directors and principal shareholders.

For applicable rules, see Regulation O of the Board of Governors of the Federal Reserve System.

§ 163.47 Pension plans.

(a) *General.* No Federal savings association or service corporation thereof shall sponsor an employee pension plan which, because of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor. For purposes of this section, an employee pension plan is defined in section 3(2) of the Employee Retirement Income Security Act of 1974, as amended. The prospective obligation or liability of a plan sponsor to each plan participant shall be stated in or determinable from the plan, and, for a defined benefit plan, shall also be based upon an actuarial estimate of future experience under the plan.

(b) *Funding.* Actuarial cost methods permitted under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, shall be used to determine plan funding.

(c) *Plan amendment.* A plan may be amended to provide reasonable annual cost-of-living increases to retired participants: *Provided,* That

(1) Any such increase shall be for a period and amount determined by the sponsor's board of directors, but in no event shall it exceed the annual increase in the Consumer Price Index published by the Bureau of Labor Statistics; and

(2) No increase shall be granted unless:

(i) Anticipated charges to net income for future periods have first been found by such board of directors to be reasonable and are documented by appropriate resolution and supporting analysis; and

(ii) The increase will not reduce the association's regulatory capital below its regulatory capital requirement.

(d) *Termination.* The plan shall permit the sponsor's board of directors and its successors to terminate such plan. Notice of intent to terminate shall be filed with the OCC at least 60 days prior to the proposed termination date.

(e) *Records.* Each Federal savings association or service corporation maintaining a plan not subject to recordkeeping and reporting requirements of the Employee Retirement Income Security Act of 1974, and the Internal Revenue Code of 1954, as amended, shall establish and maintain records containing the following:

(1) Plan description;

(2) Schedule of participants and beneficiaries;

(3) Schedule of participants and beneficiaries' rights and obligations;

(4) Plan's financial statements; and

(5) Except for defined contribution plans, an opinion signed by an enrolled actuary (as defined by the Employee Retirement Income Security Act of 1974) affirming that actuarial assumptions in the aggregate are reasonable, take into account the plan's experience and expectations, and represent the actuary's best estimate of the plan's projected experiences.

Subpart C—Securities and Borrowings

§ 163.74 Mutual capital certificates.

(a) *General.* No savings association that is in the mutual form shall issue mutual capital certificates pursuant to this section or amend the terms of such certificates unless it has obtained written approval of the appropriate

Federal banking agency. No approval shall be granted unless the proposed issuance of the mutual capital certificates and the form and manner of filing of the application are in accordance with the provisions of this section.

(b) *Eligibility Requirements.* The appropriate Federal banking agency will consider and process an application for approval of the issuance of mutual capital certificates pursuant to this section only if the issuance is authorized by applicable law and regulation and is not inconsistent with any provision of the applicant's charter, constitution or bylaws.

(c) *Application form; supporting information.* An application for approval of the issuance of mutual capital certificates pursuant to this section shall be in the form prescribed by the appropriate Federal banking agency. Such application and instructions may be obtained from the appropriate Federal banking agency. Information and exhibits shall be furnished in support of the application in accordance with such instructions, setting forth all of the terms and provisions relating to the proposed issue and showing that all of the requirements of this section have been or will be met.

(d) *Charter amendment.* No application for approval of the issuance of mutual capital certificates pursuant to this section may be filed unless the amendment to the mutual association's charter, constitution or bylaws or other actions conferring such authority shall have been approved pursuant to the procedures and requirements set forth in the mutual association's charter, constitution or bylaws, or as may otherwise be required by applicable law.

(e) *Filing requirements.* The application for issuance of mutual capital certificates shall be publicly filed with the appropriate Federal banking agency.

(f) *Supervisory objection.* No application or approval of the issuance of mutual capital certificates pursuant to this section shall be approved if, in the opinion of the appropriate Federal banking agency, the policies, condition, or operation of the applicant afford a basis for supervisory objection to the application.

(g) *Limitation on offering period.* Following the date of the approval of the application by the appropriate Federal banking agency, the association shall have an offering period of not more than one year in which to complete the sale of the mutual capital certificates issued pursuant to this section. The appropriate Federal banking agency may in its discretion extend such offering period if a written request showing good cause for such extension is filed with it not later than 30 days before the expiration of such offering period or any extension thereof.

(h) *Reports.* Within 30 days after completion of the sale of mutual capital certificates issued pursuant to this section, the association shall transmit to the appropriate Federal banking agency a written report stating the total dollar amount of securities sold, and the amount of net proceeds received by the association, and within 90 days it shall transmit a written report stating the number of purchasers.

(i) *Requirements as to mutual capital certificates*—(1) *Form of certificate.* Each mutual capital certificate and any governing agreement evidencing a mutual capital certificate issued by an association pursuant to this section:

(i) Shall bear on its face, in bold-face type, the following legend: ''This security is not a savings account or a deposit and it is not insured by the United States or any agency or fund of the United States''; and

(ii) Shall clearly state that the certificate is subject to the requirements of § 163.74(i)(2).

(2) *Legal requirements.* Mutual capital certificates issued pursuant to this section shall:

(i) Be subordinate to all claims against the association having the same priority as savings accounts, savings certificates, debt obligations or any higher priority;

(ii) Not be eligible for use as collateral for any loan made by the issuing association;

(iii) Constitute a claim in liquidation not exceeding the face value plus accrued dividends of the certificates, on the general reserves, surplus and undivided profits of the association remaining after the payment in full of all savings accounts, savings certificates and debt obligations;

(iv) Be entitled to the payment of dividends, which may be fixed, variable, participating, or cumulative, or any combination thereof, only if, when and as declared by the association's board of directors out of funds legally available for that purpose, provided that no dividend may be declared or paid without the approval of the appropriate Federal banking agency if such payment would cause the association to fail to meet its regulatory capital requirements under part 167 of this chapter if a Federal savings association or 12 CFR part 390, subpart Z if a state savings association, and provided further that no dividend may be paid if such payment would constitute a violation of 12 U.S.C. 1828(b);

(v) Not be redeemable, except: where the dollar weighted average term of each issue of mutual capital certificates to be redeemed is seven years or more and redemption is to be made pursuant to a redemption schedule; in the event of a merger, consolidation or reorganization approved by the appropriate Federal banking agency; or where the funds for redemption are raised by the issuance of mutual capital certificates approved pursuant to this section, or in conjunction with the issuance of capital stock pursuant to part 192 of this chapter: *Provided,* that mandatory redemption shall not be required; that mutual capital certificates shall not be redeemable on the demand or at the option of the holder; and that mutual capital certificates shall not receive, benefit from, be credited with or otherwise be entitled to or due payments in or for redemption if such payments would cause the association to fail to meet its regulatory capital requirements under part 167 of this chapter if a Federal savings association or 12 CFR part 390, subpart Z if a state savings association; *And Provided further,* for the purposes of this paragraph (i)(2)(v), the ''dollar weighted average term'' of an issue of mutual capital certificates shall be the sum of the products calculated for each year that the mutual capital certificates in the issue have been redeemed or are scheduled to be redeemed. Each product shall be calculated by multiplying the number of years of each mutual capital certificate of a given term by a fraction, the numerator of which shall be the total dollar amount of each mutual capital certificate in the issue with the same term and the denominator of which shall be the total dollar amount of mutual capital certificates in the entire issue;

(vi) Not have preemptive rights;

(vii) Not have voting rights, except that an association may provide for voting rights if:

(A) The savings association fails to pay dividends for a minimum of three consecutive dividend periods, and then the holders of the class or classes of mutual capital certificates granted such voting rights, and voting as a single class, with one vote for each outstanding certificate, may elect by a majority vote a maximum of one-third of the association's board of directors, the directors so elected to serve until the next annual meeting of the association succeeding the payment of all current and past dividends;

(B) Any merger, consolidation, or reorganization (except in a supervisory case) is sought to be authorized, where the issuing association is not the

survivor, provided that the regulatory capital of the resulting association available for payment of any class of mutual capital certificate on liquidation is less than the regulatory capital available for such class prior to the merger, consolidation, or reorganization;

(C) Action is sought to be authorized which would create any class of mutual capital certificates having a preference or priority over an outstanding class or classes of mutual capital certificates;

(D) Any action is sought to be authorized which would adversely change the specific terms of any class of mutual capital certificates;

(E) Action is sought to be authorized which would increase the number of a class of mutual capital certificates, or the number of a class of mutual capital certificates ranking prior to or on parity with another class of mutual capital certificates; or

(F) Action is sought which would authorize the issuance of an additional class or classes of mutual capital certificates without the association having met specific financial standards;

(viii) Not constitute an obligation of the association and shall confer no rights which would give rise to any claim of or action for default;

(ix) Not be convertible into any account, security, or interest, except that mutual capital certificates may be surrendered in exchange for preferred stock issued in connection with the conversion of the issuing savings association to the stock form pursuant to part 192 of this chapter, provided that the preferred stock shall have substantially the same voting rights, designations, preferences and relative, participating optional, or other special rights, and qualifications, limitations, and restrictions, as the mutual capital certificates exchanged for the preferred stock.

(x) Provide for charging of losses after the exhaustion of all other items in the regulatory capital account.

§ 163.76 Offers and sales of securities at an office of a Federal savings association.

(a) A Federal saving association may not offer or sell debt or equity securities issued by the association or an affiliate of the association at an office of the association; except that equity securities issued by the association or an affiliate in connection with the association's conversion from the mutual to stock form of organization in a conversion approved pursuant to part 192 of this chapter may be offered and sold at the association's offices: *Provided,* That:

(1) The OCC does not object on supervisory grounds to the offer and sale of the securities at the offices of the association;

(2) No commissions, bonuses, or comparable payments are paid to any employee of the savings association or its affiliates or to any other person in connection with the sale of securities at an office of a savings association; except that compensation and commissions consistent with industry norms may be paid to securities personnel of registered broker-dealers;

(3) No offers or sales are made by tellers or at the teller counter, or by comparable persons at comparable locations;

(4) Sales activity is conducted in a segregated or separately identifiable area of the savings association's offices apart from the area accessible to the general public for the purposes of making or withdrawing deposits;

(5) Offers and sales are made only by regular, full-time employees of the savings association or by securities personnel who are subject to supervision by a registered broker-dealer;

(6) An acknowledgment, in the form set forth in paragraph (c) of this section, is signed by any customer to whom the security is sold in the savings association's offices prior to the sale of any such securities;

(7) A legend that the security is not a deposit or account and is not Federally insured or guaranteed appears conspicuously on the security and in all offering documents and advertisements for the securities; the legend must state in bold or other prominent type at least as large as other textual type in the document that ''This security is not a deposit or account and is not Federally insured or guaranteed''; and

(8) The savings association will be in compliance with its current capital requirements upon completion of the conversion stock offering.

(b) Securities sales practices, advertisements, and other sales literature used in connection with offers and sales of securities by Federal savings associations shall be subject to § 197.10 of this chapter.

(c) Offers and sales of securities of a savings association or its affiliates in any office of the savings association must use a one-page, unambiguous, certification in substantially the following form:

FORM OF CERTIFICATION

I ACKNOWLEDGE THAT THIS SECURITY IS NOT A DEPOSIT OR ACCOUNT AND IS NOT FEDERALLY INSURED, AND IS NOT GUARANTEED BY [*insert name of savings association*] OR BY THE FEDERAL GOVERNMENT.

If anyone asserts that this security is Federally insured or guaranteed, or is as safe as an insured deposit, I should call the Office of the Comptroller of the Currency].

I further certify that, before purchasing the [*description of security being offered*] of [*name of issuer, name of savings association and affiliation to issuer (if different)*], I received an offering circular.

The offering circular that I received contains disclosure concerning the nature of the security being offered and describes the risks involved in the investment, including:

[*List briefly the principal risks involved and cross reference certain specified pages of the offering circular where a more complete description of the risks is made.*]

Signature: _____

Date: _____

(d) For purposes of this section, an ''office'' of an association means any premises used by the association that are identified to the public through advertising or signage using the association's name, trade name, or logo.

§ 163.80 Borrowing limitations.

(a) *General.* Except as the appropriate Federal banking agency otherwise may permit by advice in writing, a savings association may borrow only in accordance with the provisions of this section.

(b) *Amount of borrowing.* A savings association may borrow up to the amount authorized by the laws under which the savings association operates.

(c) *Security.* An association may give security for borrowings subject to any requirements imposed by the appropriate Federal banking agency or the FDIC regarding notice of default on borrowings and any FDIC right of first refusal to purchase collateral.

(d) *Required statement for all securities evidencing outside borrowings.* Each security shall bear on its face, in a prominent place, the following legend:

This security is not a savings account or a deposit and it is not insured by the United States or any agency or fund of the United States.

(e) *Filing requirements for outside borrowings with maturities in excess of one year.* (1) Unless the savings association meets its capital requirement under part 167 of this chapter if a Federal savings association or 12 CFR part 390, subpart Z if a state savings association, it shall, at least ten business days prior to issuance, file a notice of intent to issue securities evidencing such borrowings with the

appropriate OCC licensing office if a Federal savings association, or with the appropriate regional director of the FDIC if a state savings association. Such notice shall contain a summary of the items of the security, including:

(i) Principal amount of the securities;

(ii) Anticipated interest rate range and price range at which the securities are to be sold;

(iii) Minimum denomination;

(iv) Stated and average effective maturity;

(v) Mandatory and optional prepayment provisions;

(vi) Description, amount, and maintenance of collateral if any;

(vii) Trustee provisions if any;

(viii) Events of default and remedies of default;

(ix) Any provisions which restrict, conditionally or otherwise, the operations of the association.

(2) The appropriate Federal banking agency shall have 10 business days after receipt of such filing to object to the issuance of such securities. The appropriate Federal banking agency shall object if the terms or covenants of the proposed issue place unreasonable burdens on, or control over, the operations of the association. If no objection is taken, the savings association shall have 120 calendar days within which to issue such securities.

(f) *Note accounts.* For purposes of this section, note accounts are not borrowings.

§ 163.81 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as supplementary capital.

(a) *Scope.* A Federal savings association must comply with this section in order to include subordinated debt securities or mandatorily redeemable preferred stock (''covered securities'') in supplementary capital (tier 2 capital) under part 167 of this chapter. If a savings association does not include covered securities in supplementary capital, it is not required to comply with this section.

(b) *Application and notice procedures.* (1) A Federal savings association must file an application or notice under 12 CFR part 116, subpart A seeking the OCC's approval of, or non-objection to, the inclusion of covered securities in supplementary capital. The savings association may file its application or notice before or after it issues covered securities, but may not include covered securities in supplementary capital until the OCC approves the application or does not object to the notice.

(2) A savings association must also comply with the securities offering rules at 12 CFR part 197 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(c) *Securities requirements.* To be included in supplementary capital, covered securities must meet the following requirements:

(1) *Form.* (i) Each certificate evidencing a covered security must:

(A) Bear the following legend on its face, in bold type: ''This security is *not* a savings account or deposit and it is *not* insured by the United States or any agency or fund of the United States;''

(B) State that the security is subordinated on liquidation, as to principal, interest, and premium, to all claims against the savings association that have the same priority as savings accounts or a higher priority;

(C) State that the security is not secured by the savings association's assets or the assets of any affiliate of the savings association. An affiliate means any person or company which controls, is controlled by, or is under common control with the savings association;

(D) State that the security is not eligible collateral for a loan by the savings association;

(E) State the prohibition on the payment of dividends or interest at 12 U.S.C. 1828(b) and, in the case of subordinated debt securities, state the prohibition on the payment of principal and interest at 12 U.S.C. 1831o(h);

(F) For subordinated debt securities, state or refer to a document stating the terms under which the savings association may prepay the obligation; and

(G) State or refer to a document stating that the savings association must obtain OCC's approval before the voluntary prepayment of principal on subordinated debt securities, the acceleration of payment of principal on subordinated debt securities, or the voluntarily redemption of mandatorily redeemable preferred stock (other than scheduled redemptions), if the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized as described in § 165.4(b) of this chapter, fails to meet the regulatory capital requirements at 12 CFR part 167, or would fail to meet any of these standards following the payment.

(ii) A Federal savings association must include such additional statements as the OCC may prescribe for certificates, purchase agreements, indentures, and other related documents.

(2) *Maturity requirements.* Covered securities must have an original weighted average maturity or original weighted average period to required redemption of at least five years.

(3) *Mandatory prepayment.* Subordinated debt securities and related documents may not provide events of default or contain other provisions that could result in a mandatory prepayment of principal, other than events of default that:

(i) Arise from the Federal savings association's failure to make timely payment of interest or principal;

(ii) Arise from its failure to comply with reasonable financial, operating, and maintenance covenants of a type that are customarily included in indentures for publicly offered debt securities; or

(iii) Relate to bankruptcy, insolvency, receivership, or similar events.

(4) *Indenture.* (i) Except as provided in paragraph (c)(4)(ii) of this section, a Federal savings association must use an indenture for subordinated debt securities. If the aggregate amount of subordinated debt securities publicly offered (excluding sales in a non-public offering as defined in 12 CFR 197.4) and sold in any consecutive 12-month or 36-month period exceeds $5,000,000 or $10,000,000 respectively (or such lesser amount that the Securities and Exchange Commission shall establish by rule or regulation under 15 U.S.C. 77ddd), the indenture must provide for the appointment of a trustee other than the savings association or an affiliate of the savings association (as defined in subsection (c)(1)(i)(C) of this section) and for collective enforcement of the security holders' rights and remedies.

(ii) A Federal savings association is not required to use an indenture if the subordinated debt securities are sold only to accredited investors, as that term is defined in 15 U.S.C. 77d(6). A savings association must have an indenture that meets the requirements of paragraph (c)(4)(i) of this section in place before any debt securities for which an exemption from the indenture requirement is claimed, are transferred to any non-accredited investor. If a savings association relies on this exemption from the indenture requirement, it must place a legend on the debt securities indicating that an indenture must be in place before the debt securities are transferred to any non-accredited investor.

(d) *Review by the OCC.* (1) The OCC will review notices and applications under 12 CFR part 116, subpart E.

(2) In reviewing notices and applications under this section, the OCC will consider whether:

(i) The issuance of the covered securities is authorized under

applicable laws and regulations and is consistent with the savings association's charter and bylaws.

(ii) The savings association is at least adequately capitalized under § 165.4(b) of this chapter and meets the regulatory capital requirements at part 167 of this chapter.

(iii) The savings association is or will be able to service the covered securities.

(iv) The covered securities are consistent with the requirements of this section.

(v) The covered securities and related transactions sufficiently transfer risk from the Deposit Insurance Fund.

(vi) The OCC has no objection to the issuance based on the savings association's overall policies, condition, and operations.

(3) The OCC's approval or non-objection is conditioned upon no material changes to the information disclosed in the application or notice submitted to the OCC. The OCC may impose such additional requirements or conditions as it may deem necessary to protect purchasers, the savings association, the OCC, or the Deposit Insurance Fund.

(e) *Amendments.* If a Federal savings association amends the covered securities or related documents following the completion of the OCC's review, it must obtain the OCC's approval or non-objection under this section before it may include the amended securities in supplementary capital.

(f) *Sale of covered securities.* The Federal savings association must complete the sale of covered securities within one year after the OCC's approval or non-objection under this section. A savings association may request an extension of the offering period by filing a written request with the OCC. The savings association must demonstrate good cause for the extension and file the request at least 30 days before the expiration of the offering period or any extension of the offering period.

(g) *Reports.* A Federal savings association must file the following information with the OCC within 30 days after the savings association completes the sale of covered securities includable as supplementary capital. If the savings association filed its application or notice following the completion of the sale, it must submit this information with its application or notice:

(1) A written report indicating the number of purchasers, the total dollar amount of securities sold, the net proceeds received by the savings association from the issuance, and the amount of covered securities, net of all expenses, to be included as supplementary capital;

(2) Three copies of an executed form of the securities and a copy of any related documents governing the issuance or administration of the securities; and

(3) A certification by the appropriate executive officer indicating that the savings association complied with all applicable laws and regulations in connection with the offering, issuance, and sale of the securities.

Subpart D—[Reserved]

Subpart E—Capital Distributions

§ 163.140 What does this subpart cover?

This subpart applies to all capital distributions by a Federal savings association (''you'').

§ 163.141 What is a capital distribution?

A capital distribution is:

(a) A distribution of cash or other property to your owners made on account of their ownership, but excludes:

(1) Any dividend consisting only of your shares or rights to purchase your shares; or

(2) If you are a Federal mutual savings association, any payment that you are required to make under the terms of a deposit instrument and any other amount paid on deposits that the OCC determines is not a distribution for the purposes of this section;

(b) Your payment to repurchase, redeem, retire or otherwise acquire any of your shares or other ownership interests, any payment to repurchase, redeem, retire, or otherwise acquire debt instruments included in your total capital under part 167 of this chapter, and any extension of credit to finance an affiliate's acquisition of your shares or interests;

(c) Any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring. This includes your payment of cash or property to shareholders of another association or to shareholders of its holding company to acquire ownership in that association, other than by a distribution of shares;

(d) Any other distribution charged against your capital accounts if you would not be well capitalized, as set forth in § 165.4(b)(1) of this chapter, following the distribution; and

(e) Any transaction that the OCC determines, by order or regulation, to be in substance a distribution of capital.

§ 163.142 What other definitions apply to this subpart?

The following definitions apply to this subpart:

Affiliate means an affiliate, as defined under § 563.41(b) until superseded by regulations of the Board of Governors of the Federal Reserve System regarding transactions with affiliates.

Capital means total capital, as computed under part 167 of this chapter.

Net income means your net income computed in accordance with generally accepted accounting principles.

Retained net income means your net income for a specified period less total capital distributions declared in that period.

Shares means common and preferred stock, and any options, warrants, or other rights for the acquisition of such stock. The term ''share'' also includes convertible securities upon their conversion into common or preferred stock. The term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution.

§ 163.143 Must I file with the OCC?

Whether and what you must file with the OCC depends on whether you and your proposed capital distribution fall within certain criteria.

(a) *Application required.*

If:	Then you:
(1) You are not eligible for expedited treatment under § 116.5 of this chapter.	Must file an application with the OCC.
(2) The total amount of all of your capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds your net income for that year to date plus your retained net income for the preceding two years.	Must file an application with the OCC.
(3) You would not be at least adequately capitalized, as set forth in § 165.4(b)(2) of this chapter, following the distribution.	Must file an application with the OCC.

If:	Then you:
(4) Your proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between you and the OCC or the OTS, or violate a condition imposed on you in an application or notice approved by the OCC or the OTS.	Must file an application with the OCC.

(b) *Notice required.*

If you are not required to file an application under paragraph (a) of this section, but:	Then you:
(1) You would not be well capitalized, as set forth under § 165.4(b)(1), following the distribution.	Must file a notice with the OCC.
(2) Your proposed capital distribution would reduce the amount of or retire any part of your common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under part 167 of this chapter (other than regular payments required under a debt instrument approved under § 163.81).	Must file a notice with the OCC.
(3) You are a subsidiary of a savings and loan holding company, ...	Except as provided in (d), you must file a notice with the OCC.

(c) *No prior notice required.*

If neither you nor your proposed capital distribution meet any of the criteria listed in paragraphs (a) and (b) of this section.	Then you do not need to file a notice or an application with the OCC before making a capital distribution.

(d) *Informational copy of notice required.*

If you are a subsidiary of a stock savings and loan holding company that is filing a notice with the Board of Governors of the Federal Reserve System (Board) for a cash divided pursuant to 12 U.S.C. 1467a(f) and neither an application under (a), nor a notice under (b)(1) or (b)(2) is required,	Then you do not file a notice under (b)(3) but you must provide an informational copy to the OCC of the notice filed with the Board, at the same time it is filed with the Board.

§ 163.144 How do I file with the OCC?

(a) *Contents.* Your notice or application must:

(1) Be in narrative form.

(2) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution.

(3) Demonstrate compliance with § 163.146.

(b) *Schedules.* Your notice or application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months.

(c) *Timing.* You must file your notice or application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by your board of directors.

§ 163.145 May I combine my notice or application with other notices or applications?

You may combine the notice or application required under § 163.143 with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If you submit a combined filing, you must:

(a) State that the related notice or application is intended to serve as a notice or application under this subpart; and

(b) Submit the notice or application in a timely manner.

§ 163.146 Will the OCC permit my capital distribution?

The OCC will review your notice or application under the review procedures in 12 CFR part 116, subpart E, except that the OCC will not act on informational copies of the notice submitted to the OCC pursuant to § 163.143(d). The OCC may disapprove your notice or deny your application filed under § 163.143, in whole or in part, if it makes any of the following determinations.

(a) You will be undercapitalized, significantly undercapitalized, or critically undercapitalized as set forth in § 165.4(b) of this chapter, following the capital distribution. If so, the OCC will determine if your capital distribution is permitted under 12 U.S.C. 1831o(d)(1)(B).

(b) Your proposed capital distribution raises safety or soundness concerns.

(c) Your proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between you and the OCC or the OTS, or a condition imposed on you in an application or notice approved by the OCC or the OTS. If so, the OCC will determine whether it may permit your capital distribution notwithstanding the prohibition or condition.

Subpart F—Financial Management Policies

§ 163.161 Management and financial policies.

(a)(1) For the protection of depositors and other savings associations, each Federal savings association and each service corporation must be well managed and operate safely and soundly. Each also must pursue financial policies that are safe and consistent with economical home financing and the purposes of savings associations. In implementing this section, the OCC will consider that service corporations may be authorized to engage in activities that involve a

higher degree of risk than activities permitted to savings associations.

(2) As part of meeting its requirements under paragraph (a)(1) of this section, each Federal savings association and service corporation must maintain sufficient liquidity to ensure its safe and sound operation.

(b) Compensation to officers, directors, and employees of each Federal savings association and its service corporations shall not be in excess of that which is reasonable and commensurate with their duties and responsibilities. Former officers, directors, and employees of savings association or its service corporation who regularly perform services therefore under consulting contracts are employees thereof for purposes of this paragraph (b).

§ 163.170 Examinations and audits; appraisals; establishment and maintenance of records.

(a) *Examinations and audits.* Each Federal savings association and affiliate thereof shall be examined periodically, and may be examined at any time, by the OCC, with appraisals when deemed advisable, in accordance with general policies from time to time established by the OCC. The costs, as computed by the OCC, of any examinations made by it, including office analysis, overhead, per diem, travel expense, other supervision by the OCC, and other indirect costs, shall be paid by the savings associations examined, except that in the case of service corporations of Federal savings associations the cost of examinations, as determined by the OCC, shall be paid by the service corporations. Payments shall be made in accordance with a schedule of annual assessments based upon each savings association's total assets and of rates for examiner time in amounts determined by the OCC.

(b) *Appraisals.* (1) Unless otherwise ordered by the OCC, appraisal of real estate by the OCC in connection with any examination or audit of a savings association, affiliate, or service corporation shall be made by an appraiser, or by appraisers, selected by the OCC. The cost of such appraisal shall promptly be paid by such savings association, affiliate, or service corporation direct to such appraiser or appraisers upon receipt by the savings association, affiliate, or service corporation of a statement of such cost as approved by the OCC. A copy of the report of each appraisal made by the OCC pursuant to any of the foregoing provisions of this section shall be furnished to the savings association, affiliate, or service corporation, as appropriate within a reasonable time, not to exceed 90 days, following the completion of such appraisals and the filing of a report thereof by the appraiser, or appraisers, with the OCC.

(2) The OCC may obtain at any time, at its expense, such appraisals of any of the assets, including the security therefore, of a savings association, affiliate, or service corporation as the OCC deems appropriate.

(c) *Establishment and maintenance of records.* To enable the OCC to examine Federal savings associations and affiliates and audit savings associations, affiliates, and service corporations pursuant to the provisions of paragraph (a) of this section, each savings association, affiliate, and service corporation shall establish and maintain such accounting and other records as will provide an accurate and complete record of all business it transacts. This includes, without limitation, establishing and maintaining such other records as are required by statute or any other regulation to which the savings association, affiliate, or service corporation is subject. The documents, files, and other material or property comprising said records shall at all times be available for such examination and audit wherever any of said records, documents, files, material, or property may be.

(d) *Change in location of records.* A Federal savings association shall not transfer the location of any of its general accounting or control records, or the maintenance thereof, from its home office to a branch or service office, or from a branch or service office to its home office or to another branch or service office unless prior to the date of transfer its board of directors has:

(1) By resolution authorized the transfer or maintenance; and

(2) Sent a certified copy of the resolution to the OCC.

(e) *Use of data processing services for maintenance of records.* A Federal savings association which determines to maintain any of its records by means of data processing services shall so notify the OCC in writing, at least 90 days prior to the date on which such maintenance of records will begin. Such notification shall include identification of the records to be maintained by data processing services and a statement as to the location at which such records will be maintained. Any contract, agreement, or arrangement made by a savings association pursuant to which data processing services are to be performed for such savings association shall be in writing and shall expressly provide that the records to be maintained by such services shall at all times be available for examination and audit.

§ 163.171 [Reserved]

§ 163.172 Financial derivatives.

(a) *What is a financial derivative?* A financial derivative is a financial contract whose value depends on the value of one or more underlying assets, indices, or reference rates. The most common types of financial derivatives are futures, forward commitments, options, and swaps. A mortgage derivative security, such as a collateralized mortgage obligation or a real estate mortgage investment conduit, is not a financial derivative under this section.

(b) *May I engage in transactions involving financial derivatives?* (1) If you are a Federal savings association, you may engage in a transaction involving a financial derivative if you are authorized to invest in the assets underlying the financial derivative, the transaction is safe and sound, and you otherwise meet the requirements in this section.

(2) [Reserved]

(3) In general, if you engage in a transaction involving a financial derivative, you should do so to reduce your risk exposure.

(c) *What are my board of directors' responsibilities with respect to financial derivatives?* (1) Your board of directors is responsible for effective oversight of financial derivatives activities.

(2) Before you may engage in any transaction involving a financial derivative, your board of directors must establish written policies and procedures governing authorized financial derivatives. Your board of directors should review applicable guidance issued by the OCC on establishing a sound risk management program.

(3) Your board of directors must periodically review:

(i) Compliance with the policies and procedures established under paragraph (c)(2) of this section; and

(ii) The adequacy of these policies and procedures to ensure that they continue to be appropriate to the nature and scope of your operations and existing market conditions.

(4) Your board of directors must ensure that management establishes an adequate system of internal controls for transactions involving financial derivatives.

(d) *What are management's responsibilities with respect to financial derivatives?* (1) Management is responsible for daily oversight and management of financial derivatives

activities. Management must implement the policies and procedures established by the board of directors and must establish a system of internal controls. This system of internal controls should, at a minimum, provide for periodic reporting to the board of directors and management, segregation of duties, and internal review procedures.

(2) Management must ensure that financial derivatives activities are conducted in a safe and sound manner and should review applicable guidance issued by the OCC on implementing a sound risk management program.

(e) *What records must I keep on financial derivative transactions?* You must maintain records adequate to demonstrate compliance with this section and with your board of directors' policies and procedures on financial derivatives.

§ 163.176 Interest-rate-risk-management procedures.

Federal savings associations shall take the following actions:

(a) The board of directors or a committee thereof shall review the savings association's interest-rate-risk exposure and devise a policy for the savings association's management of that risk.

(b) The board of directors shall formally adopt a policy for the management of interest-rate risk. The management of the savings association shall establish guidelines and procedures to ensure that the board's policy is successfully implemented.

(c) The management of the savings association shall periodically report to the board of directors regarding implementation of the savings association's policy for interest-rate-risk management and shall make that information available upon request to the OCC.

(d) The savings association's board of directors shall review the results of operations at least quarterly and shall make such adjustments as it considers necessary and appropriate to the policy for interest-rate-risk management, including adjustments to the authorized acceptable level of interest-rate risk.

§ 163.177 Procedures for monitoring Bank Secrecy Act (BSA) compliance.

(a) *Purpose.* The purpose of this regulation is to require savings associations (as defined by § 161.43 of this chapter) to establish and maintain procedures reasonably designed to assure and monitor compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code, and the implementing regulations promulgated thereunder by the U.S. Department of Treasury, 31 CFR Chapter X.

(b) *Establishment of a BSA compliance program*—(1) *Program requirement.* Each savings association shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR Chapter X. The compliance program must be written, approved by the savings association's board of directors, and reflected in the minutes of the savings association.

(2) *Customer identification program.* Each savings association is subject to the requirements of 31 U.S.C. 5318(l) and the implementing regulation jointly promulgated by the OCC and the Department of the Treasury at 31 CFR 1020.220, which require a customer identification program to be implemented as part of the BSA compliance program required under this section.

(c) *Contents of compliance program.* The compliance program shall, at a minimum:

(1) Provide for a system of internal controls to assure ongoing compliance;

(2) Provide for independent testing for compliance to be conducted by a savings association's in-house personnel or by an outside party;

(3) Designate individual(s) responsible for coordinating and monitoring day-to-day compliance; and

(4) Provide training for appropriate personnel.

Subpart G—Reporting and Bonding

§ 163.180 Suspicious Activity Reports and other reports and statements.

(a) *Periodic reports.* Each savings association and service corporation thereof shall make such periodic or other reports of its affairs in such manner and on such forms as the appropriate Federal banking agency may prescribe. The appropriate Federal banking agency may provide that reports filed by savings associations or service corporations to meet the requirements of other regulations also satisfy requirements imposed under this section.

(b) *False or misleading statements or omissions.* No savings association or director, officer, agent, employee, affiliated person, or other person participating in the conduct of the affairs of such association nor any person filing or seeking approval of any application shall knowingly:

(1) Make any written or oral statement to the appropriate Federal banking agency or to an agent, representative or employee of the appropriate Federal banking agency that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the appropriate Federal banking agency or

(2) Make any such statement or omission to a person or organization auditing a savings association or otherwise preparing or reviewing its financial statements concerning the accounts, assets, management condition, ownership, safety, or soundness, or other affairs of the association.

(c) *Notifications of loss and reports of increase in deductible amount of bond.* A savings association maintaining bond coverage as required by § 163.190 of this part shall promptly notify its bond company and file a proof of loss under the procedures provided by its bond, concerning any covered losses greater than twice the deductible amount.

(d) *Suspicious Activity Reports*—(1) *Purpose and scope.* This paragraph (d) ensures that savings associations and service corporations file a Suspicious Activity Report when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act.

(2) *Definitions.* For the purposes of this paragraph (d):

(i) *FinCEN* means the Financial Crimes Enforcement Network of the Department of the Treasury.

(ii) *Institution-affiliated party* means any institution-affiliated party as that term is defined in sections 3(u) and 8(b)(9) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u) and 1818(b)(9)).

(iii) *SAR* means a Suspicious Activity Report.

(3) *SARs required.* A savings association or service corporation shall file a SAR with the appropriate Federal law enforcement agencies and the Department of the Treasury on the form prescribed by the appropriate Federal banking agency and in accordance with the form's instructions, by sending a completed SAR to FinCEN in the following circumstances:

(i) *Insider abuse involving any amount.* Whenever the savings association or service corporation detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the savings association or service corporation or involving a transaction or transactions conducted through the savings association or service corporation, where the savings

association or service corporation believes that it was either an actual or potential victim of a criminal violation, or series of criminal violations, or that it was used to facilitate a criminal transaction, and it has a substantial basis for identifying one of its directors, officers, employees, agents or other institution-affiliated parties as having committed or aided in the commission of a criminal act, regardless of the amount involved in the violation.

(ii) *Violations aggregating $5,000 or more where a suspect can be identified.* Whenever the savings association or service corporation detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the savings association or service corporation or involving a transaction or transactions conducted through the savings association or service corporation and involving or aggregating $5,000 or more in funds or other assets, where the savings association or service corporation believes that it was either an actual or potential victim of a criminal violation or series of criminal violations, or that it was used to facilitate a criminal transaction, and it has a substantial basis for identifying a possible suspect or group of suspects. If it is determined prior to filing this report that the identified suspect or group of suspects has used an alias, then information regarding the true identity of the suspect or group of suspects, as well as alias identifiers, such as drivers' license or social security numbers, addresses and telephone numbers, must be reported.

(iii) *Violations aggregating $25,000 or more regardless of potential suspects.* Whenever the savings association or service corporation detects any known or suspected Federal criminal violation, or pattern of criminal violations, committed or attempted against the savings association or service corporation or involving a transaction or transactions conducted through the savings association or service corporation and involving or aggregating $25,000 or more in funds or other assets, where the savings association or service corporation believes that it was either an actual or potential victim of a criminal violation or series of criminal violations, or that it was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects.

(iv) *Transactions aggregating $5,000 or more that involve potential money laundering or violations of the Bank Secrecy Act.* Any transaction (which for purposes of this paragraph (d)(3)(iv) means a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected) conducted or attempted by, at or through the savings association or service corporation and involving or aggregating $5,000 or more in funds or other assets, if the savings association or service corporation knows, suspects, or has reason to suspect that:

(A) The transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law;

(B) The transaction is designed to evade any regulations promulgated under the Bank Secrecy Act; or

(C) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

(4) *Service corporations.* When a service corporation is required to file a SAR under paragraph (d)(3) of this section, either the service corporation or a savings association that wholly or partially owns the service corporation may file the SAR.

(5) *Time for reporting.* A savings association or service corporation is required to file a SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR. If no suspect was identified on the date of detection of the incident requiring the filing, a savings association or service corporation may delay filing a SAR for an additional 30 calendar days to identify a suspect. In no case shall reporting be delayed more than 60 calendar days after the date of initial detection of a reportable transaction. In situations involving violations requiring immediate attention, such as when a reportable violation is ongoing, the savings association or service corporation shall immediately notify, by telephone, an appropriate law enforcement authority and the appropriate Federal banking agency in addition to filing a timely SAR.

(6) *Reports to state and local authorities.* A savings association or service corporation is encouraged to file a copy of the SAR with state and local law enforcement agencies where appropriate.

(7) *Exception.* A savings association or service corporation need not file a SAR for a robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities.

(8) *Retention of records.* A savings association or service corporation shall maintain a copy of any SAR filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of the filing of the SAR. Supporting documentation shall be identified and maintained by the savings association or service corporation as such, and shall be deemed to have been filed with the SAR. A savings association or service corporation shall make all supporting documentation available to appropriate law enforcement agencies upon request. A savings association or service corporation shall make all supporting documentation available to the appropriate Federal banking agency, FinCEN, or any Federal, state, or local law enforcement agency, or any Federal regulatory authority that examines the savings association or service corporation for compliance with the Bank Secrecy Act, or any state regulatory authority administering a state law that requires the savings association or service corporation to comply with the Bank Secrecy Act or otherwise authorizes the state authority to ensure that the institution complies with the Bank Secrecy Act, upon request.

(9) *Notification to board of directors*—(i) *Generally.* Whenever a savings association (or a service corporation in which the savings association has an ownership interest) files a SAR pursuant to this paragraph (d), the management of the savings association or service corporation shall promptly notify its board of directors, or a committee of directors or executive officers designated by the board of directors to receive notice.

(ii) *Suspect is a director or executive officer.* If the savings association or service corporation files a SAR pursuant to this paragraph (d) and the suspect is a director or executive officer, the savings association or service corporation may not notify the suspect, pursuant to 31 U.S.C. 5318(g)(2), but

shall notify all directors who are not suspects.

(10) *Compliance.* Failure to file a SAR in accordance with this section and the instructions may subject the savings association or service corporation, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action.

(11) *Obtaining SARs.* A savings association or service corporation may obtain SARs and the instructions from the appropriate Federal banking agency.

(12) *Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (d)(12).

(i) *Prohibition on disclosure by savings associations or service corporations. (A) General rule.* No savings association or service corporation, and no director, officer, employee, or agent of a savings association or service corporation, shall disclose a SAR or any information that would reveal the existence of a SAR. Any savings association or service corporation, and any director, officer, employee, or agent of any savings association or service corporation that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:

(A) Director, Litigation Division, Office of the Comptroller of the Currency or the appropriate FDIC region, as appropriate and

(B) The Financial Crimes Enforcement Network (FinCEN).

(ii) *Rules of construction.* Provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, paragraph (d)(1) of this section shall not be construed as prohibiting:

(A) The disclosure by a savings association or service corporation, or any director, officer, employee or agent of a savings association or service corporation of:

(*1*) A SAR, or any information that would reveal the existence of a SAR, to FinCEN or the appropriate Federal banking agency or any Federal, state, or local law enforcement agency; or any Federal regulatory authority that examines the savings association or service corporation for compliance with the Bank Secrecy Act, or any state regulatory authority administering a state law that requires compliance with the Bank Secrecy Act or otherwise authorizes the state authority to ensure that the institution complies with the Bank Secrecy Act; or

(*2*) The underlying facts, transactions, and documents upon which a SAR is based, including, but not limited to, disclosures:

(*i*) To another financial institution, or any director, officer, employee or agent of a financial institution, for the preparation of a joint SAR; or

(*ii*) In connection with certain employment references or termination notices, to the full extent authorized in 31 U.S.C. 5318(g)(2)(B); or

(B) The sharing by a savings association or service corporation, or any director, officer, employee, or agent of a savings association or service corporation, of a SAR, or any information that would reveal the existence of a SAR, within the corporate organizational structure of the savings association or service corporation, for purposes consistent with Title II of the Bank Secrecy Act as determined by regulation or in guidance.

(iii) *Prohibition on disclosure by the appropriate Federal banking agency.* The appropriate Federal banking agency will not, and no officer, employee or agent of appropriate Federal banking agency shall disclose a SAR, or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act. For purposes of this section, ''official duties'' shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public information under 12 CFR 4.33 or 12 CFR part 309, as appropriate.

(iv) *Limitation on liability.* A savings association or service corporation and any director, officer, employee or agent of a savings association or service corporation that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another institution, shall be protected from liability for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

(13) *Safe harbor.* The safe harbor provision of 31 U.S.C. 5318(g), which exempts any financial institution that makes a disclosure of any possible violation of law or regulation from liability under any law or regulation of the United States, or any constitution, law or regulation of any state or political subdivision, covers all reports of suspected or known criminal violations and suspicious activities to law enforcement and financial institution supervisory authorities, including supporting documentation, regardless of whether such reports are filed pursuant to this paragraph (d), or are filed on a voluntary basis.

(e) *Adjustable-rate mortgage indices*—(1) *Reporting obligation.* Upon the request of a Federal Home Loan Bank, all savings associations within the jurisdiction of that Federal Home Loan Bank shall report the data items set forth in paragraph (e)(2) of this section for the Federal Home Loan Bank to use in calculating and publishing an adjustable-rate mortgage index.

(2) *Data to be reported.* For purposes of paragraph (e)(1) of this section, the term ''data items'' means the data items previously collected from the monthly Thrift Financial Report or Consolidated Reports of Condition and Income, as appropriate, and such data items as may be altered, amended, or substituted by the requesting Federal Home Loan Bank.

(3) *Applicable indices.* For the purpose of this reporting requirement, the term ''adjustable-rate mortgage index'' means any of the adjustable-rate mortgage indices calculated and published by a Federal Home Loan Bank or the Federal Home Loan Bank Board on or before August 9, 1989.

§ 163.190 Bonds for directors, officers, employees, and agents; form of and amount of bonds.

(a) Each Federal savings association shall maintain fidelity bond coverage. The bond shall cover each director, officer, employee, and agent who has control over or access to cash, securities, or other property of the savings association.

(b) The amount of coverage to be required for each Federal savings association shall be determined by the association's management, based on its assessment of the level that would be safe and sound in view of the association's potential exposure to risk; provided, such determination shall be subject to approval by the association's board of directors.

(c) Each Federal savings association may maintain bond coverage in addition to that provided by the insurance underwriter industry's standard forms, through the use of endorsements, riders, or other forms of supplemental coverage, if, in the judgment of the association's board of directors, additional coverage is warranted.

(d) The board of directors of each Federal savings association shall formally approve the association's bond

coverage. In deciding whether to approve the bond coverage, the board shall review the adequacy of the standard coverage and the need for supplemental coverage. Documentation of the board's approval shall be included as a part of the minutes of the meeting at which the board approves coverage. Additionally, the board of directors shall review the association's bond coverage at least annually to assess the continuing adequacy of coverage.

§ 163.191 Bonds for agents.

In lieu of the bond provided in § 163.190 of this part in the case of agents appointed by a Federal savings association, a fidelity bond may be provided in an amount at least twice the average monthly collections of such agents, provided such agents shall be required to make settlement with the savings association at least monthly, and provided such bond is approved by the board of directors of the savings association. No bond need be obtained for any agent that is a financial institution insured by the Federal Deposit Insurance Corporation.

§ 163.200 Conflicts of interest.

If you are a director, officer, or employee of a Federal savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a Federal savings association:

(a) You must not advance your own personal or business interests, or those of others with whom you have a personal or business relationship, at the expense of the savings association; and

(b) You must, if you have an interest in a matter or transaction before the board of directors:

(1) Disclose to the board all material nonprivileged information relevant to the board's decision on the matter or transaction, including:

(i) The existence, nature and extent of your interests; and

(ii) The facts known to you as to the matter or transaction under consideration;

(2) Refrain from participating in the board's discussion of the matter or transaction; and

(3) Recuse yourself from voting on the matter or transaction (if you are a director).

§ 163.201 Corporate opportunity.

(a) If you are a director or officer of a Federal savings association, or have the power to direct its management or policies, or otherwise owe a fiduciary duty to a Federal savings association, you must not take advantage of corporate opportunities belonging to the savings association.

(b) A corporate opportunity belongs to a Federal savings association if:

(1) The opportunity is within the corporate powers of the savings association or a subsidiary of the savings association; and

(2) The opportunity is of present or potential practical advantage to the savings association, either directly or through its subsidiary.

(c) The OCC will not deem you to have taken advantage of a corporate opportunity belonging to the Federal savings association if a disinterested and independent majority of the savings association's board of directors, after receiving a full and fair presentation of the matter, rejected the opportunity as a matter of sound business judgment.

Subpart H—Notice of Change of Director or Senior Executive Officer

§ 163.550 What does this subpart do?

This subpart implements 12 U.S.C. 1831i, which requires certain Federal savings associations to notify the OCC before appointing or employing directors and senior executive officers.

§ 163.555 What definitions apply to this subpart?

The following definitions apply to this subpart:

Director means an individual who serves on the board of directors of a Federal savings association. This term does not include an advisory director who:

(1) Is not elected by the shareholders;

(2) Is not authorized to vote on any matters before the board of directors or any committee of the board of directors;

(3) Provides only general policy advice to the board of directors or any committee of the board of directors; and

(4) Has not been identified by the OCC or the OTS in writing as an individual who performs the functions of a director, or who exercises significant influence over, or participates in, major policymaking decisions of the board of directors.

Senior executive officer means an individual who holds the title or performs the function of one or more of the following positions (without regard to title, salary, or compensation): President, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the OCC or the OTS in writing as an individual who exercises significant influence over, or participates in, major policymaking decisions, whether or not hired as an employee.

Troubled condition means:

(1) A Federal savings association that has a composite rating of 4 or 5, as composite rating is defined in § 116.5(c) of this chapter;

(2) A Federal savings association that is subject to a capital directive, a cease-and-desist order, a consent order, a formal written agreement, or a prompt corrective action directive relating to the safety and soundness or financial viability of the savings association, unless otherwise informed in writing by the OCC; or

(3) A Federal savings association that is informed in writing by the OCC that it is in troubled condition based on information available to the OCC.

§ 163.560 Who must give prior notice?

(a) *Federal savings association.* Except as provided under § 163.590, you must notify your OCC supervisory office at least 30 days before adding or replacing any member of your board of directors, employing any person as a senior executive officer, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive position if you are a Federal savings association and at least one of the following circumstances apply:

(1) You do not comply with all minimum capital requirements under part 167 of this chapter;

(2) Are in troubled condition; or

(3) The OCC has notified you, in connection with its review of a capital restoration plan required under section 38 of the Federal Deposit Insurance Act or part 165 of this chapter or otherwise, that a notice is required under this subpart.

(b) *Notice by individual.* If you are an individual seeking election to the board of directors of a Federal savings association described in paragraph (a) of this section, and have not been nominated by management, you must either provide the prior notice required under paragraph (a) of this section or follow the process under § 163.590(b).

§ 163.565 What procedures govern the filing of my notice?

The procedures found in part 116, subpart A of this chapter govern the filing of your notice under § 163.560.

§ 163.570 What information must I include in my notice?

(a) *Content requirements.* Your notice must include:

(1) The information required under 12 U.S.C. 1817(j)(6)(A), and the information prescribed in the Interagency Notice of Change in Director or Senior Executive Officer and the

Interagency Biographical and Financial Report which are available from the OCC;

(2) Legible fingerprints of the proposed director or senior executive officer. You are not required to file fingerprints if, within three years prior to the date of submission of the notice, the proposed director or senior executive officer provided legible fingerprints as part of a notice filed with the OCC or the Office of Thrift Supervision under 12 U.S.C. 1831i; and

(3) Such other information required by the OCC.

(b) *Modification of content requirements.* The OCC may require or accept other information in place of the content requirements in paragraph (a) of this section.

§ 163.575 What procedures govern OCC review of my notice for completeness?

The OCC will first review your notice to determine whether it is complete.

(a) If your notice is complete, the OCC will notify you in writing of the date that the OCC received the complete notice.

(b) If your notice is not complete, the OCC will notify you in writing what additional information you need to submit, why we need the information, and when you must submit it. You must, within the specified time period, provide additional information or request that the OCC suspend processing of the notice. If you fail to act within the specified time period, the OCC may treat the notice as abandoned or may review the application based on the information provided.

§ 163.580 What standards and procedures will govern OCC review of the substance of my notice?

The OCC will disapprove a notice if, pursuant to the standard set forth in 12 U.S.C. 1831i(e), the OCC finds that the competence, experience, character, or integrity of the proposed director or senior executive officer indicates that it would not be in the best interests of the depositors of the Federal savings association or of the public to permit the individual to be employed by, or associated with, the savings association. If the OCC disapproves a notice, it will issue a written notice that explains why the OCC disapproved the notice. The OCC will send the notice to the savings association and the individual.

§ 163.585 When may a proposed director or senior executive officer begin service?

(a) A proposed director or senior executive officer may begin service 30 days after the date the OCC receives all required information, unless:

(1) The OCC notifies you that it has disapproved the notice; or

(2) The OCC extends the 30-day period for an additional period not to exceed 60 days. If the OCC extends the 30-day period, it will notify you in writing that the period has been extended, and will state the reason for the extension. The proposed director or senior executive officer may begin service upon expiration of the extended period, unless the OCC notifies you that it has disapproved the notice during the extended period.

(b) Notwithstanding paragraph (a) of this section, a proposed director or senior executive officer may begin service after the OCC notifies you, in writing, of its intention not to disapprove the notice.

§ 163.590 When will the OCC waive the prior notice requirement?

(a) *Waiver request.* (1) An individual may serve as a director or senior executive officer before filing a notice under this subpart if the OCC issues a written finding that:

(i) Delay would threaten the safety or soundness of the savings association;

(ii) Delay would not be in the public interest; or

(iii) Other extraordinary circumstances exist that justify waiver of prior notice.

(2) If the OCC grants a waiver, you must file a notice under this subpart within the time period specified by the OCC.

(b) *Automatic waiver.* An individual may serve as a director before filing a notice under this subpart, if the individual was not nominated by management and the individual submits a notice under this subpart within seven days after election as a director.

(c) *Subsequent OCC action.* The OCC may disapprove a notice within 30 days after the OCC issues a waiver under paragraph (a) of this section or within 30 days after the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (b) of this section.

PART 164—APPRAISALS

Sec.
164.1 Purpose, and scope.
164.2 Definitions.
164.3 Appraisals required; transactions requiring a state certified or licensed appraiser.
164.4 Minimum appraisal standards.
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164.6 Professional association membership; competency.
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Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1828(m), 3331 *et seq,* 5412(b)(2)(B).

§ 164.1 Purpose and scope.

(a) [Reserved]

(b) *Purpose and scope.* (1) Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (Pub. L. 101–73, 103 Stat. 183, 511 (1989)), 12 U.S.C. 3331 *et seq.* provides protection for Federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with Federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This part implements the requirements of title XI and applies to all Federally related transactions entered into by institutions regulated by the OCC (''regulated institutions'').

(2) This part: (i) Identifies which real estate-related financial transactions require the services of an appraiser;

(ii) Prescribes which categories of Federally related transactions shall be appraised by a state certified appraiser and which by a state licensed appraiser; and

(iii) Prescribes minimum standards for the performance of real estate appraisals in connection with Federally related transactions under the jurisdiction of the OCC.

§ 164.2 Definitions.

(a) *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

(b) *Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

(c) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institution Examination Council.

(d) *Business loan* means a loan or extension of credit to any corporation, general or limited partnership, business trust, joint venture, pool, syndicate, sole proprietorship, or other business entity.

(e) *Complex 1-to-4 family residential property appraisal* means one in which the property to be appraised, the form of ownership, or market conditions are atypical.

(f) *Federally related transaction* means any real estate-related financial

transaction entered into on or after August 9, 1990, that:

(1) Any regulated institution engages in or contracts for; and

(2) Requires the services of an appraiser.

(g) *Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(1) Buyer and seller are typically motivated;

(2) Both parties are well informed or well advised, and acting in what they consider their own best interests;

(3) A reasonable time is allowed for exposure in the open market;

(4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(h) *Real estate* or *real property* means an identified parcel or tract of land, with improvements, and includes easements, rights of way, undivided or future interests, or similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights, or similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

(i) *Real estate-related financial transaction* means any transaction involving:

(1) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; or

(2) The refinancing of real property or interests in real property; or

(3) The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

(j) *State certified appraiser* means any individual who has satisfied the requirements for certification in a state or territory whose criteria for certification as a real estate appraiser currently meet the minimum criteria for certification issued by the Appraiser Qualifications Board of the Appraisal Foundation. No individual shall be a state certified appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a state or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualifications Board of the National Foundation. In addition, the Appraisal Subcommittee must not have issued a finding that the policies, practices, or procedures of the state or territory are inconsistent with title XI of FIRREA. The OCC may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with Federally related transactions within its jurisdiction.

(k) *State licensed appraiser* means any individual who has satisfied the requirements for licensing in a state or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the policies, practices, or procedures of the state or territory are inconsistent with title XI. The OCC may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with Federally related transactions within its jurisdiction.

(l) *Tract development* means a project of five units or more that is constructed or is to be constructed as a single development.

(m) *Transaction value* means:

(1) For loans or other extensions of credit, the amount of the loan or extension of credit;

(2) For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property interest involved; and

(3) For the pooling of loans or interests in real property for resale or purchase, the amount of the loan or market value of the real property calculated with respect to each such loan or interest in real property.

§ 164.3 Appraisals required; transactions requiring a state certified or licensed appraiser.

(a) *Appraisals required.* An appraisal performed by a state certified or licensed appraiser is required for all real estate-related financial transactions except those in which:

(1) The transaction value is $250,000 or less;

(2) A lien on real estate has been taken as collateral in an abundance of caution;

(3) The transaction is not secured by real estate;

(4) A lien on real estate has been taken for purposes other than the real estate's value;

(5) The transaction is a business loan that:

(i) Has a transaction value of $1 million or less; and

(ii) Is not dependent on the sale of, or rental income derived from, real estate as the primary source of repayment;

(6) A lease of real estate is entered into, unless the lease is the economic equivalent of a purchase or sale of the leased real estate;

(7) The transaction involves an existing extension of credit at the lending institution, provided that:

(i) There has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the institution's real estate collateral protection after the transaction, even with the advancement of new monies; or

(ii) There is no advancement of new monies, other than funds necessary to cover reasonable closing costs;

(8) The transaction involves the purchase, sale, investment in, exchange of, or extension of credit secured by, a loan or interest in a loan, pooled loans, or interests in real property, including mortgaged-backed securities, and each loan or interest in a loan, pooled loan, or real property interest met OCC regulatory requirements for appraisals at the time of origination;

(9) The transaction is wholly or partially insured or guaranteed by a United States government agency or United States government sponsored agency;

(10) The transaction either:

(i) Qualifies for sale to a United States government agency or United States government sponsored agency; or

(ii) Involves a residential real estate transaction in which the appraisal conforms to the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation appraisal standards applicable to that category of real estate;

(11) The regulated institution is acting in a fiduciary capacity and is not required to obtain an appraisal under other law; or

(12) The OCC determines that the services of an appraiser are not necessary in order to protect Federal financial and public policy interests in real estate-related financial transactions or to protect the safety and soundness of the institution.

(b) *Evaluations required.* For a transaction that does not require the services of a state certified or licensed appraiser under paragraph (a)(1), (a)(5) or (a)(7) of this section, the institution shall obtain an appropriate evaluation of real property collateral that is consistent with safe and sound banking practices.

(c) *Appraisals to address safety and soundness concerns.* The OCC reserves the right to require an appraisal under this part whenever the agency believes it is necessary to address safety and soundness concerns.

(d) *Transactions requiring a state certified appraiser*— (1) *All transactions of $1,000,000 or more.* All Federally related transactions having a transaction value of $1,000,000 or more shall require an appraisal prepared by a state certified appraiser.

(2) *Nonresidential and residential (other than 1-to-4 family) transactions of $250,000 or more.* All Federally related transactions having a transaction value of $250,000 or more, other than those involving appraisals of 1-to-4 family residential properties, shall require an appraisal prepared by a state certified appraiser.

(3) *Complex residential transactions of $250,000 or more.* All complex 1-to-4 family residential property appraisals rendered in connection with Federally related transactions shall require a state certified appraiser if the transaction value is $250,000 or more. A regulated institution may presume that appraisals of 1-to-4 family residential properties are not complex, unless the institution has readily available information that a given appraisal will be complex. The regulated institution shall be responsible for making the final determination of whether the appraisal is complex. If during the course of the appraisal a licensed appraiser identifies factors that would result in the property, form of ownership, or market conditions being considered atypical, then either:

(i) The regulated institution may ask the licensed appraiser to complete the appraisal and have a certified appraiser approve and co-sign the appraisal; or

(ii) The institution may engage a certified appraiser to complete the appraisal.

(e) *Transactions requiring either a state certified or licensed appraiser.* All appraisals for Federally related transactions not requiring the services of a state certified appraiser shall be prepared by either a state certified appraiser or a state licensed appraiser.

§ 164.4 Minimum appraisal standards.

For Federally related transactions, all appraisals shall, at a minimum:

(a) Conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation unless principles of safe and sound banking require compliance with stricter standards;

(b) Be written and contain sufficient information and analysis to support the institution's decision to engage in the transaction;

(c) Analyze and report appropriate deductions and discounts for proposed construction or renovation, partially leased buildings, non-market lease terms, and tract developments with unsold units;

(d) Be based upon the definition of market value as set forth in this part; and

(e) Be performed by state licensed or certified appraisers in accordance with requirements set forth in this part.

§ 164.5 Appraiser independence.

(a) *Staff appraisers.* If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the Federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an appraisal are involved in the lending, investment, or collection functions of the regulated institution, the regulated institution shall take appropriate steps to ensure that the appraisers exercise independent judgment and that the appraisal is adequate. Such steps include, but are not limited to, prohibiting an individual from performing an appraisal in connection with Federally related transactions in which the appraiser is otherwise involved and prohibiting directors and officers from participating in any vote or approval involving assets on which they performed an appraisal.

(b) *Fee appraisers.* (1) If an appraisal is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or the transaction.

(2) A regulated institution also may accept an appraisal that was prepared by an appraiser engaged directly by another financial services institution, if:

(i) The appraiser has no direct or indirect interest, financial or otherwise, in the property or the transaction; and

(ii) The regulated institution determines that the appraisal conforms to the requirements of this part and is otherwise acceptable.

§ 164.6 Professional association membership; competency.

(a) *Membership in appraisal organizations.* A state certified appraiser or a state licensed appraiser may not be excluded from consideration for an assignment for a Federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* All staff and fee appraisers performing appraisals in connection with Federally related transactions must be state certified or licensed, as appropriate. However, a state certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as they relate to the particular appraisal assignment for which he or she is being considered.

§ 164.7 Enforcement.

Institutions and institution-affiliated parties, including staff appraisers and fee appraisers, who violate this part may be subject to removal and/or prohibition orders, cease and desist orders, and the imposition of civil money penalties pursuant to the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, as amended, or other applicable law.

§ 164.8 Appraisal policies and practices of Federal savings associations and subsidiaries.

(a) *Introduction.* The soundness of a Federal savings association's mortgage loans and real estate investments, and those of its service corporation(s), depends to a great extent upon the adequacy of the loan underwriting used to support these transactions. An appraisal standard is one of several critical components of a sound underwriting policy because appraisal reports contain estimates of the value of collateral held or assets owned. This section sets forth the responsibilities of management to develop, implement, and maintain appraisal standards in determining compliance with the appraisal requirements of § 163.170 of this chapter.

(b) *Definition.* For purposes of this section, management means: the directors and officers of a Federal savings association, or service corporation of such savings association, as those terms are defined in §§ 161.18 and 161.35 of this chapter respectively.

(c) *Responsibilities of management.* An appraisal is a critical component of the loan underwriting or real estate investment decision. Therefore, management shall develop, implement, and maintain appraisal policies to ensure that appraisals reflect professional competence and to facilitate the reporting of estimates of market value upon which Federal savings associations may rely to make

lending decisions. To achieve these results:

(1) Management shall develop written appraisal policies, subject to formal adoption by the savings association's board of directors, that it shall implement in consultation with other appropriate personnel. These policies shall ensure that adequate appraisals are obtained and proper appraisal procedures are followed consistent with the requirements of this part 164.

(2) Management shall develop and adopt guidelines and institute procedures pertaining to the hiring of appraisers to perform appraisal services for the savings association consistent with the requirements of this part 164. These guidelines shall set forth specific factors to be considered by management including, but not limited to, an appraiser's state certification or licensing, professional education, and type of experience. An appraiser's membership in professional appraisal organizations may be considered consistent with the requirements of § 164.6

(3) Management shall review on an annual basis the performance of all approved appraisers used within the preceding 12-month period for compliance with (i) the savings association's appraisal policies and procedures; and (ii) the reasonableness of the value estimates reported.

(d) *Exemptions.* The requirements of § 164.4(b) through (d) shall not apply with respect to appraisals on nonresidential properties prepared on form reports approved by the OCC and completed in accordance with the applicable instructional booklet.

PART 165—PROMPT CORRECTIVE ACTION

Sec.

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Authority: 12 U.S.C. 1831o, 5412(b)(2)(B).

§ 165.1 Authority, purpose, scope, other supervisory authority, and disclosure of capital categories.

(a) *Authority.* This part is issued by the OCC pursuant to section 38 (section 38) of the Federal Deposit Insurance Act (FDI Act) as added by section 131 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102–242, 105 Stat. 2236 (1991)) (12 U.S.C. 1831o).

(b) *Purpose.* Section 38 of the FDI Act establishes a framework of supervisory actions for insured depository institutions that are not adequately capitalized. The principal purpose of this part is to define, for Federal savings associations, the capital measures and capital levels that are used for determining the supervisory actions authorized under section 38 of the FDI Act. This part also establishes procedures for submission and review of capital restoration plans and for issuance and review of directives and orders pursuant to section 38.

(c) *Scope.* This part implements the provisions of section 38 of the FDI Act as they apply to Federal savings associations. Certain of these provisions also apply to officers, directors and employees of Federal savings associations. Other provisions apply to any company that controls a Federal savings association and to the affiliates of a Federal savings association.

(d) *Other supervisory authority.* Neither section 38 nor this part in any way limits the authority of the OCC under any other provision of law to take supervisory actions to address unsafe or unsound practices, deficient capital levels, violations of law, unsafe or unsound conditions, or other practices. Action under section 38 of the FDI Act and this part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the OCC, including issuance of cease and desist orders, capital directives, approval or denial of applications or notices, assessment of civil money penalties, or any other actions authorized by law.

(e) *Disclosure of capital categories.* The assignment of a Federal savings association under this part within a particular capital category is for purposes of implementing and applying the provisions of section 38. Unless permitted by the OCC or otherwise required by law, no Federal savings association may state in any advertisement or promotional material its capital category under this subpart or that the OCC or any other Federal banking agency has assigned the Federal savings association to a particular category.

§ 165.2 Definitions.

For purposes of this part, except as modified in this section or unless the context otherwise requires, the terms used in this part have the same meanings as set forth in sections 38 and 3 of the FDI Act.

(a)(1) *Control* has the same meaning assigned to it in section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the term ''controlled'' shall be construed consistently with the term ''control.''

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate Federal banking agency for up to three one-year periods.

(b) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(c) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with part 167 of this chapter.

(d) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the Federal savings association or related overhead expenses, including payments related to supervisory, executive, managerial or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the Federal savings association.

(e) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with part 167 of this chapter.

(f) *Tangible equity* means the amount of a Federal savings association's core capital as computed in part 167 of this chapter plus the amount of its outstanding cumulative perpetual preferred stock (including related surplus), minus intangible assets as

defined in § 167.1 of this chapter, except mortgage servicing assets to the extent they are includable under § 167.12. Non-mortgage servicing assets that have not been previously deducted in calculating core capital are deducted.

(g) *Tier 1 capital* means the amount of core capital as defined in part 167 of this chapter.

(h) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with part 167 of this chapter.

(i) *Total assets,* for purposes of § 165.4(b)(5), means adjusted total assets as calculated in accordance with part 167 of this chapter, minus intangible assets as provided in the definition of tangible equity.

(j) *Total risk-based capital ratio* means the ratio of total capital to risk-weighted assets, as calculated in accordance with part 167 of this chapter.

§ 165.3 Notice of capital category.

(a) *Effective date of determination of capital category.* A Federal savings association shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this part as of the date the savings association is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A Federal savings association shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition (Call Report) or Thrift Financial Report (TFR), as appropriate, is required to be filed with the OCC;

(2) A final report of examination is delivered to the savings association; or

(3) Written notice is provided by the OCC to the savings association of its capital category for purposes of section 38 of the FDI Act and this part or that the savings association's capital category has changed as provided in paragraph (c) of this section or § 165.4(c).

(c) *Adjustments to reported capital levels and category*—(1) *Notice of adjustment by Federal savings association.* A Federal savings association shall provide the OCC with written notice that an adjustment to the savings association's capital category may have occurred no later than 15 calendar days following the date that any material event has occurred that would cause the savings association to be placed in a lower capital category from the category assigned to the savings association for purposes of section 38 and this part on the basis of the savings association's most recent Call Report or TFR, as appropriate, or report of examination.

(2) *Determination by the OCC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the OCC shall determine whether to change the capital category of the Federal savings association and shall notify the savings association of the OCC determination.

§ 165.4 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this part, the relevant capital measures shall be:

(1) The total risk-based capital ratio;

(2) The Tier 1 risk-based capital ratio; and

(3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this part, a Federal savings association shall be deemed to be:

(1) *Well capitalized* if the savings association:

(i) Has a total risk-based capital ratio of 10.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and

(iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the OCC or OTS under section 8 of the FDI Act, the International Lending Supervision Act of 1983 (12 U.S.C. 3907), the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act, or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the savings association:

(i) Has a total risk-based capital ratio of 8.0 percent or greater; and

(ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and

(iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the savings association is assigned a composite rating of 1, as composite rating is defined in § 116.5(c) of this chapter; and

(iv) Does not meet the definition of a *well capitalized* savings association.

(3) *Undercapitalized* if the savings association:

(i) Has a total risk-based capital ratio that is less than 8.0 percent; or

(ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or

(iii)(A) Except as provided in paragraph (b)(3)(iii)(B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent if the savings association is assigned a composite rating of 1, as composite rating is defined in § 116.5(c) of this chapter.

(4) *Significantly undercapitalized* if the savings association has:

(i) A total risk-based capital ratio that is less than 6.0 percent; or

(ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or

(iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the savings association has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Reclassification based on supervisory criteria other than capital.* The OCC may reclassify a well capitalized Federal savings association as adequately capitalized and may require an adequately capitalized or undercapitalized Federal savings association to comply with certain mandatory or discretionary supervisory actions as if the savings association were in the next lower capital category (except that the OCC may not reclassify a significantly undercapitalized savings association as critically undercapitalized) (each of these actions are hereinafter referred to generally as ''reclassifications'') in the following circumstances:

(1) *Unsafe or unsound condition.* The OCC has determined, after notice and opportunity for hearing pursuant to § 165.8(a) of this part, that the savings association is in an unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The OCC has determined, after notice and an opportunity for hearing pursuant to § 165.8(a) of this part, that the savings association received a less-than-satisfactory rating for any rating category (other than in a rating category specifically addressing capital adequacy) under the Uniform Financial Institutions Rating System, or an equivalent rating under a comparable rating system adopted by the OCC; and has not corrected the conditions that served as the basis for the less than satisfactory rating. Ratings under this paragraph (c)(2) refer to the most recent ratings (as determined either on-site or off-site by the most recent examination) of which the savings association has been notified in writing.

§ 165.5 Capital restoration plans.

(a) *Schedule for filing plan*—(1) *In general.* A Federal savings association shall file a written capital restoration plan with the OCC within 45 days of the

date that the savings association receives notice or is deemed to have notice that the savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized, unless the OCC notifies the savings association in writing that the plan is to be filed within a different period. An adequately capitalized savings association that has been required pursuant to § 165.4(c) to comply with supervisory actions as if the savings association were undercapitalized is not required to submit a capital restoration plan solely by virtue of the reclassification.

(2) *Additional capital restoration plans.* Notwithstanding paragraph (a)(1) of this section, a Federal savings association that has already submitted and is operating under a capital restoration plan approved under section 38 and this part is not required to submit an additional capital restoration plan based on a revised calculation of its capital measures or a reclassification of the institution under § 165.4(c) unless the OCC notifies the savings association that it must submit a new or revised capital plan. A savings association that is notified that it must submit a new or revised capital restoration plan shall file the plan in writing with the OCC within 45 days of receiving such notice, unless the OCC notifies the savings association in writing that the plan is to be filed within a different period.

(b) *Contents of plan.* All financial data submitted in connection with a capital restoration plan shall be prepared in accordance with the instructions provided on the Call Report or TFR, as appropriate, unless the OCC instructs otherwise. The capital restoration plan shall include all of the information required to be filed under section 38(e)(2) of the FDI Act. A Federal savings association that is required to submit a capital restoration plan as the result of a reclassification of the savings association pursuant to § 165.4(c) of this part shall include a description of the steps the savings association will take to correct the unsafe or unsound condition or practice. No plan shall be accepted unless it includes any performance guarantee described in section 38(e)(2)(C) of the FDI Act by each company that controls the savings association.

(c) *Review of capital restoration plans.* Within 60 days after receiving a capital restoration plan under this part, the OCC shall provide written notice to the Federal savings association of whether the plan has been approved. The OCC may extend the time within which notice regarding approval of a plan shall be provided.

(d) *Disapproval of capital plan.* If a capital restoration plan is not approved by the OCC, the Federal savings association shall submit a revised capital restoration plan, when directed to do so, within the time specified by the OCC. Upon receiving notice that its capital restoration plan has not been approved, any undercapitalized savings association (as defined in § 165.4(b)(3) of this part) shall be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions. These provisions shall be applicable until such time as a new or revised capital restoration plan submitted by the savings association has been approved by the OCC.

(e) *Failure to submit a capital restoration plan.* A Federal savings association that is undercapitalized (as defined in § 165.4(b)(3) of this part) and that fails to submit a written capital restoration plan within the period provided in this section shall, upon the expiration of that period, be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions.

(f) *Failure to implement a capital restoration plan.* Any undercapitalized Federal savings association that fails in any material respect to implement a capital restoration plan shall be subject to all of the provisions of section 38 and this part applicable to significantly undercapitalized institutions.

(g) *Amendment of capital plan.* A Federal savings association that has filed an approved capital restoration plan may, after prior written notice to and approval by the OCC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the savings association shall implement the capital restoration plan as approved prior to the proposed amendment.

(h) *Notice to FDIC.* Within 45 days of the effective date of OCC approval of a capital restoration plan, or any amendment to a capital restoration plan, the OCC shall provide a copy of the plan or amendment to the FDIC.

(i) *Performance guarantee by companies that control a savings association*—(1) *Limitation on liability*—(i) *Amount limitation.* The aggregate liability under the guarantee provided under section 38 and this part for all companies that control a specific Federal savings association that is required to submit a capital restoration plan under this part shall be limited to the lesser of:

(A) An amount equal to 5.0 percent of the savings association's total assets at the time the savings association was notified or deemed to have notice that the savings association was undercapitalized; or

(B) The amount necessary to restore the relevant capital measures of the savings association to the levels required for the savings association to be classified as adequately capitalized, as those capital measures and levels are defined at the time that the savings association initially fails to comply with a capital restoration plan under this part.

(ii) *Limit on duration.* The guarantee and limit of liability under section 38 and this part shall expire after the OCC notifies the Federal savings association that it has remained adequately capitalized for each of four consecutive calendar quarters. The expiration or fulfillment by a company of a guarantee of a capital restoration plan shall not limit the liability of the company under any guarantee required or provided in connection with any capital restoration plan filed by the same savings association after expiration of the first guarantee.

(iii) *Collection on guarantee.* Each company that controls a given Federal savings association shall be jointly and severally liable for the guarantee for such savings association as required under section 38 and this part, and the OCC may require and collect payment of the full amount of that guarantee from any or all of the companies issuing the guarantee.

(2) *Failure to provide guarantee.* In the event that a Federal savings association that is controlled by any company submits a capital restoration plan that does not contain the guarantee required under section 38(e)(2) of the FDI Act, the savings association shall, upon submission of the plan, be subject to the provisions of section 38 and this part that are applicable to savings associations that have not submitted an acceptable capital restoration plan.

(3) *Failure to perform guarantee.* Failure by any company that controls a Federal savings association to perform fully its guarantee of any capital plan shall constitute a material failure to implement the plan for purposes of section 38(f) of the FDI Act. Upon such failure, the savings association shall be subject to the provisions of section 38 and this part that are applicable to savings associations that have failed in a material respect to implement a capital restoration plan.

§ 165.6 Mandatory and discretionary supervisory actions under section 38.

(a) *Mandatory supervisory actions*—(1) *Provisions applicable to all Federal savings associations.* All Federal savings

associations are subject to the restrictions contained in section 38(d) of the FDI Act on payment of capital distributions and management fees.

(2) *Provisions applicable to undercapitalized, significantly undercapitalized, and critically undercapitalized Federal savings associations.* Immediately upon receiving notice or being deemed to have notice, as provided in § 165.3 or § 165.5 of this part, that the Federal savings association is undercapitalized, significantly undercapitalized, or critically undercapitalized, the savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting payment of capital distributions and management fees (section 38(d));

(ii) Requiring that the OCC monitor the condition of the savings association (section 38(e)(1));

(iii) Requiring submission of a capital restoration plan within the schedule established in this part (section 38(e)(2));

(iv) Restricting the growth of the savings association's assets (section 38(e)(3)); and

(v) Requiring prior approval of certain expansion proposals (section 38(e)(4)).

(3) *Additional provisions applicable to significantly undercapitalized, and critically undercapitalized Federal savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraph (a)(2) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 165.3 or § 165.5 of this part, that the Federal savings association is significantly undercapitalized, or critically undercapitalized, or that the savings association is subject to the provisions applicable to institutions that are significantly undercapitalized because the savings association failed to submit or implement in any material respect an acceptable capital restoration plan, the savings association shall become subject to the provisions of section 38 of the FDI Act that restrict compensation paid to senior executive officers of the institution (section 38(f)(4)).

(4) *Additional provisions applicable to critically undercapitalized Federal savings associations.* In addition to the provisions of section 38 of the FDI Act described in paragraphs (a)(2) and (a)(3) of this section, immediately upon receiving notice or being deemed to have notice, as provided in § 165.3 of this part, that the Federal savings association is critically undercapitalized, the savings association shall become subject to the provisions of section 38 of the FDI Act:

(i) Restricting the activities of the savings association (section 38(h)(1)); and

(ii) Restricting payments on subordinated debt of the savings association (section 38(h)(2)).

(b) *Discretionary supervisory actions.* In taking any action under section 38 that is within the OCC discretion to take in connection with: A Federal savings association that is deemed to be undercapitalized, significantly undercapitalized or critically undercapitalized, or has been reclassified as undercapitalized, or significantly undercapitalized; an officer or director of such savings association; or a company that controls such savings association, the OCC shall follow the procedures for issuing directives under §§ 165.7 and 165.9 of this part unless otherwise provided in section 38 or this part.

§ 165.7 Directives to take prompt corrective action.

(a) *Notice of intent to issue a directive*—(1) *In general.* The OCC shall provide an undercapitalized, significantly undercapitalized, or critically undercapitalized Federal savings association or, where appropriate, any company that controls the savings association, prior written notice of the OCC's intention to issue a directive requiring such savings association or company to take actions or to follow proscriptions described in section 38 that are within the OCC's discretion to require or impose under section 38 of the FDI Act, including sections 38(e)(5), (f)(2), (f)(3), or (f)(5). The savings association shall have such time to respond to a proposed directive as provided by the OCC under paragraph (c) of this section.

(2) *Immediate issuance of final directive.* If the OCC finds it necessary in order to carry out the purposes of section 38 of the FDI Act, the OCC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue a directive requiring a Federal savings association or any company that controls a Federal savings association immediately to take actions or to follow proscriptions described in section 38 that are within the OCC's discretion to require or impose under section 38 of the FDI Act, including section 38(e)(5), (f)(2), (f)(3), or (f)(5). A savings association or company that is subject to such an immediately effective directive may submit a written appeal of the directive to the OCC. Such an appeal must be received by the OCC within 14 calendar days of the issuance of the directive, unless the OCC permits a longer period. The OCC shall consider any such appeal, if filed in a timely matter, within 60 days of receiving the appeal. During such period of review, the directive shall remain in effect unless the OCC, in its sole discretion, stays the effectiveness of the directive.

(b) *Contents of notice.* A notice of intention to issue a directive shall include:

(1) A statement of the Federal savings association's capital measures and capital levels;

(2) A description of the restrictions, prohibitions or affirmative actions that the OCC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of such affirmative actions; and

(4) The date by which the Federal savings association or company subject to the directive may file with the OCC a written response to the notice.

(c) *Response to notice*—(1) *Time for response.* A Federal savings association or company may file a written response to a notice of intent to issue a directive within the time period set by the OCC. The date shall be at least 14 calendar days from the date of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(2) *Content of response.* The response should include:

(i) An explanation why the action proposed by the OCC is not an appropriate exercise of discretion under section 38;

(ii) Any recommended modification of the proposed directive; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the proposed directive.

(d) *OCC consideration of response.* After considering the response, the OCC may:

(1) Issue the directive as proposed or in modified form;

(2) Determine not to issue the directive and so notify the savings association or company; or

(3) Seek additional information or clarification of the response from the savings association or company, or any other relevant source.

(e) *Failure to file response.* Failure by a Federal savings association or company to file with the OCC, within the specified time period, a written response to a proposed directive shall constitute a waiver of the opportunity to

respond and shall constitute consent to the issuance of the directive.

(f) *Request for modification or rescission of directive.* Any Federal savings association or company that is subject to a directive under this part may, upon a change in circumstances, request in writing that the OCC reconsider the terms of the directive, and may propose that the directive be rescinded or modified. Unless otherwise ordered by the OCC, the directive shall continue in place while such request is pending before the OCC.

§ 165.8 Procedures for reclassifying a Federal savings association based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification*—(i) *Grounds for reclassification.* (A) Pursuant to § 165.4(c) of this part, the OCC may reclassify a well capitalized Federal savings association as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The OCC determines that the savings association is in an unsafe or unsound condition; or

(*2*) The OCC deems the savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as ''reclassification.''

(ii) *Prior notice to institution.* Prior to taking action pursuant to § 165.4(c)(1), the OCC shall issue and serve on the Federal savings association a written notice of the OCC's intention to reclassify the savings association.

(2) *Contents of notice.* A notice of intention to reclassify a Federal savings association based on unsafe or unsound condition shall include:

(i) A statement of the savings association's capital measures and capital levels and the category to which the savings association would be reclassified;

(ii) The reasons for reclassification of the savings association;

(iii) The date by which the savings association subject to the notice of reclassification may file with the OCC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A Federal savings association may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(i) An explanation of why the savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a Federal savings association to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC or its designee under this section. If the Federal savings association desires to present oral testimony or witnesses at the hearing, the savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the Federal savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(7) *Hearing procedures.* (i) The Federal savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The savings association may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor parts 19 or 109 of this chapter apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the Federal savings association and notify the savings association of the OCC's decision.

(b) *Request for rescission of reclassification.* Any Federal savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

§ 165.9 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on a Federal savings association pursuant to section 165.7 requiring the savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OCC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OCC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a Federal savings association to dismiss from office any director or senior executive officer, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor parts 19 or 109 of this chapter apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the Federal savings association would materially strengthen the savings association's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the savings association's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC concerning the Respondent's request for reinstatement with the Federal savings association.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing has been requested, the OCC shall grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC shall set forth in the notification the reasons for the OCC's action.

§ 165.10 Enforcement of directives.

(a) *Judicial remedies.* Whenever a Federal savings association or company that controls a Federal savings association fails to comply with a directive issued under section 38, the OCC may seek enforcement of the directive in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Administrative remedies*—(1) *Failure to comply with directive.* Pursuant to section 8(i)(2)(A) of the FDI Act, the OCC may assess a civil money penalty against any Federal savings association or company that controls a Federal savings association that violates or otherwise fails to comply with any final directive issued under section 38 and against any institution-affiliated party who participates in such violation or noncompliance.

(2) *Failure to implement capital restoration plan.* The failure of a Federal savings association to implement a capital restoration plan required under section 38, or this part, or the failure of a company having control of a Federal savings association to fulfill a guarantee of a capital restoration plan made pursuant to section 38(e)(2) of the FDI Act shall subject the savings association or company to the assessment of civil money penalties pursuant to section 8(i)(2)(A) of the FDI Act.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the OCC may seek enforcement of the provisions of section 38 or this part through any other judicial or administrative proceeding authorized by law.

PART 167—CAPITAL

Sec.

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Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828 (note), 5412(b)(2)(B).

Subpart A—Scope

§ 167.0 Scope.

(a) This part prescribes the minimum regulatory capital requirements for Federal savings associations. Subpart B of this part applies to all Federal savings associations, except as described in paragraph (b) of this section.

(b)(1) A Federal savings association that uses Appendix C of this part must comply with the minimum qualifying criteria for internal risk measurement and management processes for calculating risk-based capital requirements, utilize the methodologies for calculating risk-based capital requirements, and make the required disclosures described in that appendix.

(2) Subpart B of this part does not apply to the computation of risk-based capital requirements by a Federal savings association that uses Appendix C of this part. However, these savings associations:

(i) Must compute the components of capital under § 167.5, subject to the modifications in sections 11 and 12 of Appendix C of this part.

(ii) Must meet the leverage ratio requirement at §§ 167.2(a)(2) and 167.8 with tier 1 capital, as computed under sections 11 and 12 of Appendix C of this part.

(iii) Must meet the tangible capital requirement described at §§ 167.2(a)(3) and 167.9.

(iv) Are subject to §§ 167.3 (individual minimum capital requirement), 167.4 (capital directives); and 167.10 (consequences of failure to meet capital requirements).

(v) Are subject to the reservations of authority at § 167.11, which supplement the reservations of authority at section 1 of Appendix C of this part.

(c) [Reserved]

Subpart B—Regulatory Capital Requirements

§ 167.1 Definitions.

For the purposes of this subpart:

Adjusted total assets. The term *adjusted total assets* means:

(1) A Federal savings association's total assets as that term is defined in this section;

(2) Plus the prorated assets of any includable subsidiary in which the savings association has a minority ownership interest that is not consolidated under GAAP;

(3) Minus:

(i) Assets not included in the applicable capital standard except for those subject to paragraphs (3)(ii) and (3)(iii) of this definition;

(ii) Investments in any includable subsidiary in which a savings association has a minority interest; and

(iii) Investments in any subsidiary subject to consolidation under paragraph (2)(ii) of this definition.

Asset-backed commercial paper program. The term *asset-backed commercial paper program* (ABCP program) means a program that primarily issues commercial paper that has received a credit rating from an NRSRO and that is backed by assets or other exposures held in a bankruptcy-remote special purpose entity. The term *sponsor* of an ABCP program means a Federal savings association that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the asset pools to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the assets, arranging for debt placement, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

Cash items in the process of collection. The term *cash items in the process of collection* means checks or drafts in the process of collection that are drawn on another depository institution, including a central bank, and that are payable immediately upon presentation; U.S. Government checks that are drawn on the United States Treasury or any other U.S. Government or Government-sponsored agency and that are payable immediately upon presentation; broker's security drafts and commodity or bill-of-lading drafts payable immediately upon presentation; and unposted debits.

Commitment. The term commitment means any arrangement that obligates a Federal savings association to:

(1) Purchase loans or securities;

(2) Extend credit in the form of loans or leases, participations in loans or leases, overdraft facilities, revolving credit facilities, home equity lines of credit, eligible ABCP liquidity facilities, or similar transactions.

Common stockholders' equity. The term *common stockholders' equity* means common stock, common stock surplus, retained earnings, and adjustments for the cumulative effect of foreign currency translation, less net unrealized losses on available-for-sale equity securities with readily determinable fair values.

Conditional guarantee. The term *conditional guarantee* means a contingent obligation of the United States Government or its agencies, the validity of which to the beneficiary is dependent upon some affirmative action— *e.g.,* servicing requirements—on the part of the beneficiary of the guarantee or a third party.

Credit derivative. The term *credit derivative* means a contract that allows one party (the protection purchaser) to transfer the credit risk of an asset or off-balance sheet credit exposure to another party (the protection provider). The value of a credit derivative is dependent, at least in part, on the credit performance of a ''referenced asset.''

Credit-enhancing interest-only strip. (1) The term *credit-enhancing interest-only strip* means an on-balance sheet asset that, in form or in substance:

(i) Represents the contractual right to receive some or all of the interest due on transferred assets; and

(ii) Exposes the Federal savings association to credit risk directly or indirectly associated with the transferred assets that exceeds its *pro rata* share of the savings association's claim on the assets whether through subordination provisions or other credit enhancement techniques.

(2) The OCC reserves the right to identify other cash flows or related interests as a credit-enhancing interest-only strip. In determining whether a particular interest cash flow functions as a credit-enhancing interest-only strip, The OCC will consider the economic substance of the transaction.

Credit-enhancing representations and warranties. (1) The term *credit-enhancing representations and warranties* means representations and warranties that are made or assumed in connection with a transfer of assets (including loan servicing assets) and that obligate a Federal savings association to protect investors from losses arising from credit risk in the assets transferred or loans serviced.

(2) Credit-enhancing representations and warranties include promises to protect a party from losses resulting from the default or nonperformance of another party or from an insufficiency in the value of the collateral.

(3) Credit-enhancing representations and warranties do not include:

(i) Early-default clauses and similar warranties that permit the return of, or premium refund clauses covering, qualifying mortgage loans for a period not to exceed 120 days from the date of transfer. These warranties may cover only those loans that were originated within one year of the date of the transfer;

(ii) Premium refund clauses covering assets guaranteed, in whole or in part, by the United States government, a United States government agency, or a United States government-sponsored enterprise, provided the premium

refund clause is for a period not to exceed 120 days from the date of transfer; or

(iii) Warranties that permit the return of assets in instances of fraud, misrepresentation or incomplete documentation.

Depository institution. The term *domestic depository institution* means a financial institution that engages in the business of banking; that is recognized as a bank by the bank supervisory or monetary authorities of the country of its incorporation and the country of its principal banking operations; that receives deposits to a substantial extent in the regular course of business; and that has the power to accept demand deposits. In the United States, this definition encompasses all Federally insured offices of commercial banks, mutual and stock savings banks, savings or building and loan associations (stock and mutual), cooperative banks, credit unions, and international banking facilities of domestic depository institutions. Bank holding companies and savings and loan holding companies are excluded from this definition. For the purposes of assigning risk weights, the differentiation between OECD depository institutions and non-OECD depository institutions is based on the country of incorporation. Claims on branches and agencies of foreign banks located in the United States are to be categorized on the basis of the parent bank's country of incorporation.

Direct credit substitute. The term *direct credit substitute* means an arrangement in which a Federal savings association assumes, in form or in substance, credit risk associated with an on- or off-balance sheet asset or exposure that was not previously owned by the savings association (third-party asset) and the risk assumed by the savings association exceeds the *pro rata* share of the savings association's interest in the third-party asset. If a savings association has no claim on the third-party asset, then the savings association's assumption of any credit risk is a direct credit substitute. Direct credit substitutes include:

(1) Financial standby letters of credit that support financial claims on a third party that exceed a savings association's *pro rata* share in the financial claim;

(2) Guarantees, surety arrangements, credit derivatives, and similar instruments backing financial claims that exceed a savings association's *pro rata* share in the financial claim;

(3) Purchased subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Credit derivative contracts under which the savings association assumes more than its *pro rata* share of credit risk on a third-party asset or exposure;

(5) Loans or lines of credit that provide credit enhancement for the financial obligations of a third party;

(6) Purchased loan servicing assets if the servicer is responsible for credit losses or if the servicer makes or assumes credit-enhancing representations and warranties with respect to the loans serviced. Servicer cash advances as defined in this section are not direct credit substitutes;

(7) Clean-up calls on third party assets. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the savings association are not direct credit substitutes; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

Eligible ABCP liquidity facility. The term *eligible ABCP liquidity facility* means a liquidity facility that supports asset-backed commercial paper, in form or in substance, and that meets the following criteria:

(1)(i) At the time of the draw, the liquidity facility must be subject to an asset quality test that precludes funding against assets that are 90 days or more past due or in default; and

(ii) If the assets that the liquidity facility is required to fund against are assets or exposures that have received a credit rating by a NRSRO at the time of the inception of the facility, the facility can be used to fund only those assets or exposures that are rated investment grade by an NRSRO at the time of funding; or

(2) If the assets that are funded under the liquidity facility do not meet the criteria described in paragraph (1) of this definition, the assets must be guaranteed, conditionally or unconditionally, by the United States Government, its agencies, or the central government of an OECD country.

Eligible Federal savings association. (1) The term *eligible Federal savings association* means a Federal savings association with respect to which the Comptroller of the Currency has determined, on the basis of information available at the time, that:

(i) The savings association's management appears to be competent;

(ii) The savings association, as certified by its Board of Directors, is in substantial compliance with all applicable statutes, regulations, orders and written agreements and directives; and

(iii) The savings association's management, as certified by its Board of Directors, has not engaged in insider dealing, speculative practices, or any other activities that have or may jeopardize the association's safety and soundness or contributed to impairing the association's capital.

(2) Federal savings associations, for purposes of this paragraph, will be deemed to be eligible unless the Comptroller makes a determination otherwise or notifies the savings association of its intent to conduct either an informal or formal examination to determine eligibility and provides written notification thereof to the savings association.

Equity investments. (1) The term *equity investments* includes investments in equity securities and real property that would be considered an equity investment under GAAP.

(2)(i) The term *equity securities* means any:

(A) Stock, certificate of interest of participation in any profit-sharing agreement, collateral trust certificate or subscription, preorganization certificate or subscription, transferable share, investment contract, or voting trust certificate; or

(B) In general, any interest or instrument commonly known as an equity security; or

(C) Loans having profit sharing features which GAAP would reclassify as equity securities; or

(D) Any security immediately convertible at the option of the holder without payment of substantial additional consideration into such a security; or

(E) Any security carrying any warrant or right to subscribe to or purchase such a security; or

(F) Any certificate of interest or participation in, temporary or Interim certificate for, or receipt for any of the foregoing or any partnership interest; or

(G) Investments in equity securities and loans or advances to and guarantees issued on behalf of partnerships or joint ventures in which a Federal savings association holds an interest in real property under GAAP.

(ii) The term *equity securities* does not include investments in a subsidiary as that term is defined in this section, equity investments that are permissible for national banks, ownership interests in pools of assets that are risk-weighted in accordance with § 167.6(a)(1)(vi) of this part, or the stock of Federal Home Loan Banks or Federal Reserve Banks.

(3) For purposes of this part, the term *equity investments in real property* does not include interests in real property that are primarily used or intended to be

used by the savings association, its subsidiaries, or its affiliates as offices or related facilities for the conduct of its business.

(4) In addition, for purposes of this part, the term *equity investments in real property* does not include interests in real property that are acquired in satisfaction of a debt previously contracted in good faith or acquired in sales under judgments, decrees, or mortgages held by the savings association, provided that the property is not intended to be held for real estate investment purposes but is expected to be disposed of within five years or a longer period approved by the OCC.

Exchange rate contracts. The term *exchange rate contracts* includes cross-currency interest rate swaps; forward foreign exchange rate contracts; currency options purchased; and any similar instrument that, in the opinion of the OCC, may give rise to similar risks.

Face amount. The term *face amount* means the notational principal, or face value, amount of an off-balance sheet item or the amortized cost of an on-balance sheet asset.

Financial asset. The term *financial asset* means cash or other monetary instrument, evidence of debt, evidence of an ownership interest in an entity, or a contract that conveys a right to receive or exchange cash or another financial instrument from another party.

Financial standby letter of credit. The term *financial standby letter of credit* means a letter of credit or similar arrangement that represents an irrevocable obligation to a third-party beneficiary:

(1) To repay money borrowed by, or advanced to, or for the account of, a second party (the account party); or

(2) To make payment on behalf of the account party, in the event that the account party fails to fulfill its obligation to the beneficiary.

Includable subsidiary. The term *includable subsidiary* means a subsidiary of a Federal savings association that is:

(1) Engaged solely in activities not impermissible for a national bank;

(2) Engaged in activities not permissible for a national bank, but only if acting solely as agent for its customers and such agency position is clearly documented in the savings association's files;

(3) Engaged solely in mortgage-banking activities;

(4)(i) Itself an insured depository institution or a company the sole investment of which is an insured depository institution, and

(ii) Was acquired by the parent savings association prior to May 1, 1989; or

(5) A subsidiary of any savings association existing as a savings association on August 9, 1989 that

(i) Was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under state law, or

(ii) Acquired its principal assets from an association that was chartered prior to October 15, 1982, as a savings bank or a cooperative bank under state law.

Intangible assets. The term *intangible assets* means assets considered to be intangible assets under GAAP. These assets include, but are not limited to, goodwill, core deposit premiums, purchased credit card relationships, favorable leaseholds, and servicing assets (mortgage and non-mortgage). Interest-only strips receivable and other nonsecurity financial instruments are not intangible assets under this definition.

Interest-rate contracts. The term *interest-rate contracts* includes single currency interest-rate swaps; basis swaps; forward rate agreements; interest-rate options purchased; forward forward deposits accepted; and any other instrument that, in the opinion of the OCC, may give rise to similar risks, including when-issued securities.

Liquidity facility. The term *liquidity facility* means a legally binding commitment to provide liquidity support to asset-backed commercial paper by lending to, or purchasing assets from any structure, program or conduit in the event that funds are required to repay maturing asset-backed commercial paper.

Mortgage-related securities. The term *mortgage-related securities* means any mortgage-related qualifying securities under section 3(a)(41) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(41), *Provided,* That the rating requirements of that section shall not be considered for purposes of this definition.

Nationally recognized statistical rating organization (NRSRO). The term *nationally recognized statistical rating organization* means an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (Commission) as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers.

OECD-based country. The term *OECD-based country* means a member of that grouping of countries that are full members of the Organization for Economic Cooperation and Development (OECD) plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. This term excludes any country that has rescheduled its external sovereign debt within the previous five years. A rescheduling of external sovereign debt generally would include any renegotiation of terms arising from a country's inability or unwillingness to meet its external debt service obligations, but generally would not include renegotiations of debt in the normal course of business, such as a renegotiation to allow the borrower to take advantage of a decline in interest rates or other change in market conditions.

Original maturity. The term *original maturity* means, with respect to a commitment, the earliest date after a commitment is made on which the commitment is scheduled to expire (*i.e.,* it will reach its stated maturity and cease to be binding on either party), *Provided,* That either:

(1) The commitment is not subject to extension or renewal and will actually expire on its stated expiration date; or

(2) If the commitment is subject to extension or renewal beyond its stated expiration date, the stated expiration date will be deemed the original maturity only if the extension or renewal must be based upon terms and conditions independently negotiated in good faith with the customer at the time of the extension or renewal and upon a new, *bona fide* credit analysis utilizing current information on financial condition and trends.

Performance-based standby letter of credit. The term *performance-based standby letter of credit* means any letter of credit, or similar arrangement, however named or described, which represents an irrevocable obligation to the beneficiary on the part of the issuer to make payment on account of any default by a third party in the performance of a nonfinancial or commercial obligation. Such letters of credit include arrangements backing subcontractors' and suppliers' performance, labor and materials contracts, and construction bids.

Perpetual preferred stock. The term *perpetual preferred stock* means preferred stock without a fixed maturity date that cannot be redeemed at the option of the holder, and that has no other provisions that will require future redemption of the issue. For purposes of these instruments, preferred stock that can be redeemed at the option of the holder is deemed to have an ''original maturity'' of the earliest possible date

on which it may be so redeemed. Cumulative perpetual preferred stock is preferred stock where the dividends accumulate from one period to the next. Noncumulative perpetual preferred stock is preferred stock where the unpaid dividends are not carried over to subsequent dividend periods.

Problem institution. The term *problem institution* means a Federal savings association that, at the time of its acquisition, merger, purchase of assets or other business combination with or by another savings association:

(1) Was subject to special regulatory controls by its primary Federal or state regulatory authority;

(2) Posed particular supervisory concerns to its primary Federal or state regulatory authority; or

(3) Failed to meet its regulatory capital requirement immediately before the transaction.

Prorated assets. The term *prorated assets* means the total assets (as determined in the most recently available GAAP report but in no event more than one year old) of a subsidiary (including those subsidiaries where the savings association has a minority interest) multiplied by the Federal savings association's percentage of ownership of that subsidiary.

Qualifying mortgage loan. (1) The term *qualifying mortgage loan* means a loan that:

(i) Is fully secured by a first lien on a one-to four-family residential property;

(ii) Is underwritten in accordance with prudent underwriting standards, including standards relating the ratio of the loan amount to the value of the property (LTV ratio). *See* Appendix to 12 CFR 160.101. A nonqualifying mortgage loan that is paid down to an appropriate LTV ratio (calculated using value at origination) may become a qualifying loan if it meets all other requirements of this definition;

(iii) Maintains an appropriate LTV ratio based on the amortized principal balance of the loan; and

(iv) Is performing and is not more than 90 days past due.

(2) If a Federal savings association holds the first and junior lien(s) on a residential property and no other party holds an intervening lien, the transaction is treated as a single loan secured by a first lien for the purposes of determining the LTV ratio and the appropriate risk weight under § 167.6(a).

(3) A loan to an individual borrower for the construction of the borrower's home may be included as a qualifying mortgage loan.

(4) A loan that meets the requirements of this section prior to modification on a permanent or trial basis under the U.S. Department of Treasury's Home Affordable Mortgage Program may be included as a *qualifying mortgage loan,* so long as the loan is not 90 days or more past due.

Qualifying multifamily mortgage loan. (1) The term *qualifying multifamily mortgage loan* means a loan secured by a first lien on multifamily residential properties consisting of 5 or more dwelling units, provided that:

(i) The amortization of principal and interest occurs over a period of not more than 30 years;

(ii) The original minimum maturity for repayment of principal on the loan is not less than seven years;

(iii) When considering the loan for placement in a lower risk-weight category, all principal and interest payments have been made on a timely basis in accordance with its terms for the preceding year;

(iv) The loan is performing and not 90 days or more past due;

(v) The loan is made by the Federal savings association in accordance with prudent underwriting standards; and

(vi) If the interest rate on the loan does not change over the term of the loan:

(A) The current loan balance amount does not exceed 80 percent of the value of the property securing the loan; and

(B) For the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 120 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution; or

(vii) If the interest rate on the loan changes over the term of the loan:

(A) The current loan balance amount does not exceed 75 percent of the value of the property securing the loan; and

(B) For the property's most recent fiscal year, the ratio of annual net operating income generated by the property (before payment of any debt service on the loan) to annual debt service on the loan is not less than 115 percent, or in the case of cooperative or other not-for-profit housing projects, the property generates sufficient cash flows to provide comparable protection to the institution.

(2) The term *qualifying multifamily mortgage loan* also includes a multifamily mortgage loan that on March 18, 1994 was a first mortgage loan on an existing property consisting of 5–36 dwelling units with an initial loan-to-value ratio of not more than 80% where an average annual occupancy rate of 80% or more of total units had existed for at least one year, and continues to meet these criteria.

(3) For purposes of paragraphs (1)(vi) and (vii) of this definition, the term *value of the property* means, at origination of a loan to purchase a multifamily property: the lower of the purchase price or the amount of the initial appraisal, or if appropriate, the initial evaluation. In cases not involving the purchase of a multifamily loan, the *value of the property* is determined by the most current appraisal, or if appropriate, the most current evaluation.

(4) In cases where a borrower refinances a loan on an existing property, as an alternative to paragraphs (1)(iii), (vi), and (vii) of this definition:

(i) All principal and interest payments on the loan being refinanced have been made on a timely basis in accordance with the terms of that loan for the preceding year; and

(ii) The net income on the property for the preceding year would support timely principal and interest payments on the new loan in accordance with the applicable debt service requirement.

Qualifying residential construction loan. (1) The term *qualifying residential construction loan,* also referred to as a residential bridge loan, means a loan made in accordance with sound lending principles satisfying the following criteria:

(i) The builder must have substantial project equity in the home construction project;

(ii) The residence being constructed must be a 1–4 family residence sold to a home purchaser;

(iii) The lending Federal savings association must obtain sufficient documentation from a permanent lender (which may be the construction lender) demonstrating that:

(A) The home buyer intends to purchase the residence; and

(B) Has the ability to obtain a permanent qualifying mortgage loan sufficient to purchase the residence;

(iv) The home purchaser must have made a substantial earnest money deposit;

(v) The construction loan must not exceed 80 percent of the sales price of the residence;

(vi) The construction loan must be secured by a first lien on the lot, residence under construction, and other improvements;

(vii) The lending thrift must retain sufficient undisbursed loan funds throughout the construction period to ensure project completion;

(viii) The builder must incur a significant percentage of direct costs (*i.e.,* the actual costs of land, labor, and material) before any drawdown on the loan;

(ix) If at any time during the life of the construction loan any of the criteria of this rule are no longer satisfied, the association must immediately recategorize the loan at a 100 percent risk-weight and must accurately report the loan in the association's next quarterly Consolidated Reports of Condition and Income (Call Report) or Thrift Financial Report (TFR), as appropriate;

(x) The home purchaser must intend that the home will be owner-occupied;

(xi) The home purchaser(s) must be an individual(s), not a partnership, joint venture, trust corporation, or any other entity (including an entity acting as a sole proprietorship) that is purchasing the home(s) for speculative purposes; and

(xii) The loan must be performing and not more than 90 days past due.

(2) The documentation for each loan and home sale must be sufficient to demonstrate compliance with the criteria in paragraph (1) of this definition. The OCC retains the discretion to determine that any loans not meeting sound lending principles must be placed in a higher risk-weight category. The OCC also reserves the discretion to modify these criteria on a case-by-case basis provided that any such modifications are not inconsistent with the safety and soundness objectives of this definition.

Qualifying securities firm. The term *qualifying securities firm* means:

(1) A securities firm incorporated in the United States that is a broker-dealer that is registered with the Securities and Exchange Commission (SEC) and that complies with the SEC's net capital regulations (17 CFR 240.15c3(1)); and

(2) A securities firm incorporated in any other OECD-based country, if the Federal savings association is able to demonstrate that the securities firm is subject to consolidated supervision and regulation (covering its subsidiaries, but not necessarily its parent organizations) comparable to that imposed on depository institutions in OECD countries. Such regulation must include risk-based capital requirements comparable to those imposed on depository institutions under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998).

Reciprocal holdings of depository institution instruments. The term *reciprocal holdings of depository institution instruments* means cross-holdings or other formal or informal arrangements in which two or more depository institutions swap, exchange, or otherwise agree to hold each other's capital instruments. This definition does not include holdings of capital instruments issued by other depository institutions that were taken in satisfaction of debts previously contracted, provided that the reporting Federal savings association has not held such instruments for more than five years or a longer period approved by the OCC.

Recourse. The term *recourse* means a Federal savings association's retention, in form or in substance, of any credit risk directly or indirectly associated with an asset it has sold (in accordance with GAAP) that exceeds a *pro rata* share of that savings association's claim on the asset. If a savings association has no claim on an asset it has sold, then the retention of any credit risk is recourse. A recourse obligation typically arises when a savings association transfers assets in a sale and retains an explicit obligation to repurchase assets or to absorb losses due to a default on the payment of principal or interest or any other deficiency in the performance of the underlying obligor or some other party. Recourse may also exist implicitly if a savings association provides credit enhancement beyond any contractual obligation to support assets it has sold. Recourse obligations include:

(1) Credit-enhancing representations and warranties made on transferred assets;

(2) Loan servicing assets retained pursuant to an agreement under which the savings association will be responsible for losses associated with the loans serviced. Servicer cash advances as defined in this section are not recourse obligations;

(3) Retained subordinated interests that absorb more than their *pro rata* share of losses from the underlying assets;

(4) Assets sold under an agreement to repurchase, if the assets are not already included on the balance sheet;

(5) Loan strips sold without contractual recourse where the maturity of the transferred portion of the loan is shorter than the maturity of the commitment under which the loan is drawn;

(6) Credit derivatives that absorb more than the savings association's pro rata share of losses from the transferred assets;

(7) Clean-up calls on assets the savings association has sold. However, clean-up calls that are 10 percent or less of the original pool balance and that are exercisable at the option of the savings association are not recourse arrangements; and

(8) Liquidity facilities that provide support to asset-backed commercial paper (other than eligible ABCP liquidity facilities).

Replacement cost. The term *replacement cost* means, with respect to interest rate and exchange-rate contracts, the loss that would be incurred in the event of a counterparty default, as measured by the net cost of replacing the contract at the current market value. If default would result in a theoretical profit, the replacement value is considered to be zero. This mark-to-market process must incorporate changes in both interest rates and counterparty credit quality.

Residential properties. The term *residential properties* means houses, condominiums, cooperative units, and manufactured homes. This definition does not include boats or motor homes, even if used as a primary residence, or timeshare properties.

Residual characteristics. The term *residual characteristics* means interests similar to a multi-class pay-through obligation representing the excess cash flow generated from mortgage collateral over the amount required for the issue's debt service and ongoing administrative expenses or interests presenting similar degrees of interest-rate/prepayment risk and principal loss risks.

Residual interest. (1) The term *residual interest* means any on-balance sheet asset that:

(i) Represents an interest (including a beneficial interest) created by a transfer that qualifies as a sale (in accordance with GAAP) of financial assets, whether through a securitization or otherwise; and

(ii) Exposes a Federal savings association to credit risk directly or indirectly associated with the transferred asset that exceeds a *pro rata* share of that savings association's claim on the asset, whether through subordination provisions or other credit enhancement techniques.

(2) Residual interests generally include credit-enhancing interest-only strips, spread accounts, cash collateral accounts, retained subordinated interests (and other forms of overcollateralization), and similar assets that function as a credit enhancement.

(3) Residual interests further include those exposures that, in substance, cause the savings association to retain the credit risk of an asset or exposure that had qualified as a residual interest before it was sold.

(4) Residual interests generally do not include assets purchased from a third

party. However, a credit-enhancing interest-only strip that is acquired in any asset transfer is a residual interest.

Risk participation. The term *risk participation* means a participation in which the originating party remains liable to the beneficiary for the full amount of an obligation (*e.g.,* a direct credit substitute), notwithstanding that another party has acquired a participation in that obligation.

Risk-weighted assets. The term *risk-weighted assets* means the sum total of risk-weighted on-balance sheet assets and the total of risk-weighted off-balance sheet credit equivalent amounts. These assets are calculated in accordance with § 167.6 of this part.

Securitization. The term *securitization* means the pooling and repackaging by a special purpose entity of assets or other credit exposures that can be sold to investors. *Securitization* includes transactions that create stratified credit risk positions whose performance is dependent upon an underlying pool of credit exposures, including loans and commitments.

Servicer cash advance. The term *servicer cash advance* means funds that a residential mortgage servicer advances to ensure an uninterrupted flow of payments, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the loan. A servicer cash advance is not a recourse obligation or a direct credit substitute if:

(1) The servicer is entitled to full reimbursement and this right is not subordinated to other claims on the cash flows from the underlying asset pool; or

(2) For any one loan, the servicer's obligation to make nonreimbursable advances is contractually limited to an insignificant amount of the outstanding principal amount on that loan.

State. The term *state* means any one of the several states of the United States of America, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Structured financing program. The term *structured financing program* means a program where receivable interests and asset-or mortgage-backed securities issued by multiple participants are purchased by a special purpose entity that repackages those exposures into securities that can be sold to investors. Structured financing programs allocate credit risk, generally, between the participants and credit enhancement provided to the program.

Subsidiary. The term *subsidiary* means any corporation, partnership, business trust, joint venture, association or similar organization in which a Federal savings association directly or indirectly holds an ownership interest and the assets of which are consolidated with those of the Federal savings association for purposes of reporting under GAAP. Generally, these are majority-owned subsidiaries.[1] This definition does not include ownership interests that were taken in satisfaction of debts previously contracted, provided that the reporting association has not held the interest for more than five years or a longer period approved by the OCC.

Tier 1 capital. The term *Tier 1 capital* means core capital as computed in accordance with § 167.5(a) of this part.

Tier 2 capital. The term *Tier 2 capital* means supplementary capital as computed in accordance with § 167.5 of this part.

Total assets. The term *total assets* means total assets as would be required to be reported for consolidated entities on period-end reports filed with the OCC in accordance with GAAP.

Traded position. The term *traded position* means a position retained, assumed, or issued in connection with a securitization that is rated by a NRSRO, where there is a reasonable expectation that, in the near future, the rating will be relied upon by:

(1) Unaffiliated investors to purchase the security; or

(2) An unaffiliated third party to enter into a transaction involving the position, such as a purchase, loan, or repurchase agreement.

Unconditionally cancelable. The term *unconditionally cancelable* means, with respect to a commitment-type lending arrangement, that the Federal savings association may, at any time, with or without cause, refuse to advance funds or extend credit under the facility. In the case of home equity lines of credit, the savings association is deemed able to unconditionally cancel the commitment if it can, at its option, prohibit additional extensions of credit, reduce the line, and terminate the commitment to the full extent permitted by relevant Federal law.

United States Government or its agencies. The term *United States Government or its agencies* means an instrumentality of the U.S. Government whose debt obligations are fully and explicitly guaranteed as to the timely payment of principal and interest by the full faith and credit of the United States Government.

United States Government-sponsored agency or corporation. The term *United States Government-sponsored agency or corporation* means an agency or corporation originally established or chartered to serve public purposes specified by the United States Congress but whose obligations are not explicitly guaranteed by the full faith and credit of the United States Government.

§ 167.2 Minimum regulatory capital requirement.

(a) To meet its regulatory capital requirement a Federal savings association must satisfy each of the following capital standards:

(1) *Risk-based capital requirement.* (i) A Federal savings association's minimum risk-based capital requirement shall be an amount equal to 8% of its risk-weighted assets as measured under § 167.6 of this part.

(ii) A Federal savings association may not use supplementary capital to satisfy this requirement in an amount greater than 100% of its core capital as defined in § 167.5 of this part.

(2) *Leverage ratio requirement.* (i) A Federal savings association's minimum leverage ratio requirement shall be the amount set forth in § 167.8 of this part.

(ii) A Federal savings association must satisfy this requirement with core capital as defined in § 167.5(a) of this part.

(3) *Tangible capital requirement.* (i) A Federal savings association's minimum tangible capital requirement shall be the amount set forth in § 167.9 of this part.

(ii) A Federal savings association must satisfy this requirement with tangible capital as defined in § 167.9 of this part in an amount not less than 1.5% of its adjusted total assets.

(b) [Reserved]

(c) Federal savings associations are expected to maintain compliance with all of these standards at all times.

§ 167.3 Individual minimum capital requirements.

(a) *Purpose and scope.* The rules and procedures specified in this section apply to the establishment of an individual minimum capital requirement for a Federal savings association that varies from the risk-based capital requirement, the leverage ratio requirement or the tangible capital requirement that would otherwise apply to the savings association under this part.

(b) *Appropriate considerations for establishing individual minimum capital requirements.* Minimum capital levels higher than the risk-based capital requirement, the leverage ratio requirement or the tangible capital

[1] The OCC reserves the right to review a Federal savings association's investment in a subsidiary on a case-by-case basis. If the OCC determines that such investment is more appropriately treated as an equity security or an ownership interest in a subsidiary, it will make such determination regardless of the percentage of ownership held by the savings association.

requirement required under this part may be appropriate for individual savings associations. Increased individual minimum capital requirements may be established upon a determination that the savings association's capital is or may become inadequate in view of its circumstances. For example, higher capital levels may be appropriate for:

(1) A Federal savings association receiving special supervisory attention;

(2) A Federal savings association that has or is expected to have losses resulting in capital inadequacy;

(3) A Federal savings association that has a high degree of exposure to interest rate risk, prepayment risk, credit risk, concentration of credit risk, certain risks arising from nontraditional activities, or similar risks; or a high proportion of off-balance sheet risk, especially standby letters of credit;

(4) A Federal savings association that has poor liquidity or cash flow;

(5) A Federal savings association growing, either internally or through acquisitions, at such a rate that supervisory problems are presented that are not dealt with adequately by other OCC regulations or other guidance;

(6) A Federal savings association that may be adversely affected by the activities or condition of its holding company, affiliate(s), subsidiaries, or other persons or savings associations with which it has significant business relationships, including concentrations of credit;

(7) A Federal savings association with a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or that has loans in nonperforming status or on which borrowers fail to comply with repayment terms;

(8) A Federal savings association that has inadequate underwriting policies, standards, or procedures for its loans and investments; or

(9) A Federal savings association that has a record of operational losses that exceeds the average of other, similarly situated savings associations; has management deficiencies, including failure to adequately monitor and control financial and operating risks, particularly the risks presented by concentrations of credit and nontraditional activities; or has a poor record of supervisory compliance.

(c) *Standards for determination of appropriate individual minimum capital requirements.* The appropriate minimum capital level for an individual Federal savings association cannot be determined solely through the application of a rigid mathematical formula or wholly objective criteria. The decision is necessarily based, in part, on subjective judgment grounded in agency expertise. The factors to be considered in the determination will vary in each case and may include, for example:

(1) The conditions or circumstances leading to the determination that a higher minimum capital requirement is appropriate or necessary for the savings association;

(2) The exigency of those circumstances or potential problems;

(3) The overall condition, management strength, and future prospects of the savings association and, if applicable, its holding company, subsidiaries, and affiliates;

(4) The savings association's liquidity, capital and other indicators of financial stability, particularly as compared with those of similarly situated savings associations; and

(5) The policies and practices of the savings association's directors, officers, and senior management as well as the internal control and internal audit systems for implementation of such adopted policies and practices.

(d) *Procedures*—(1) *Notification.* When the OCC determines that a minimum capital requirement is necessary or appropriate for a particular Federal savings association, it shall notify the savings association in writing of its proposed individual minimum capital requirement; the schedule for compliance with the new requirement; and the specific causes for determining that the higher individual minimum capital requirement is necessary or appropriate for the savings association.

(2) *Response.* (i) The response shall include any information that the Federal savings association wants the OCC to consider in deciding whether to establish or to amend an individual minimum capital requirement for the savings association, what the individual capital requirement should be, and, if applicable, what compliance schedule is appropriate for achieving the required capital level. The response of the savings association must be in writing and must be delivered to the OCC within 30 days after the date on which the notification was received. The OCC may extend the time period for good cause. The time period for response by the insured savings association may be shortened for good cause:

(A) When, in the opinion of the OCC, the condition of the savings association so requires, and the OCC informs the savings association of the shortened response period in the notice;

(B) With the consent of the savings association; or

(C) When the savings association already has advised the OCC that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days, or such other time period as may be specified by the OCC, may constitute a waiver of any objections to the proposed individual minimum capital requirement or to the schedule for complying with it, unless the OCC has provided an extension of the response period for good cause.

(3) *Decision.* After expiration of the response period, the OCC shall decide whether or not the OCC believes the proposed individual minimum capital requirement should be established for the Federal savings association, or whether that proposed requirement should be adopted in modified form, based on a review of the savings association's response and other relevant information. The OCC's decision shall address comments received within the response period from the savings association and shall state the level of capital required, the schedule for compliance with this requirement, and any specific remedial action the savings association could take to eliminate the need for continued applicability of the individual minimum capital requirement. The OCC shall provide the savings association with a written decision on the individual minimum capital requirement, addressing the substantive comments made by the savings association and setting forth the decision and the basis for that decision. Upon receipt of this decision by the savings association, the individual minimum capital requirement becomes effective and binding upon the savings association. This decision represents final agency action.

(4) *Failure to comply.* Failure to satisfy an individual minimum capital requirement, or to meet any required incremental additions to capital under a schedule for compliance with such an individual minimum capital requirement, shall constitute a legal basis for issuing a capital directive pursuant to § 167.4 of this part.

(5) *Change in circumstances.* If, after a decision is made under paragraph (d)(3) of this section, there is a change in the circumstances affecting the savings association's capital adequacy or its ability to reach its required minimum capital level by the specified date, the OCC may amend the individual minimum capital requirement or the savings association's schedule for such compliance. The OCC may decline to consider a savings association's request for such changes that are not based on a significant change in circumstances or that are

repetitive or frivolous. Pending the OCC's reexamination of the original decision, that original decision and any compliance schedule established thereunder shall continue in full force and effect.

§ 167.4 Capital directives.

(a) *Issuance of a Capital Directive*—(1) *Purpose.* (i) In addition to any other action authorized by law, the OCC may issue a capital directive to a Federal savings association that does not have an amount of capital satisfying its minimum capital requirement. Issuance of such a capital directive may be based on a Federal savings association's noncompliance with the risk-based capital requirement, the leverage ratio requirement, the tangible capital requirement, or individual minimum capital requirement established under this part, by a written agreement under 12 U.S.C. 1464(s), or as a condition for approval of an application. A capital directive may order a Federal savings association to:

(A) Achieve its minimum capital requirement by a specified date;

(B) Adhere to the compliance schedule for achieving its individual minimum capital requirement;

(C) Submit and adhere to a capital plan acceptable to the OCC describing the means and a time schedule by which the savings association shall reach its required capital level;

(D) Take other action, including but not limited to, reducing the savings association's assets or its rate of liability growth, or imposing restrictions on the savings association's payment of dividends, in order to cause the savings association to reach its required capital level;

(E) Take any action authorized under § 167.10(e); or

(F) Take a combination of any of these actions.

(ii) A capital directive issued under this section, including a plan submitted pursuant to a capital directive, is enforceable under 12 U.S.C. 1818 in the same manner and to the same extent as an effective and outstanding cease and desist order which has become final under 12 U.S.C. 1818.

(2) *Notice of intent to issue capital directive.* The OCC will determine whether to initiate the process of issuing a capital directive. The OCC will notify a Federal savings association in writing by registered mail of its intention to issue a capital directive. The notice will state:

(i) The reasons for issuance of the capital directive and

(ii) The proposed contents of the capital directive.

(3) *Response to notice of intent.* (i) A Federal savings association may respond to the notice of intent by submitting its own compliance plan, or may propose an alternative plan. The response should also include any information that the savings association wishes the OCC to consider in deciding whether to issue a capital directive. The response must be in writing and be delivered within 30 days after the receipt of the notices. Such response must be filed in accordance with §§ 116.30 and 116.40 of this chapter. In its discretion, the OCC may extend the time period for the response for good cause. The OCC may, for good cause, shorten the 30-day time period for response by the insured savings association:

(A) When, in the opinion of the OCC, the condition of the savings association so requires, and the OCC informs the savings association of the shortened response period in the notice;

(B) With the consent of the savings association; or

(C) When the savings association already has advised the OCC that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days of receipt, or such other time period as may be specified by the OCC, may constitute a waiver of any objections to the capital directive unless the OCC grants an extension of the time period for good cause.

(4) *Decision.* After the closing date of the Federal savings association's response period, or upon receipt of the savings association's response, if earlier, the OCC shall consider the savings association's response and may seek additional information or clarification of the response. Thereafter, the OCC will determine whether or not to issue a capital directive and, if one is to be issued, whether it should be as originally proposed or in modified form.

(5) *Service and effectiveness.* (i) Upon issuance, a capital directive will be served upon the Federal savings association. It will include or be accompanied by a statement of reasons for its issuance and shall address the responses received during the response period.

(ii) A capital directive shall become effective upon the expiration of 30 days after service upon the savings association, unless the OCC determines that a shorter effective period is necessary either on account of the public interest or in order to achieve the capital directive's purpose. If the savings association has consented to issuance of the capital directive, it may become effective immediately. A capital directive shall remain in effect and enforceable unless, and then only to the extent that, it is stayed, modified, or terminated by the OCC.

(6) *Change in circumstances.* Upon a change in circumstances, a Federal savings association may submit a request to the OCC to reconsider the terms of the capital directive or consider changes in the savings association's capital plan issued under a directive for the savings association to achieve its minimum capital requirement. If the OCC believes such a change is warranted, the OCC may modify the savings association's capital requirement or may refuse to make such modification if it determines that there are not significant changes in circumstances. Pending a decision on reconsideration, the capital directive and capital plan shall continue in full force and effect.

(b) *Relation to other administrative actions.* The OCC —

(1) May consider a Federal savings association's progress in adhering to any capital plan required under this section whenever such savings association or any affiliate of such savings association (including any company which controls such savings association) seeks approval for any proposal that would have the effect of diverting earnings, diminishing capital, or otherwise impeding such savings association's progress in meeting its minimum capital requirement; and

(2) May disapprove any proposal referred to in paragraph (b)(1) of this section if the OCC determines that the proposal would adversely affect the ability of the savings association on a current or pro forma basis to satisfy its capital requirement.

§ 167.5 Components of capital.

(a) *Core Capital.* (1) The following elements,[2] less the amount of any deductions pursuant to paragraph (a)(2) of this section, comprise a Federal savings association's core capital:

(i) Common stockholders' equity (including retained earnings);

(ii) Noncumulative perpetual preferred stock and related surplus;[3]

[2] Stock issues where the dividend is reset periodically based on current market conditions and the savings association's current credit rating, including but not limited to, auction rate, money market or remarketable preferred stock, are assigned to supplementary capital, regardless of cumulative or noncumulative characteristics.

[3] Stock issued by subsidiaries that may not be counted by the parent savings association on the Call Report or TFR, as appropriate, likewise shall not be considered in calculating capital. For example, preferred stock issued by a Federal savings association or a subsidiary that is, in effect, collateralized by assets of the savings association or

(iii) Minority interests in the equity accounts of the subsidiaries that are fully consolidated.

(iv) Nonwithdrawable accounts and pledged deposits of mutual savings associations (excluding any treasury shares held by the savings association) meeting the criteria of regulations and memoranda of the OCC to the extent that such accounts or deposits have no fixed maturity date, cannot be withdrawn at the option of the accountholder, and do not earn interest that carries over to subsequent periods;

(v) [Reserved]

(2) *Deductions from core capital.* (i) Intangible assets, as defined in § 167.1 of this part, are deducted from assets and capital in computing core capital, except as otherwise provided by § 167.12 of this part.

(ii) Servicing assets that are not includable in core capital pursuant to § 167.12 of this part are deducted from assets and capital in computing core capital.

(iii) Credit-enhancing interest-only strips that are not includable in core capital under § 167.12 of this part are deducted from assets and capital in computing core capital.

(iv) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the savings association has a minority ownership interest) are deducted from assets and, thus core capital except as provided in paragraphs (a)(2)(v) and (a)(2)(vi) of this section.

(v) If a Federal savings association has any investments (both debt and equity) in one or more subsidiaries engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, core capital in accordance with this paragraph (a)(2)(v). The savings association must first deduct from assets and, thus, core capital the amount by which any investments in such subsidiary(ies) exceed the amount of such investments held by the savings association as of April 12, 1989. Next the savings association must deduct from assets and, thus, core capital, the savings association's investments in and extensions of credit to the subsidiary on the date as of which the savings association's capital is being determined.

(vi) If a Federal savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution, the OCC may, in its sole discretion upon determining that the amount of core capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent savings association than the amount that would be required if the parent savings association's investment were deducted pursuant to paragraphs (a)(2)(iv) and (a)(2)(v) of this section, consolidate the assets and liabilities of that subsidiary with those of the parent savings association in calculating the capital adequacy of the parent savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in § 167.1 of this part.

(vii) Deferred tax assets that are not includable in core capital pursuant to § 167.12 of this part are deducted from assets and capital in computing core capital.

(b) *Supplementary Capital.* Supplementary capital counts towards a Federal savings association's total capital up to a maximum of 100% of the savings association's core capital. The following elements comprise a Federal savings association's supplementary capital:

(1) *Permanent Capital Instruments.* (i) Cumulative perpetual preferred stock and other perpetual preferred stock[4] issued pursuant to regulations and memoranda of the OCC;

(ii) Mutual capital certificates issued pursuant to regulations and memoranda of the OCC;

(iii) Nonwithdrawable accounts and pledged deposits (excluding any treasury shares held by the savings association) meeting the criteria of 12 CFR 161.42 to the extent that such instruments are not included in core capital under paragraph (a) of this section;

(iv) Perpetual subordinated debt issued pursuant to regulations and memoranda of the OCC; and

(v) Mandatory convertible subordinated debt (capital notes) issued pursuant to regulations and memoranda of the OCC.

(2) *Maturing Capital Instruments.* (i) Subordinated debt issued pursuant to regulations and memoranda of the OCC;

(ii) Intermediate-term preferred stock issued pursuant to regulations and memoranda of the OCC and any related surplus:

(iii) Mandatory convertible subordinated debt (commitment notes) issued pursuant to regulations and memoranda of the OCC; and

(iv) Mandatorily redeemable preferred stock that was issued before July 23, 1985 or issued pursuant to regulations and memoranda of the Office of Thrift Supervision and approved in writing by the FSLIC for inclusion as regulatory capital before or after issuance.

(3) *Transition rules for maturing capital instruments*—(i) [Reserved]

(ii) A Federal savings association issuing maturing capital instruments after November 7, 1989, may choose, subject to paragraph (b)(3)(ii)(C) of this section, to include such instruments pursuant to either paragraph (b)(3)(ii)(A) or (b)(3)(ii)(B) of this section.

(A) At the beginning of each of the last five years of the life of the maturing capital instrument, the amount that is eligible to be included as supplementary capital is reduced by 20% of the original amount of that instrument (net of redemptions).[5]

(B) Only the aggregate amount of maturing capital instruments that mature in any one year during the seven years immediately prior to an instrument's maturity that does not exceed 20% of an institution's capital will qualify as supplementary capital.

(C) Once a Federal savings association selects either paragraph (b)(3)(ii)(A) or (b)(3)(ii)(B) of this section for the issuance of a maturing capital instrument, it must continue to elect that option for all subsequent issuances of maturing capital instruments for as long as there is a balance outstanding of such issuances. Only when such issuances have all been repaid and the savings association has no balance of such issuances outstanding may the savings association elect the other option.

(4) *Allowance for loan and lease losses.* Allowance for loan and lease losses established under regulations and memoranda of the OCC to a maximum of 1.25 percent of risk-weighted assets.[6]

(5) *Unrealized gains on equity securities.* Up to 45 percent of unrealized gains on available-for-sale equity securities with readily

one of its subsidiaries shall not be included in capital. Similarly, common stock with mandatorily redeemable provisions is not includable in core capital.

[4] Other public disclosure requirements continue to apply—for example, Federal securities law and regulatory reporting requirements.

[5] Capital instruments may be redeemed prior to maturity and without the prior approval of the OCC, as long as the instruments are redeemed with the proceeds of, or replaced by, a like amount of a similar or higher quality capital instrument. However, the OCC must be notified in writing at least 30 days in advance of such redemption.

[6] *See* Security Guidelines, II.B. and III.D. Further, the Agencies note that, in addition to contractual obligations to a financial institution, a service provider may be required to implement its own comprehensive information security program in accordance with the Safeguards Rule promulgated by the Federal Trade Commission (''FTC''), 16 CFR part 314.

determinable fair values may be included in supplementary capital. Unrealized gains are unrealized holding gains, net of unrealized holding losses, before income taxes, calculated as the amount, if any, by which fair value exceeds historical cost. The OCC may disallow such inclusion in the calculation of supplementary capital if the OCC determines that the equity securities are not prudently valued.

(c) *Total capital.* (1) A Federal savings association's total capital equals the sum of its core capital and supplementary capital (to the extent that such supplementary capital does not exceed 100% of its core capital).

(2) The following assets, in addition to assets required to be deducted elsewhere in calculating core capital, are deducted from assets for purposes of determining total capital:

(i) Reciprocal holdings of depository institution capital instruments; and

(ii) All equity investments.

§ 167.6 Risk-based capital credit risk-weight categories.

(a) *Risk-weighted assets.* Risk-weighted assets equal risk-weighted on-balance sheet assets (computed under paragraph (a)(1) of this section), plus risk-weighted off-balance sheet activities (computed under paragraph (a)(2) of this section), plus risk-weighted recourse obligations, direct credit substitutes, and certain other positions (computed under paragraph (b) of this section). Assets not included (*i.e.,* deducted from capital) for purposes of calculating capital under § 167.5 are not included in calculating risk-weighted assets.

(1) *On-balance sheet assets.* Except as provided in paragraph (b) of this section, risk-weighted on-balance sheet assets are computed by multiplying the on-balance sheet asset amounts times the appropriate risk-weight categories. The risk-weight categories are:

(i) *Zero percent Risk Weight (Category 1).* (A) Cash, including domestic and foreign currency owned and held in all offices of a Federal savings association or in transit. Any foreign currency held by a Federal savings association must be converted into U.S. dollar equivalents;

(B) Securities issued by and other direct claims on the U.S. Government or its agencies (to the extent such securities or claims are unconditionally backed by the full faith and credit of the United States Government) or the central government of an OECD country;

(C) Notes and obligations issued by either the Federal Savings and Loan Insurance Corporation or the Federal Deposit Insurance Corporation and backed by the full faith and credit of the United States Government;

(D) Deposit reserves at, claims on, and balances due from Federal Reserve Banks;

(E) The book value of paid-in Federal Reserve Bank stock;

(F) That portion of assets that is fully covered against capital loss and/or yield maintenance agreements by the Federal Savings and Loan Insurance Corporation or any successor agency.

(G) That portion of assets directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country.

(H) Claims on, and claims guaranteed by, a qualifying securities firm that are collateralized by cash on deposit in the savings association or by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country. To be eligible for this risk weight, the savings association must maintain a positive margin of collateral on the claim on a daily basis, taking into account any change in a savings association's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

(ii) *20 percent Risk Weight (Category 2).* (A) Cash items in the process of collection;

(B) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States government or its agencies, or the central government of an OECD country;

(C) That portion of assets conditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country;

(D) Securities (not including equity securities) issued by and other claims on the U.S. Government or its agencies which are not backed by the full faith and credit of the United States Government;

(E) Securities (not including equity securities) issued by, or other direct claims on, United States Government-sponsored agencies;

(F) That portion of assets guaranteed by United States Government-sponsored agencies;

(G) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;

(H) Claims on, and claims guaranteed by, a qualifying securities firm, subject to the following conditions:

(*1*) A qualifying securities firm must have a long-term issuer credit rating, or a rating on at least one issue of long-term unsecured debt, from a NRSRO. The rating must be in one of the three highest investment grade categories used by the NRSRO. If two or more NRSROs assign ratings to the qualifying securities firm, the savings association must use the lowest rating to determine whether the rating requirement of this paragraph is met. A qualifying securities firm may rely on the rating of its parent consolidated company, if the parent consolidated company guarantees the claim.

(*2*) A collateralized claim on a qualifying securities firm does not have to comply with the rating requirements under paragraph (a)(1)(ii)(H)(*1*) of this section if the claim arises under a contract that:

(*i*) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(*ii*) Is collateralized by debt or equity securities that are liquid and readily marketable;

(*iii*) Is marked-to-market daily;

(*iv*) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(*v*) Can be liquidated, terminated or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided under applicable law of the relevant jurisdiction. For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or Regulation EE (12 CFR part 231).

(*3*) If the securities firm uses the claim to satisfy its applicable capital requirements, the claim is not eligible for a risk weight under this paragraph (a)(1)(ii)(H);

(I) Claims representing general obligations of any public-sector entity in an OECD country, and that portion of any claims guaranteed by any such public-sector entity;

(J) [Reserved]

(K) Balances due from and all claims on domestic depository institutions. This includes demand deposits and other transaction accounts, savings deposits and time certificates of deposit,

Federal funds sold, loans to other depository institutions, including overdrafts and term Federal funds, holdings of the savings association's own discounted acceptances for which the account party is a depository institution, holdings of bankers acceptances of other institutions and securities issued by depository institutions, except those that qualify as capital;

(L) The book value of paid-in Federal Home Loan Bank stock;

(M) Deposit reserves at, claims on and balances due from the Federal Home Loan Banks;

(N) Assets collateralized by cash held in a segregated deposit account by the reporting savings association;

(O) Claims on, or guaranteed by, official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member; [7]

(P) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions or regional development institutions in which the United States Government is a shareholder or contributing member.

(Q) All claims on depository institutions incorporated in an OECD country, and all assets backed by the full faith and credit of depository institutions incorporated in an OECD country. This includes the credit equivalent amount of participations in commitments and standby letters of credit sold to other depository institutions incorporated in an OECD country, but only if the originating bank remains liable to the customer or beneficiary for the full amount of the commitment or standby letter of credit. Also included in this category are the credit equivalent amounts of risk participations in bankers' acceptances conveyed to other depository institutions incorporated in an OECD country. However, bank-issued securities that qualify as capital of the issuing bank are not included in this risk category;

(R) Claims on, or guaranteed by depository institutions other than the central bank, incorporated in a non-OECD country, with a remaining maturity of one year or less;

(S) That portion of local currency claims conditionally guaranteed by central governments of non-OECD countries, to the extent the savings association has local currency liabilities in that country.

(iii) *50 percent Risk Weight (Category 3).* (A) Revenue bonds issued by any public-sector entity in an OECD country for which the underlying obligor is a public-sector entity, but which are repayable solely from the revenues generated from the project financed through the issuance of the obligations;

(B) Qualifying mortgage loans and qualifying multifamily mortgage loans;

(C) Privately-issued mortgage-backed securities (*i.e.,* those that do not carry the guarantee of a government or government sponsored entity) representing an interest in qualifying mortgage loans or qualifying multifamily mortgage loans. If the security is backed by qualifying multifamily mortgage loans, the savings association must receive timely payments of principal and interest in accordance with the terms of the security. Payments will generally be considered timely if they are not 30 days past due;

(D) Qualifying residential construction loans as defined in § 167.1 of this part.

(iv) *100 percent Risk Weight (Category 4).* All assets not specified above or deducted from calculations of capital pursuant to § 167.5 of this part, including, but not limited to:

(A) Consumer loans;

(B) Commercial loans;

(C) Home equity loans;

(D) Non-qualifying mortgage loans;

(E) Non-qualifying multifamily mortgage loans;

(F) Residential construction loans;

(G) Land loans;

(H) Nonresidential construction loans;

(I) Obligations issued by any state or any political subdivision thereof for the benefit of a private party or enterprise where that party or enterprise, rather than the issuing state or political subdivision, is responsible for the timely payment of principal and interest on the obligations, *e.g.,* industrial development bonds;

(J) Debt securities not otherwise described in this section;

(K) Investments in fixed assets and premises;

(L) Certain nonsecurity financial instruments including servicing assets and intangible assets includable in core capital under § 167.12 of this part;

(M) Interest-only strips receivable, other than credit-enhancing interest-only strips;

(N)–(O) [Reserved]

(P) That portion of equity investments not deducted pursuant to § 167.5 of this part;

(Q) The prorated assets of subsidiaries (except for the assets of includable, fully consolidated subsidiaries) to the extent such assets are included in adjusted total assets;

(R) All repossessed assets or assets that are more than 90 days past due; and

(S) Equity investments that the OCC determines have the same risk characteristics as foreclosed real estate by the savings association;

(T) Equity investments permissible for a national bank.

(v) [Reserved]

(vi) *Indirect ownership interests in pools of assets.* Assets representing an indirect holding of a pool of assets, *e.g.,* mutual funds, are assigned to risk-weight categories under this section based upon the risk weight that would be assigned to the assets in the portfolio of the pool. An investment in shares of a mutual fund whose portfolio consists primarily of various securities or money market instruments that, if held separately, would be assigned to different risk-weight categories, generally is assigned to the risk-weight category appropriate to the highest risk-weighted asset that the fund is permitted to hold in accordance with the investment objectives set forth in its prospectus. The savings association may, at its option, assign the investment on a pro rata basis to different risk-weight categories according to the investment limits in its prospectus. In no case will an investment in shares in any such fund be assigned to a total risk weight less than 20 percent. If the savings association chooses to assign investments on a pro rata basis, and the sum of the investment limits of assets in the fund's prospectus exceeds 100 percent, the savings association must assign the highest pro rata amounts of its total investment to the higher risk categories. If, in order to maintain a necessary degree of short-term liquidity, a fund is permitted to hold an insignificant amount of its assets in short-term, highly liquid securities of superior credit quality that do not qualify for a preferential risk weight, such securities will generally be disregarded in determining the risk-weight category into which the savings association's holding in the overall fund should be assigned. The prudent use of hedging instruments by a mutual fund to reduce the risk of its assets will not increase the risk weighting of the mutual fund investment. For example, the use of hedging instruments by a mutual fund to reduce the interest rate risk of its government bond portfolio will not increase the risk weight of that fund above the 20 percent category. Nonetheless, if the fund engages in any

[7] These institutions include, but are not limited to, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investments Bank, the International Monetary Fund and the Bank for International Settlements.

activities that appear speculative in nature or has any other characteristics that are inconsistent with the preferential risk-weighting assigned to the fund's assets, holdings in the fund will be assigned to the 100 percent risk-weight category.

(2) *Off-balance sheet items.* Except as provided in paragraph (b) of this section, risk-weighted off-balance sheet items are determined by the following two-step process. First, the face amount of the off-balance sheet item must be multiplied by the appropriate credit conversion factor listed in this paragraph (a)(2). This calculation translates the face amount of an off-balance sheet exposure into an on-balance sheet credit-equivalent amount. Second, the credit-equivalent amount must be assigned to the appropriate risk-weight category using the criteria regarding obligors, guarantors, and collateral listed in paragraph (a)(1) of this section, *provided* that the maximum risk weight assigned to the credit-equivalent amount of an interest-rate or exchange-rate contract is 50 percent. The following are the credit conversion factors and the off-balance sheet items to which they apply.

(i) *100 percent credit conversion factor (Group A).*

(A) [Reserved]

(B) Risk participations purchased in bankers' acceptances;

(C) [Reserved]

(D) Forward agreements and other contingent obligations with a certain draw down, *e.g.,* legally binding agreements to purchase assets at a specified future date. On the date an institution enters into a forward agreement or similar obligation, it should convert the principal amount of the assets to be purchased at 100 percent as of that date and then assign this amount to the risk-weight category appropriate to the obligor or guarantor of the item, or the nature of the collateral;

(E) Indemnification of customers whose securities the savings association has lent as agent. If the customer is not indemnified against loss by the savings association, the transaction is excluded from the risk-based capital calculation. When a savings association lends its own securities, the transaction is treated as a loan. When a savings association lends its own securities or is acting as agent, agrees to indemnify a customer, the transaction is assigned to the risk weight appropriate to the obligor or collateral that is delivered to the lending or indemnifying institution or to an independent custodian acting on their behalf.

(ii) *50 percent credit conversion factor (Group B).* (A) Transaction-related contingencies, including, among other things, performance bonds and performance-based standby letters of credit related to a particular transaction;

(B) Unused portions of commitments (including home equity lines of credit and eligible ABCP liquidity facilities) with an original maturity exceeding one year except those listed in paragraph (a)(2)(v) of this section. For eligible ABCP liquidity facilities, the resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph (b)(3) of this section, if applicable; and

(C) Revolving underwriting facilities, note issuance facilities, and similar arrangements pursuant to which the savings association's customer can issue short-term debt obligations in its own name, but for which the savings association has a legally binding commitment to either:

(*1*) Purchase the obligations the customer is unable to sell by a stated date; or

(*2*) Advance funds to its customer, if the obligations cannot be sold.

(iii) *20 percent credit conversion factor (Group C).* Trade-related contingencies, *i.e.,* short-term, self-liquidating instruments used to finance the movement of goods and collateralized by the underlying shipment. A commercial letter of credit is an example of such an instrument.

(iv) *10 percent credit conversion factor (Group D).* Unused portions of eligible ABCP liquidity facilities with an original maturity of one year or less. The resulting credit equivalent amount is assigned to the risk category appropriate to the assets to be funded by the liquidity facility based on the assets or the obligor, after considering any collateral or guarantees, or external credit ratings under paragraph (b)(3) of this section, if applicable;

(v) *Zero percent credit conversion factor (Group E).* (A) Unused portions of commitments with an original maturity of one year or less, except for eligible ABCP liquidity facilities;

(B) Unused commitments with an original maturity greater than one year, if they are unconditionally cancelable at any time at the option of the savings association and the savings association has the contractual right to make, and in fact does make, either:

(*1*) A separate credit decision based upon the borrower's current financial condition before each drawing under the lending facility; or

(*2*) An annual (or more frequent) credit review based upon the borrower's current financial condition to determine whether or not the lending facility should be continued; and

(C) The unused portion of retail credit card lines or other related plans that are unconditionally cancelable by the savings association in accordance with applicable law.

(vi) *Off-balance sheet contracts; interest-rate and foreign exchange rate contracts (Group F)*—(A) *Calculation of credit equivalent amounts.* The credit equivalent amount of an off-balance sheet interest rate or foreign exchange rate contract that is not subject to a qualifying bilateral netting contract in accordance with paragraph (a)(2)(vi)(B) of this section is equal to the sum of the current credit exposure, *i.e.,* the replacement cost of the contract, and the potential future credit exposure of the off-balance sheet rate contract. The calculation of credit equivalent amounts is measured in U.S. dollars, regardless of the currency or currencies specified in the off-balance sheet rate contract.

(*1*) *Current credit exposure.* The current credit exposure of an off-balance sheet rate contract is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current credit exposure equals that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero. In determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, a Federal savings association may net positive and negative mark-to-market values of off-balance sheet rate contracts if subject to a bilateral netting contract as provided in paragraph (a)(2)(vi)(B) of this section.

(*2*) *Potential future credit exposure.* The potential future credit exposure of an off-balance sheet rate contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional principal [8] by a credit conversion factor. Federal savings associations, subject to examiner review, should use the effective rather than the apparent or stated notional amount in this calculation. The conversion factors are: [9]

[8] For purposes of calculating potential future credit exposure for foreign exchange contracts and other similar contracts, in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

[9] No potential future credit exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate

Remaining maturity	Interest rate contracts (percents)	Foreign exchange rate contracts (percents)
One year or less	0.0	1.0
Over one year	0.5	5.0

(B) *Off-balance sheet rate contracts subject to bilateral netting contracts.* In determining its current credit exposure for multiple off-balance sheet rate contracts executed with a single counterparty, a Federal savings association may net off-balance sheet rate contracts subject to a bilateral netting contract by offsetting positive and negative mark-to-market values, provided that:

(*1*) The bilateral netting contract is in writing;

(*2*) The bilateral netting contract creates a single legal obligation for all individual off-balance sheet rate contracts covered by the bilateral netting contract. In effect, the bilateral netting contract provides that the savings association has a single claim or obligation either to receive or pay only the net amount of the sum of the positive and negative mark-to-market values on the individual off-balance sheet rate contracts covered by the bilateral netting contract. The single legal obligation for the net amount is operative in the event that a counterparty, or a counterparty to whom the bilateral netting contract has been validly assigned, fails to perform due to any of the following events: default, insolvency, bankruptcy, or other similar circumstances;

(*3*) The Federal savings association obtains a written and reasoned legal opinion(s) representing, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy or similar circumstances, the relevant court and administrative authorities would find the savings association's exposure to be the net amount under:

(*i*) The law of the jurisdiction in which the counterparty is chartered or the equivalent location in the case of noncorporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(*ii*) The law that governs the individual off-balance sheet rate contracts covered by the bilateral netting contract; and

(*iii*) The law that governs the bilateral netting contract;

(*4*) The savings association establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the bilateral netting contract continues to satisfy the requirements of this section; and

(*5*) The savings association maintains in its files documentation adequate to support the netting of an off-balance sheet rate contract.[10]

(C) *Walkaway clause.* A bilateral netting contract that contains a walkaway clause is not eligible for netting for purposes of calculating the current credit exposure amount. The term ''walkaway clause'' means a provision in a bilateral netting contract that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

(D) *Risk weighting.* Once the savings association determines the credit equivalent amount for an off-balance sheet rate contract, that amount is assigned to the risk-weight category appropriate to the counterparty, or, if relevant, to the nature of any collateral or guarantee. Collateral held against a netting contract is not recognized for capital purposes unless it is legally available for all contracts included in the netting contract. However, the maximum risk weight for the credit equivalent amount of such off-balance sheet rate contracts is 50 percent.

(E) *Exceptions.* The following off-balance sheet rate contracts are not subject to the above calculation, and therefore, are not part of the denominator of a Federal savings association's risk-based capital ratio:

(*1*) A foreign exchange rate contract with an original maturity of 14 calendar days or less; and

(*2*) Any interest rate or foreign exchange rate contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(*3*) If a Federal savings association has multiple overlapping exposures (such as a program-wide credit enhancement and a liquidity facility) to an ABCP program that is not consolidated for risk-based capital purposes, the savings association is not required to hold duplicative risk-based capital under this part against the overlapping position. Instead, the savings association should apply to the overlapping position the applicable risk-based capital treatment that results in the highest capital charge.

(b) *Recourse obligations, direct credit substitutes, and certain other positions*—(1) *In general.* Except as otherwise permitted in this paragraph (b), to determine the risk-weighted asset amount for a recourse obligation or a direct credit substitute (but not a residual interest):

(i) Multiply the full amount of the credit-enhanced assets for which the savings association directly or indirectly retains or assumes credit risk by a 100 percent conversion factor. (For a direct credit substitute that is an on-balance sheet asset (e.g., a purchased subordinated security), a Federal savings association must use the amount of the direct credit substitute and the full amount of the asset its supports, *i.e.,* all the more senior positions in the structure); and

(ii) Assign this credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral. Paragraph (a)(1) of this section lists the risk-weight categories.

(2) *Residual interests.* Except as otherwise permitted under this paragraph (b), a Federal savings association must maintain risk-based capital for residual interests as follows:

(i) *Credit-enhancing interest-only strips.* After applying the concentration limit under § 167.12(e)(2) of this part, a

indices, so-called floating/floating or basis swaps; the credit equivalent amount is measured solely on the basis of the current credit exposure.

[10] By netting individual off-balance sheet rate contracts for the purpose of calculating its credit equivalent amount, a Federal savings association represents that documentation adequate to support the netting of an off-balance sheet rate contract is in the savings association's files and available for inspection by the OCC. Upon determination by the OCC that a Federal savings association's files are inadequate or that a bilateral netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs (a)(2)(vi)(B)(*3*)(*i*) through (*iii*) of this section, the underlying individual off-balance sheet rate contracts may not be netted for the purposes of this section.

saving association must maintain risk-based capital for a credit-enhancing interest-only strip equal to the remaining amount of the strip (net of any existing associated deferred tax liability), even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred credit-enhancing interest-only strip are treated as if the strip was retained by the savings association and was not transferred.

(ii) *Other residual interests.* A saving association must maintain risk-based capital for a residual interest (excluding a credit-enhancing interest-only strip) equal to the face amount of the residual interest (net of any existing associated deferred tax liability), even if the amount of risk-based capital that must be maintained exceeds the full risk-based capital requirement for the assets transferred. Transactions that, in substance, result in the retention of credit risk associated with a transferred residual interest are treated as if the residual interest was retained by the savings association and was not transferred.

(iii) *Residual interests and other recourse obligations.* Where a Federal savings association holds a residual interest (including a credit-enhancing interest-only strip) and another recourse obligation in connection with the same transfer of assets, the savings association must maintain risk-based capital equal to the greater of:

(A) The risk-based capital requirement for the residual interest as calculated under paragraph (b)(2)(i) through (ii) of this section; or

(B) The full risk-based capital requirement for the assets transferred, subject to the low-level recourse rules under paragraph (b)(7) of this section.

(3) *Ratings-based approach*—(i) *Calculation.* A Federal savings association may calculate the risk-weighted asset amount for an eligible position described in paragraph (b)(3)(ii) of this section by multiplying the face amount of the position by the appropriate risk weight determined in accordance with Table A or B of this section.

Note: Stripped mortgage-backed securities or other similar instruments, such as interest-only and principal-only strips, that are not credit enhancing must be assigned to the 100% risk-weight category.

TABLE A

Long term rating category	Risk weight (In percent)
Highest or second highest investment grade	20
Third highest investment grade	50
Lowest investment grade	100
One category below investment grade	200

TABLE B

Short term rating category	Risk weight (In percent)
Highest investment grade	20
Second highest investment grade	50
Lowest investment grade	100

(ii) *Eligibility*—(A) *Traded positions.* A position is eligible for the treatment described in paragraph (b)(3)(i) of this section, if:

(*1*) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security and is not a credit-enhancing interest-only strip;

(*2*) The position is a traded position; and

(*3*) The NRSRO has rated a long term position as one grade below investment grade or better or a short term position as investment grade. If two or more NRSROs assign ratings to a traded position, the savings association must use the lowest rating to determine the appropriate risk-weight category under paragraph (b)(3)(i) of this section.

(B) *Non-traded positions.* A position that is not traded is eligible for the treatment described in paragraph (b)(3)(i) of this section if:

(*1*) The position is a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security extended in connection with a securitization and is not a credit-enhancing interest-only strip;

(*2*) More than one NRSRO rate the position;

(*3*) All of the NRSROs that provide a rating rate a long term position as one grade below investment grade or better or a short term position as investment grade. If the NRSROs assign different ratings to the position, the savings association must use the lowest rating to determine the appropriate risk-weight category under paragraph (b)(3)(i) of this section;

(*4*) The NRSROs base their ratings on the same criteria that they use to rate securities that are traded positions; and

(*5*) The ratings are publicly available.

(C) *Unrated senior positions.* If a recourse obligation, direct credit substitute, residual interest, or asset- or mortgage-backed security is not rated by an NRSRO, but is senior or preferred in all features to a traded position (including collateralization and maturity), the savings association may risk-weight the face amount of the senior position under paragraph (b)(3)(i) of this section, based on the rating of the traded position, subject to supervisory guidance. The savings association must satisfy the OCC that this treatment is appropriate. This paragraph (b)(3)(i)(C) applies only if the traded position provides substantive credit support to the unrated position until the unrated position matures.

(4) *Certain positions that are not rated by NRSROs*—(i) *Calculation.* A Federal savings association may calculate the risk-weighted asset amount for eligible position described in paragraph (b)(4)(ii) of this section based on the savings association's determination of the credit rating of the position. To risk-weight the asset, the savings association must multiply the face amount of the position by the appropriate risk weight determined in accordance with Table C of this section.

TABLE C

Rating category	Risk weight (In percent)
Investment grade	100
One category below investment grade	200

(ii) *Eligibility.* A position extended in connection with a securitization is eligible for the treatment described in paragraph (b)(4)(i) of this section if it is not rated by an NRSRO, is not a residual interest, and meets the one of the three alternative standards described in paragraph (b)(4)(ii)(A), (B), or (C) below of this section:

(A) *Position rated internally.* A direct credit substitute, but not a purchased credit-enhancing interest-only strip, is eligible for the treatment described under paragraph (b)(4)(i) of this section, if the position is assumed in connection with an asset-backed commercial paper program sponsored by the savings association. Before it may rely on an internal credit risk rating system, the saving association must demonstrate to the OCC's satisfaction that the system is adequate. Adequate internal credit risk rating systems typically:

(*1*) Are an integral part of the savings association's risk management system that explicitly incorporates the full range of risks arising from the savings association's participation in securitization activities;

(*2*) Link internal credit ratings to measurable outcomes, such as the probability that the position will experience any loss, the expected loss on the position in the event of default, and the degree of variance in losses in the event of default on that position;

(*3*) Separately consider the risk associated with the underlying loans or borrowers, and the risk associated with the structure of the particular securitization transaction;

(*4*) Identify gradations of risk among ''pass'' assets and other risk positions;

(*5*) Use clear, explicit criteria to classify assets into each internal rating grade, including subjective factors;

(*6*) Employ independent credit risk management or loan review personnel to assign or review the credit risk ratings;

(*7*) Include an internal audit procedure to periodically verify that internal risk ratings are assigned in accordance with the savings association's established criteria;

(*8*) Monitor the performance of the assigned internal credit risk ratings over time to determine the appropriateness of the initial credit risk rating assignment, and adjust individual credit risk ratings or the overall internal credit risk rating system, as needed; and

(*9*) Make credit risk rating assumptions that are consistent with, or more conservative than, the credit risk rating assumptions and methodologies of NRSROs.

(B) *Program ratings.* (*1*) A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph (b)(4)(i) of this section, if the position is retained or assumed in connection with a structured finance program and an NRSRO has reviewed the terms of the program and stated a rating for positions associated with the program. If the program has options for different combinations of assets, standards, internal or external credit enhancements and other relevant factors, and the NRSRO specifies ranges of rating categories to them, the savings association may apply the rating category applicable to the option that corresponds to the savings association's position.

(*2*) To rely on a program rating, the savings association must demonstrate to the OCC's satisfaction that the credit risk rating assigned to the program meets the same standards generally used by NRSROs for rating traded positions. The savings association must also demonstrate to the OCC's satisfaction that the criteria underlying the assignments for the program are satisfied by the particular position.

(*3*) If a Federal savings association participates in a securitization sponsored by another party, the OCC may authorize the savings association to use this approach based on a program rating obtained by the sponsor of the program.

(C) *Computer program.* A recourse obligation or direct credit substitute, but not a residual interest, is eligible for the treatment described in paragraph (b)(4)(i) of this section, if the position is extended in connection with a structured financing program and the savings association uses an acceptable credit assessment computer program to determine the rating of the position. An NRSRO must have developed the computer program and the savings association must demonstrate to the OCC's satisfaction that the ratings under the program correspond credibly and reliably with the rating of traded positions.

(5) *Alternative capital computation for small business obligations*— (i) *Definitions.* For the purposes of this paragraph (b)(5):

(A) *Qualified Federal savings association* means a savings association that:

(*1*) Is well capitalized as defined in § 165.4 of this chapter without applying the capital treatment described in this paragraph (b)(5); or

(*2*) Is adequately capitalized as defined in § 165.4 of this chapter without applying the capital treatment described in this paragraph (b)(5) and has received written permission from the OCC to apply that capital treatment.

(B) *Small business* means a business that meets the criteria for a small business concern established by the Small Business Administration in 13 CFR 121 pursuant to 15 U.S.C. 632.

(ii) *Capital requirement.* Notwithstanding any other provision of this paragraph (b), with respect to a transfer of a small business loan or lease of personal property with recourse that is a sale under GAAP, a qualified Federal savings association may elect to include only the amount of its recourse in its risk-weighted assets. To qualify for this election, the savings association must establish and maintain a reserve under GAAP sufficient to meet the reasonable estimated liability of the savings association under the recourse obligation.

(iii) *Aggregate amount of recourse.* The total outstanding amount of recourse retained by a qualified Federal savings association with respect to transfers of small business loans and leases of personal property and included in the risk-weighted assets of the savings association as described in paragraph (b)(5)(ii) of this section, may not exceed 15 percent of the association's total capital computed under § 167.5(c).

(iv) *Federal savings association that ceases to be a qualified Federal savings association or that exceeds aggregate limits.* If a Federal savings association ceases to be a qualified savings association or exceeds the aggregate limit described in paragraph (b)(5)(iii) of this section, the savings association may continue to apply the capital treatment described in paragraph (b)(5)(ii) of this section to transfers of small business loans and leases of personal property that occurred when the association was a qualified savings association and did not exceed the limit.

(v) *Prompt corrective action not affected.* (A) A Federal savings association shall compute its capital without regard to this paragraph (b)(5) of this section for purposes of prompt corrective action (12 U.S.C. 1831o), unless the savings association is adequately or well capitalized without applying the capital treatment described in this paragraph (b)(5) and would be well capitalized after applying that capital treatment.

(B) A Federal savings association shall compute its capital requirement without regard to this paragraph (b)(5) for the purposes of applying 12 U.S.C. 1831o(g), regardless of the association's capital level.

(6) *Risk participations and syndications of direct credit substitutes.* A Federal savings association must calculate the risk-weighted asset amount for a risk participation in, or syndication of, a direct credit substitute as follows:

(i) If a Federal savings association conveys a risk participation in a direct credit substitute, the savings association must convert the full amount of the assets that are supported by the direct credit substitute to a credit equivalent amount using a 100 percent conversion factor. The savings association must assign the *pro rata* share of the credit equivalent amount that was conveyed through the risk participation to the lower of: The risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral; or the risk-weight category appropriate to the party acquiring the participation. The savings association must assign the *pro rata* share of the credit equivalent amount that was not participated out to the risk-weight category appropriate to the obligor, after considering any associated guarantees or collateral.

(ii) If a Federal savings association acquires a risk participation in a direct

credit substitute, the savings association must multiply its *pro rata* share of the direct credit substitute by the full amount of the assets that are supported by the direct credit substitute, and convert this amount to a credit equivalent amount using a 100 percent conversion factor. The savings association must assign the resulting credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction, after considering any associated guarantees or collateral.

(iii) If the Federal savings association holds a direct credit substitute in the form of a syndication where each savings association or other participant is obligated only for its *pro rata* share of the risk and there is no recourse to the originating party, the savings association must calculate the credit equivalent amount by multiplying only its *pro rata* share of the assets supported by the direct credit substitute by a 100 percent conversion factor. The savings association must assign the resulting credit equivalent amount to the risk-weight category appropriate to the obligor in the underlying transaction after considering any associated guarantees or collateral.

(7) *Limitations on risk-based capital requirements*—(i) *Low-level exposure rule.* If the maximum contractual exposure to loss retained or assumed by a Federal savings association is less than the effective risk-based capital requirement, as determined in accordance with this paragraph (b), for the assets supported by the savings association's position, the risk-based capital requirement is limited to the savings association's contractual exposure less any recourse liability account established in accordance with GAAP. This limitation does not apply when a Federal savings association provides credit enhancement beyond any contractual obligation to support assets it has sold.

(ii) *Mortgage-related securities or participation certificates retained in a mortgage loan swap.* If a Federal savings association holds a mortgage-related security or a participation certificate as a result of a mortgage loan swap with recourse, it must hold risk-based capital to support the recourse obligation and that percentage of the mortgage-related security or participation certificate that is not covered by the recourse obligation. The total amount of risk-based capital required for the security (or certificate) and the recourse obligation is limited to the risk-based capital requirement for the underlying loans, calculated as if the savings association continued to hold these loans as an on-balance sheet asset.

(iii) *Related on-balance sheet assets.* If an asset is included in the calculation of the risk-based capital requirement under this paragraph (b) and also appears as an asset on the savings association's balance sheet, the savings association must risk-weight the asset only under this paragraph (b), except in the case of loan servicing assets and similar arrangements with embedded recourse obligations or direct credit substitutes. In that case, the savings association must separately risk-weight the on-balance sheet servicing asset and the related recourse obligations and direct credit substitutes under this section, and incorporate these amounts into the risk-based capital calculation.

(8) *Obligations of subsidiaries.* If a Federal savings association retains a recourse obligation or assumes a direct credit substitute on the obligation of a subsidiary that is not an includable subsidiary, and the recourse obligation or direct credit substitute is an equity or debt investment in that subsidiary under GAAP, the face amount of the recourse obligation or direct credit substitute is deducted for capital under §§ 167.5(a)(2) and 167.9(c). All other recourse obligations and direct credit substitutes retained or assumed by a Federal savings association on the obligations of an entity in which the savings association has an equity investment are risk-weighted in accordance with this paragraph (b).

§ 167.8 Leverage ratio.

(a) The minimum leverage capital requirement for a Federal savings association assigned a composite rating of 1, as defined in § 116.3 of this chapter, shall consist of a ratio of core capital to adjusted total assets of 3 percent. These generally are strong associations that are not anticipating or experiencing significant growth and have well-diversified risks, including no undue interest rate risk exposure, excellent asset quality, high liquidity, and good earnings.

(b) For all Federal savings associations not meeting the conditions set forth in paragraph (a) of this section, the minimum leverage capital requirement shall consist of a ratio of core capital to adjusted total assets of 4 percent. Higher capital ratios may be required if warranted by the particular circumstances or risk profiles of an individual Federal savings association. In all cases, Federal savings associations should hold capital commensurate with the level and nature of all risks, including the volume and severity of problem loans, to which they are exposed.

§ 167.9 Tangible capital requirement.

(a) Federal savings associations shall have and maintain tangible capital in an amount equal to at least 1.5% of adjusted total assets.

(b) The following elements, less the amount of any deductions pursuant to paragraph (c) of this section, comprise a Federal savings association's tangible capital:

(1) Common stockholders' equity (including retained earnings);

(2) Noncumulative perpetual preferred stock and related earnings;

(3) Nonwithdrawable accounts and pledged deposits that would qualify as core capital under § 167.5 of this part; and

(4) Minority interests in the equity accounts of fully consolidated subsidiaries.

(c) *Deductions from tangible capital.* In calculating tangible capital, a Federal savings association must deduct from assets, and, thus, from capital:

(1) Intangible assets (as defined in § 167.1) except for mortgage servicing assets to the extent they are includable in tangible capital under § 167.12, and credit enhancing interest-only strips and deferred tax assets not includable in tangible capital under § 167.12.

(2) Investments, both equity and debt, in subsidiaries that are not includable subsidiaries (including those subsidiaries where the savings association has a minority ownership interest), except as provided in paragraphs (c)(3) and (c)(4) of this section.

(3) If a Federal savings association has any investments (both debt and equity) in one or more subsidiary(ies) engaged in any activity that would not fall within the scope of activities in which includable subsidiaries may engage, it must deduct such investments from assets and, thus, tangible capital in accordance with this paragraph (c)(3). The savings association must first deduct from assets and, thus, capital the amount by which any investments in such a subsidiary(ies) exceed the amount of such investments held by the savings association. Next, the savings association must deduct from assets and, thus, tangible capital the savings association's investments in and extensions of credit to the subsidiary on the date as of which the savings association's capital is being determined.

(4) If a savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution the OCC may, in

its sole discretion upon determining that the amount of tangible capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent savings association than the amount that would be required if the parent savings association's investment were deducted pursuant to paragraphs (c)(2) and (c)(3) of this section, consolidate the assets and liabilities of that subsidiary with those of the parent savings association in calculating the capital adequacy of the parent savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in § 167.1 of this part.

§ 167.10 Consequences of failure to meet capital requirements.

(a) *Capital plans.* (1) [Reserved]

(2) The OCC shall require any Federal savings association not in compliance with capital standards to submit a capital plan that:

(i) Addresses the savings association's need for increased capital;

(ii) Describes the manner in which the savings association will increase capital so as to achieve compliance with capital standards;

(iii) Specifies types and levels of activities in which the savings association will engage;

(iv) Requires any increase in assets to be accompanied by increase in tangible capital not less in percentage amount than the leverage limit then applicable;

(v) Requires any increase in assets to be accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standard then applicable; and

(vi) Is acceptable to the Comptroller.

(3) To be acceptable to the Comptroller under this section, a plan must, in addition to satisfying all of the requirements set forth in paragraphs (a)(2)(i) through (a)(2)(v) of this section, contain a certification that while the plan is under review by the OCC, the savings association will not, without the prior written approval of the OCC:

(i) Grow beyond net interest credited;

(ii) Make any capital distributions; or

(iii) Act inconsistently with any other limitations on activities established by statute, regulation or by the OCC in supervisory guidance for Federal savings associations not meeting capital standards.

(4) If the plan submitted to the Comptroller under paragraph (a)(2) of this section is not approved by the Comptroller, the savings association shall immediately and without any further action, be subject to the following restrictions:

(i) It may not increase its assets beyond the amount held on the day it receives written notice of the Comptroller's disapproval of the plan; and

(ii) It must comply with any other restrictions or limitations set forth in the written notice of the Comptroller's disapproval of the plan.

(b) The Comptroller shall:

(1) Prohibit any asset growth by any Federal savings association not in compliance with capital standards, *except* as provided in paragraph (d) of this section; and

(2) Require any Federal savings association not in compliance with capital standards to comply with a capital directive issued by the Comptroller which may include the restrictions contained in paragraph (e) of this section and any other restrictions the Comptroller determines appropriate.

(c) A Federal savings association that wishes to obtain an exemption from the sanctions provided in paragraph (b)(2) of this section must file a request for exemption with the OCC. Such request must include a capital plan that satisfies the requirements of paragraph (a)(2) of this section.

(d) The Comptroller may permit any Federal savings association that is subject to paragraph (b) of this section to increase its assets in an amount not exceeding the amount of net interest credited to the savings association's deposit liabilities, if:

(1) The savings association obtains the Comptroller's prior approval;

(2) Any increase in assets is accompanied by an increase in tangible capital in an amount not less than 3% of the increase in assets;

(3) Any increase in assets is accompanied by an increase in capital not less in percentage amount than required under the risk-based capital standards then applicable;

(4) Any increase in assets is invested in low-risk assets; and

(5) The savings association's ratio of core capital to total assets is not less than the ratio existing on January 1, 1991.

(e) If a Federal savings association fails to meet the risk-based capital requirement, the leverage ratio requirement, or the tangible capital requirement established under this part, the Comptroller may, through enforcement proceedings or otherwise, require such savings association to take one or more of the following corrective actions:

(1) Increase the amount of its regulatory capital to a specified level or levels;

(2) Convene a meeting or meetings with the supervision staff of the OCC for the purpose of accomplishing the objectives of this section;

(3) Reduce the rate of earnings that may be paid on savings accounts;

(4) Limit the receipt of deposits to those made to existing accounts;

(5) Cease or limit the issuance of new accounts of any or all classes or categories, except in exchange for existing accounts;

(6) Cease or limit lending or the making of a particular type or category of loan;

(7) Cease or limit the purchase of loans or the making of specified other investments;

(8) Limit operational expenditures to specified levels;

(9) Increase liquid assets and maintain such increased liquidity at specified levels; or

(10) Take such other action or actions as the Comptroller may deem necessary or appropriate for the safety and soundness of the savings association, or depositors or investors in the savings association.

(f) The Comptroller shall treat as an unsafe and unsound practice any material failure by a Federal savings association to comply with any plan, regulation, written agreement undertaken under this section or order or directive issued to comply with the requirements of this part.

§ 167.11 Reservation of authority.

(a) *Transactions for purposes of evasion.* The Comptroller may disregard any transaction entered into primarily for the purpose of reducing the minimum required amount of regulatory capital or otherwise evading the requirements of this part.

(b) *Average versus period-end figures.* The OCC reserves the right to require a Federal savings association to compute its capital ratios on the basis of average, rather than period-end, assets when the OCC determines appropriate to carry out the purposes of this part.

(c)(1) *Reservation of authority.* Notwithstanding the definitions of core and supplementary capital in § 167.5 of this part, the OCC may find that a particular type of purchased intangible asset or capital instrument constitutes or may constitute core or supplementary capital, and may permit one or more Federal savings associations to include all or a portion of such intangible asset or funds obtained through such capital instrument as core or supplementary capital, permanently or on a temporary basis, for the purposes of compliance with this part or for any other purposes. Similarly, the OCC may find that a

particular asset or core or supplementary capital component has characteristics or terms that diminish its contribution to a Federal savings association's ability to absorb losses, and the OCC may require the discounting or deduction of such asset or component from the computation of core, supplementary, or total capital.

(2) Notwithstanding § 167.6 of this part, the OCC will look to the substance of a transaction and may find that the assigned risk weight for any asset, or credit equivalent amount or credit conversion factor for any off-balance sheet item does not appropriately reflect the risks imposed on the savings association. The OCC may require the savings association to apply another risk-weight, credit equivalent amount, or credit conversion factor that the OCC deems appropriate.

(3) The OCC may find that the capital treatment for an exposure to a transaction not subject to consolidation on the savings association's balance sheet does not appropriately reflect the risks imposed on the savings association. Accordingly, the OCC may require the savings association to treat the transaction as if it were consolidated on the savings association's balance sheet. The OCC will look to the substance of and risk associated with the transaction as well as other relevant factors in determining whether to require such treatment and in calculating risk based capital as the OCC deems appropriate.

(4) If this part does not specifically assign a risk weight, credit equivalent amount, or credit conversion factor, the OCC may assign any risk weight, credit equivalent amount, or credit conversion factor that it deems appropriate. In making this determination, the OCC will consider the risks associated with the asset or off-balance sheet item as well as other relevant factors.

(d) In making a determination under this paragraph (c) of this section, the OCC will notify the savings association of the determination and solicit a response from the savings association. After review of the response by the savings association, the OCC shall issue a final supervisory decision regarding the determination made under paragraph (c) of this section.

§ 167.12 Purchased credit card relationships, servicing assets, intangible assets (other than purchased credit card relationships and servicing assets), credit-enhancing interest-only strips, and deferred tax assets.

(a) *Scope.* This section prescribes the maximum amount of purchased credit card relationships, serving assets, intangible assets (other than purchased credit card relationships and servicing assets), credit-enhancing interest-only strips, and deferred tax assets that Federal savings associations may include in calculating tangible and core capital.

(b) *Computation of core and tangible capital.* (1) Purchased credit card relationships may be included (that is, not deducted) in computing core capital in accordance with the restrictions in this section, but must be deducted in computing tangible capital.

(2) In accordance with the restrictions in this section, mortgage servicing assets may be included in computing core and tangible capital and nonmortgage servicing assets may be included in core capital.

(3) Intangible assets, as defined in § 167.1 of this part, other than purchased credit card relationships described in paragraph (b)(1) of this section, servicing assets described in paragraph (b)(2) of this section, and core deposit intangibles described in paragraph (g)(3) of this section, are deducted in computing tangible and core capital, subject to paragraph (e)(3)(ii) of this section.

(4) Credit-enhancing interest-only strips may be included (that is not deducted) in computing core capital subject to the restrictions of this section, and may be included in tangible capital in the same amount.

(5) Deferred tax assets may be included (that is not deducted) in computing core capital subject to the restrictions of paragraph (h) of this section, and may be included in tangible capital in the same amount.

(c) *Market valuations.* The OCC reserves the authority to require any Federal savings association to perform an independent market valuation of assets subject to this section on a case-by-case basis or through the issuance of policy guidance. An independent market valuation, if required, shall be conducted in accordance with any policy guidance issued by the OCC. A required valuation shall include adjustments for any significant changes in original valuation assumptions, including changes in prepayment estimates or attrition rates. The valuation shall determine the current fair value of assets subject to this section. This independent market valuation may be conducted by an independent valuation expert evaluating the reasonableness of the internal calculations and assumptions used by the association in conducting its internal analysis. The association shall calculate an estimated fair value for assets subject to this section at least quarterly regardless of whether an independent valuation expert is required to perform an independent market valuation.

(d) *Value limitation.* For purposes of calculating core capital under this part (but not for financial statement purposes), purchased credit card relationships and servicing assets must be valued at the lesser of:

(1) 90 percent of their fair value determined in accordance with paragraph (c) of this section; or

(2) 100 percent of their remaining unamortized book value determined in accordance with the instructions for the Call Report or TFR, as appropriate.

(e) *Core capital limitations*—(1) *Servicing assets and purchased credit card relationships.* (i) The maximum aggregate amount of servicing assets and purchased credit card relationships that may be included in core capital is limited to the lesser of:

(A) 100 percent of the amount of core capital; or

(B) The amount of servicing assets and purchased credit card relationships determined in accordance with paragraph (d) of this section.

(ii) In addition to the aggregate limitation in paragraph (e)(1)(i) of this section, a sublimit applies to purchased credit card relationships and non mortgage-related serving assets. The maximum allowable amount of these two types of assets combined is limited to the lesser of:

(A) 25 percent the amount of core capital; and

(B) The amount of purchased credit card relationships and non mortgage-related servicing assets determined in accordance with paragraph (d) of this section.

(2) *Credit-enhancing interest-only strips.* The maximum aggregate amount of credit-enhancing interest-only strips that may be included in core capital is limited to 25 percent of the amount of core capital. Purchased and retained credit-enhancing interest-only strips, on a non-tax adjusted basis, are included in the total amount that is used for purposes of determining whether a Federal savings association exceeds the core capital limit.

(3) *Computation.* (i) For purposes of computing the limits and sublimits in paragraphs (e) and (h) of this section, core capital is computed before the deduction of disallowed servicing assets, disallowed purchased credit card relationships, disallowed credit-enhancing interest-only strips (purchased and retained), and disallowed deferred tax assets.

(ii) A Federal savings association may elect to deduct the following items on a basis net of deferred tax liabilities:

(A) Disallowed servicing assets;

(B) Goodwill such that only the net amount must be deducted from Tier 1 capital;

(C) Disallowed credit-enhancing interest only strips (both purchased and retained); and

(D) Other intangible assets arising from non-taxable business combinations. A deferred tax liability that is specifically related to an intangible asset (other than purchased credit card relationships) arising from a nontaxable business combination may be netted against this intangible asset. The net amount of the intangible asset must be deducted from Tier 1 capital.

(iii) Deferred tax liabilities that are netted in accordance with paragraph (e)(3)(ii) of this section cannot also be netted against deferred tax assets when determining the amount of deferred tax assets that are dependent upon future taxable income.

(f) *Tangible capital limitation.* The maximum amount of mortgage servicing assets that may be included in tangible capital shall be the same amount includable in core capital in accordance with the limitations set by paragraph (e) of this section. All nonmortgage servicing assets are deducted in computing tangible capital.

(g) *Exemption for certain subsidiaries*—(1) *Exemption standard.* An association holding purchased mortgage servicing rights in separately capitalized, nonincludable subsidiaries may submit an application for approval by the OCC for an exemption from the deductions and limitations set forth in this section. The deductions and limitations will apply to such purchased mortgage servicing rights, however, if the OCC determines that:

(i) The thrift and subsidiary are not conducting activities on an arm's length basis; or

(ii) The exemption is not consistent with the association's safe and sound operation.

(2) *Applicable requirements.* If the OCC determines to grant or to permit the continuation of an exemption under paragraph (h)(1) of this section, the association receiving the exemption must ensure the following:

(i) The association's investments in, and extensions of credit to, the subsidiary are deducted from capital when calculating capital under this part;

(ii) Extensions of credit and other transactions with the subsidiary are conducted in compliance with the rules for covered transactions with affiliates set forth in sections 23A and 23B of the Federal Reserve Act, as applied to thrifts; and

(iii) Any contracts entered into by the subsidiary include a written disclosure indicating that the subsidiary is not a bank or Federal savings association; the subsidiary is an organization separate and apart from any bank or Federal savings association; and the obligations of the subsidiary are not backed or guaranteed by any bank or Federal savings association and are not insured by the FDIC.

(h) *Treatment of deferred tax assets.* For purposes of calculating Tier 1 capital under this part (but not for financial statement purposes) deferred tax assets are subject to the conditions, limitations, and restrictions described in this section.

(1) Tier 1 capital limitations. (i) The maximum allowable amount of deferred tax assets net of any valuation allowance that are dependent upon future taxable income will be limited to the lesser of:

(A) The amount of deferred tax assets that are dependent upon future taxable income that is expected to be realized within one year of the calendar quarter-end date, based on a projected future taxable income for that year; or

(B) Ten percent of the amount of Tier 1 capital that exists before the deduction of any disallowed servicing assets, any disallowed purchased credit card relationships, any disallowed credit-enhancing interest-only strips, and any disallowed deferred tax assets.

(ii) For purposes of this limitation, all existing temporary differences should be assumed to fully reverse at the calendar quarter-end date. The recorded amount of deferred tax assets that are dependent upon future taxable income, net of any valuation allowance for deferred tax assets, in excess of this limitation will be deducted from assets and from equity capital for purposes of determining Tier 1 capital under this part. The amount of deferred tax assets that can be realized from taxes paid in prior carryback years and from the reversal of existing taxable temporary differences generally would not be deducted from assets and from equity capital.

(iii) Notwithstanding paragraph (h)(1)(B)(ii) of this section, the amount of carryback potential that may be considered in calculating the amount of deferred tax assets that a Federal savings association that is part of a consolidated group (for tax purposes) may include in Tier 1 capital may not exceed the amount which the association could reasonably expect to have refunded by its parent.

(2) Projected future taxable income. Projected future taxable income should not include net operating loss carryforwards to be used within one year of the most recent calendar quarter-end date or the amount of existing temporary differences expected to reverse within that year. Projected future taxable income should include the estimated effect of tax planning strategies that are expected to be implemented to realize tax carryforwards that will otherwise expire during that year. Future taxable income projections for the current fiscal year (adjusted for any significant changes that have occurred or are expected to occur) may be used when applying the capital limit at an interim calendar quarter-end date rather than preparing a new projection each quarter.

(3) *Unrealized holding gains and losses on available-for-sale debt securities.* The deferred tax effects of any unrealized holding gains and losses on available-for-sale debt securities may be excluded from the determination of the amount of deferred tax assets that are dependent upon future taxable income and the calculation of the maximum allowable amount of such assets. If these deferred tax effects are excluded, this treatment must be followed consistently over time.

§ 167.14–167.19 [Reserved]

Appendixes A–B to Part 167 [Reserved]

Appendix C to Part 167—Risk-Based Capital Requirements—Internal-Ratings-Based and Advanced Measurement Approaches

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Part I. General Provisions

Section 1. Purpose, Applicability, Reservation of Authority, and Principle of Conservatism

(a) *Purpose.* This appendix establishes:

(1) Minimum qualifying criteria for Federal savings associations using Federal savings association-specific internal risk measurement and management processes for calculating risk-based capital requirements;

(2) Methodologies for such Federal savings associations to calculate their risk-based capital requirements; and

(3) Public disclosure requirements for such Federal savings associations.

(b) *Applicability.* (1) This appendix applies to a Federal savings association that:

(i) Has consolidated assets, as reported on the most recent year-end Consolidated Reports of Condition and Income (Call Report) or Thrift Financial Report (TFR), as appropriate, equal to $250 billion or more;

(ii) Has consolidated total on-balance sheet foreign exposure at the most recent year-end equal to $10 billion or more (where total on-balance sheet foreign exposure equals total cross-border claims less claims with head office or guarantor located in another country plus redistributed guaranteed amounts to the country of head office or guarantor plus local country claims on local residents plus revaluation gains on foreign exchange and derivative products, calculated in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report);

(iii) Is a subsidiary of a depository institution that uses 12 CFR part 3, appendix C, 12 CFR part 208, appendix F, 12 CFR part 325, appendix D, or 12 CFR part 167, appendix C, to calculate its risk-based capital requirements; or

(iv) Is a subsidiary of a bank holding company that uses 12 CFR part 225, appendix G, to calculate its risk-based capital requirements.

(2) Any Federal savings association may elect to use this appendix to calculate its risk-based capital requirements.

(3) A Federal savings association that is subject to this appendix must use this appendix unless the OCC determines in writing that application of this appendix is not appropriate in light of the savings association's asset size, level of complexity, risk profile, or scope of operations. In making a determination under this paragraph, the OCC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 167.3(d).

(c) *Reservation of authority*—(1) *Additional capital in the aggregate.* The OCC may require a Federal savings association to hold an amount of capital greater than otherwise required under this appendix if the OCC determines that the savings association's risk-based capital requirement under this appendix is not commensurate with the savings association's credit, market, operational, or other risks. In making a determination under this paragraph, the OCC will apply notice and response procedures in the same manner and to the same extent as the notice and response procedures in § 167.3(d).

(2) *Specific risk-weighted asset amounts.* (i) If the OCC determines that the risk-weighted asset amount calculated under this appendix by the savings association for one or more exposures is not commensurate with the risks associated with those exposures, the OCC may require the savings association to assign a different risk-weighted asset amount to the exposures, to assign different risk parameters to the exposures (if the exposures are wholesale or retail exposures), or to use different model assumptions for the exposures (if relevant), all as specified by the OCC.

(ii) If the OCC determines that the risk-weighted asset amount for operational risk produced by the savings association under this appendix is not commensurate with the operational risks of the savings association, the OCC may require the savings association to assign a different risk-weighted asset amount for operational risk, to change elements of its operational risk analytical framework, including distributional and dependence assumptions, or to make other changes to the savings association's operational risk management processes, data and assessment systems, or quantification systems, all as specified by the OCC.

(3) *Regulatory capital treatment of unconsolidated entities.* The OCC may find that the capital treatment for an exposure to a transaction not subject to consolidation on the savings association's balance sheet does not appropriately reflect the risks imposed on the savings association. Accordingly, the OCC may require the savings association to treat the transaction as if it were consolidated on the savings association's balance sheet. The OCC will look to the substance of and risk associated with the transaction as well as other relevant factors in determining whether to require such treatment and in calculating risk-based capital as the OCC deems appropriate.

(4) *Other supervisory authority.* Nothing in this appendix limits the authority of the OCC under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient capital levels, or violations of law.

(d) *Principle of conservatism.* Notwithstanding the requirements of this appendix, a Federal savings association may choose not to apply a provision of this appendix to one or more exposures, provided that:

(1) The savings association can demonstrate on an ongoing basis to the satisfaction of the OCC that not applying the provision would, in all circumstances, unambiguously generate a risk-based capital requirement for each such exposure greater than that which would otherwise be required under this appendix;

(2) The savings association appropriately manages the risk of each such exposure;

(3) The savings association notifies the OCC in writing prior to applying this principle to each such exposure; and

(4) The exposures to which the savings association applies this principle are not, in the aggregate, material to the savings association.

Section 2. Definitions

Advanced internal ratings-based (IRB) systems means a Federal savings association's internal risk rating and segmentation system; risk parameter quantification system; data management and maintenance system; and control, oversight, and validation system for credit risk of wholesale and retail exposures.

Advanced systems means a Federal savings association's advanced IRB systems, operational risk management processes, operational risk data and assessment systems, operational risk quantification systems, and, to the extent the savings association uses the following systems, the internal models methodology, double default excessive correlation detection process, IMA for equity exposures, and IAA for securitization exposures to ABCP programs.

Affiliate with respect to a company means any company that controls, is controlled by, or is under common control with, the company.

Applicable external rating means:

(1) With respect to an exposure that has multiple external ratings assigned by NRSROs, the lowest solicited external rating assigned to the exposure by any NRSRO; and

(2) With respect to an exposure that has a single external rating assigned by an NRSRO, the external rating assigned to the exposure by the NRSRO.

Applicable inferred rating means:

(1) With respect to an exposure that has multiple inferred ratings, the lowest inferred rating based on a solicited external rating; and

(2) With respect to an exposure that has a single inferred rating, the inferred rating.

Asset-backed commercial paper (ABCP) program means a program that primarily issues commercial paper that:

(1) Has an external rating; and

(2) Is backed by underlying exposures held in a bankruptcy-remote SPE.

Asset-backed commercial paper (ABCP) program sponsor means a Federal savings association that:

(1) Establishes an ABCP program;

(2) Approves the sellers permitted to participate in an ABCP program;

(3) Approves the exposures to be purchased by an ABCP program; or

(4) Administers the ABCP program by monitoring the underlying exposures, underwriting or otherwise arranging for the placement of debt or other obligations issued by the program, compiling monthly reports, or ensuring compliance with the program documents and with the program's credit and investment policy.

Backtesting means the comparison of a Federal savings association's internal estimates with actual outcomes during a sample period not used in model development. In this context, backtesting is one form of out-of-sample testing.

Bank holding company is defined in section 2 of the Bank Holding Company Act (12 U.S.C. 1841).

Benchmarking means the comparison of a Federal savings association's internal estimates with relevant internal and external data or with estimates based on other estimation techniques.

Business environment and internal control factors means the indicators of a Federal savings association's operational risk profile that reflect a current and forward-looking assessment of the savings association's underlying business risk factors and internal control environment.

Carrying value means, with respect to an asset, the value of the asset on the balance sheet of the Federal savings association, determined in accordance with GAAP.

Clean-up call means a contractual provision that permits an originating Federal savings association or servicer to call securitization exposures before their stated maturity or call date. See also *eligible clean-up call.*

Commodity derivative contract means a commodity-linked swap, purchased commodity-linked option, forward commodity-linked contract, or any other instrument linked to commodities that gives rise to similar counterparty credit risks.

Company means a corporation, partnership, limited liability company, depository institution, business trust, special purpose entity, association, or similar organization.

Control. A person or company *controls* a company if it:

(1) Owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or

(2) Consolidates the company for financial reporting purposes.

Controlled early amortization provision means an early amortization provision that meets all the following conditions:

(1) The originating Federal savings association has appropriate policies and procedures to ensure that it has sufficient capital and liquidity available in the event of an early amortization;

(2) Throughout the duration of the securitization (including the early amortization period), there is the same pro rata sharing of interest, principal, expenses, losses, fees, recoveries, and other cash flows from the underlying exposures based on the originating Federal savings association's and the investors' relative shares of the underlying exposures outstanding measured on a consistent monthly basis;

(3) The amortization period is sufficient for at least 90 percent of the total underlying exposures outstanding at the beginning of the early amortization period to be repaid or recognized as in default; and

(4) The schedule for repayment of investor principal is not more rapid than would be allowed by straight-line amortization over an 18-month period.

Credit derivative means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures (reference exposure) to another party (the protection provider). See also *eligible credit derivative.*

Credit-enhancing interest-only strip (CEIO) means an on-balance sheet asset that, in form or in substance:

(1) Represents a contractual right to receive some or all of the interest and no more than a minimal amount of principal due on the underlying exposures of a securitization; and

(2) Exposes the holder to credit risk directly or indirectly associated with the underlying exposures that exceeds a pro rata share of the holder's claim on the underlying exposures, whether through subordination provisions or other credit-enhancement techniques.

Credit-enhancing representations and warranties means representations and warranties that are made or assumed in connection with a transfer of underlying exposures (including loan servicing assets) and that obligate a Federal savings association to protect another party from losses arising from the credit risk of the underlying exposures. Credit-enhancing representations and warranties include provisions to protect a party from losses resulting from the default or nonperformance of the obligors of the underlying exposures or from an insufficiency in the value of the collateral backing the underlying exposures. Credit-enhancing representations and warranties do not include:

(1) Early default clauses and similar warranties that permit the return of, or premium refund clauses that cover, first-lien residential mortgage exposures for a period not to exceed 120 days from the date of transfer, provided that the date of transfer is within one year of origination of the residential mortgage exposure;

(2) Premium refund clauses that cover underlying exposures guaranteed, in whole or in part, by the U.S. government, a U.S. government agency, or a U.S. government sponsored enterprise, provided that the clauses are for a period not to exceed 120 days from the date of transfer; or

(3) Warranties that permit the return of underlying exposures in instances of misrepresentation, fraud, or incomplete documentation.

Credit risk mitigant means collateral, a credit derivative, or a guarantee.

Credit-risk-weighted assets means 1.06 multiplied by the sum of:

(1) Total wholesale and retail risk-weighted assets;

(2) Risk-weighted assets for securitization exposures; and

(3) Risk-weighted assets for equity exposures.

Current exposure means, with respect to a netting set, the larger of zero or the market value of a transaction or portfolio of transactions within the netting set that would be lost upon default of the counterparty, assuming no recovery on the value of the transactions. Current exposure is also called replacement cost.

Default—(1) *Retail.* (i) A retail exposure of a Federal savings association is in default if:

(A) The exposure is 180 days past due, in the case of a residential mortgage exposure or revolving exposure;

(B) The exposure is 120 days past due, in the case of all other retail exposures; or

(C) The savings association has taken a full or partial charge-off, write-down of principal, or material negative fair value adjustment of principal on the exposure for credit-related reasons.

(ii) Notwithstanding paragraph (1)(i) of this definition, for a retail exposure held by a non-U.S. subsidiary of the savings association that is subject to an internal ratings-based approach to capital adequacy consistent with the Basel Committee on Banking Supervision's ''International Convergence of Capital Measurement and Capital Standards: A Revised Framework'' in a non-U.S. jurisdiction, the savings association may elect to use the definition of default that is used in that jurisdiction, provided that the savings association has obtained prior approval from the OCC to use the definition of default in that jurisdiction.

(iii) A retail exposure in default remains in default until the savings association has reasonable assurance of repayment and performance for all contractual principal and interest payments on the exposure.

(2) *Wholesale.* (i) A Federal savings association's wholesale obligor is in default if:

(A) The savings association determines that the obligor is unlikely to pay its credit obligations to the savings association in full, without recourse by the savings association to actions such as realizing collateral (if held); or

(B) The obligor is past due more than 90 days on any material credit obligation(s) to the savings association.[1]

(ii) An obligor in default remains in default until the savings association has reasonable assurance of repayment and performance for all contractual principal and interest payments on all exposures of the savings association to the obligor (other than exposures that have been fully written-down or charged-off).

Dependence means a measure of the association among operational losses across and within units of measure.

Depository institution is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

Derivative contract means a financial contract whose value is derived from the values of one or more underlying assets, reference rates, or indices of asset values or reference rates. Derivative contracts include interest rate derivative contracts, exchange rate derivative contracts, equity derivative contracts, commodity derivative contracts, credit derivatives, and any other instrument that poses similar counterparty credit risks. Derivative contracts also include unsettled securities, commodities, and foreign exchange transactions with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days.

Early amortization provision means a provision in the documentation governing a securitization that, when triggered, causes investors in the securitization exposures to be repaid before the original stated maturity of the securitization exposures, unless the provision:

(1) Is triggered solely by events not directly related to the performance of the underlying exposures or the originating Federal savings association (such as material changes in tax laws or regulations); or

(2) Leaves investors fully exposed to future draws by obligors on the underlying exposures even after the provision is triggered.

Economic downturn conditions means, with respect to an exposure held by the savings association, those conditions in which the aggregate default rates for that exposure's wholesale or retail exposure subcategory (or subdivision of such subcategory selected by the savings association) in the exposure's national jurisdiction (or subdivision of such jurisdiction selected by the savings association) are significantly higher than average.

Effective maturity (M) of a wholesale exposure means:

(1) For wholesale exposures other than repo-style transactions, eligible margin loans, and OTC derivative contracts described in paragraph (2) or (3) of this definition:

(i) The weighted-average remaining maturity (measured in years, whole or fractional) of the expected contractual cash flows from the exposure, using the undiscounted amounts of the cash flows as weights; or

(ii) The nominal remaining maturity (measured in years, whole or fractional) of the exposure.

(2) For repo-style transactions, eligible margin loans, and OTC derivative contracts subject to a qualifying master netting agreement for which the savings association does not apply the internal models approach in paragraph (d) of section 32 of this appendix, the weighted-average remaining maturity (measured in years, whole or fractional) of the individual transactions subject to the qualifying master netting agreement, with the weight of each individual transaction set equal to the notional amount of the transaction.

(3) For repo-style transactions, eligible margin loans, and OTC derivative contracts for which the savings association applies the internal models approach in paragraph (d) of section 32 of this appendix, the value determined in paragraph (d)(4) of section 32 of this appendix.

Effective notional amount means, for an eligible guarantee or eligible credit derivative, the lesser of the contractual notional amount of the credit risk mitigant and the EAD of the hedged exposure, multiplied by the percentage coverage of the credit risk mitigant. For example, the effective notional amount of an eligible guarantee that covers, on a pro rata basis, 40 percent of any losses on a $100 bond would be $40.

Eligible clean-up call means a clean-up call that:

(1) Is exercisable solely at the discretion of the originating Federal savings association or servicer;

(2) Is not structured to avoid allocating losses to securitization exposures held by investors or otherwise structured to provide credit enhancement to the securitization; and

(3)(i) For a traditional securitization, is only exercisable when 10 percent or less of the principal amount of the underlying exposures or securitization exposures (determined as of the inception of the securitization) is outstanding; or

(ii) For a synthetic securitization, is only exercisable when 10 percent or less of the principal amount of the reference portfolio of underlying exposures (determined as of the inception of the securitization) is outstanding.

Eligible credit derivative means a credit derivative in the form of a credit default swap, nth-to-default swap, total return swap, or any other form of credit derivative approved by the OCC, provided that:

(1) The contract meets the requirements of an eligible guarantee and has been confirmed by the protection purchaser and the protection provider;

(2) Any assignment of the contract has been confirmed by all relevant parties;

(3) If the credit derivative is a credit default swap or nth-to-default swap, the contract includes the following credit events:

(i) Failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and

(ii) Bankruptcy, insolvency, or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;

(4) The terms and conditions dictating the manner in which the contract is to be settled are incorporated into the contract;

(5) If the contract allows for cash settlement, the contract incorporates a robust valuation process to estimate loss reliably and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;

(6) If the contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provides that any required consent to transfer may not be unreasonably withheld;

(7) If the credit derivative is a credit default swap or nth-to-default swap, the contract clearly identifies the parties responsible for determining whether a credit event has occurred, specifies that this determination is not the sole responsibility of the protection provider, and gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event; and

(8) If the credit derivative is a total return swap and the savings association records net payments received on the swap as net income, the savings association records offsetting deterioration in the value of the hedged exposure (either through reductions in fair value or by an addition to reserves).

Eligible credit reserves means all general allowances that have been established through a charge against earnings to absorb credit losses associated with on- or off-balance sheet wholesale and retail exposures, including the allowance for loan and lease losses (ALLL) associated with such exposures but excluding specific reserves created against recognized losses.

Eligible double default guarantor, with respect to a guarantee or credit derivative obtained by a Federal savings association, means:

(1) *U.S.-based entities.* A depository institution, a bank holding company, a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k), a securities broker or dealer registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78o *et seq.*), or an insurance company in the business of providing credit protection (such as a monoline bond insurer or re-insurer) that is subject to supervision by a state insurance regulator, if:

(i) At the time the guarantor issued the guarantee or credit derivative or at any time thereafter, the savings association assigned a PD to the guarantor's rating grade that was equal to or lower than the PD associated with a long-term external rating in the third-highest investment-grade rating category; and

(ii) The savings association currently assigns a PD to the guarantor's rating grade that is equal to or lower than the PD associated with a long-term external rating in the lowest investment-grade rating category; or

[1] Overdrafts are past due once the obligor has breached an advised limit or been advised of a limit smaller than the current outstanding balance.

(2) *Non-U.S.-based entities.* A foreign bank (as defined in § 211.2 of the Federal Reserve Board's Regulation K (12 CFR 211.2)), a non-U.S.-based securities firm, or a non-U.S.-based insurance company in the business of providing credit protection, if:

(i) The savings association demonstrates that the guarantor is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies (as the case may be), or has issued and outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating of at least investment grade;

(ii) At the time the guarantor issued the guarantee or credit derivative or at any time thereafter, the savings association assigned a PD to the guarantor's rating grade that was equal to or lower than the PD associated with a long-term external rating in the third-highest investment-grade rating category; and

(iii) The savings association currently assigns a PD to the guarantor's rating grade that is equal to or lower than the PD associated with a long-term external rating in the lowest investment-grade rating category.

Eligible guarantee means a guarantee that:

(1) Is written and unconditional;

(2) Covers all or a pro rata portion of all contractual payments of the obligor on the reference exposure;

(3) Gives the beneficiary a direct claim against the protection provider;

(4) Is not unilaterally cancelable by the protection provider for reasons other than the breach of the contract by the beneficiary;

(5) Is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;

(6) Requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure in a timely manner without the beneficiary first having to take legal actions to pursue the obligor for payment;

(7) Does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure; and

(8) Is not provided by an affiliate of the savings association, unless the affiliate is an insured depository institution, bank, securities broker or dealer, or insurance company that:

(i) Does not control the savings association; and

(ii) Is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies (as the case may be).

Eligible margin loan means an extension of credit where:

(1) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, gold, or conforming residential mortgages;

(2) The collateral is marked to market daily, and the transaction is subject to daily margin maintenance requirements;

(3) The extension of credit is conducted under an agreement that provides the savings association the right to accelerate and terminate the extension of credit and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; [2] and

(4) The savings association has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

Eligible operational risk offsets means amounts, not to exceed expected operational loss, that:

(1) Are generated by internal business practices to absorb highly predictable and reasonably stable operational losses, including reserves calculated consistent with GAAP; and

(2) Are available to cover expected operational losses with a high degree of certainty over a one-year horizon.

Eligible purchased wholesale exposure means a purchased wholesale exposure that:

(1) The savings association or securitization SPE purchased from an unaffiliated seller and did not directly or indirectly originate;

(2) Was generated on an arm's-length basis between the seller and the obligor (intercompany accounts receivable and receivables subject to contra-accounts between firms that buy and sell to each other do not satisfy this criterion);

(3) Provides the savings association or securitization SPE with a claim on all proceeds from the exposure or a pro rata interest in the proceeds from the exposure;

(4) Has an M of less than one year; and

(5) When consolidated by obligor, does not represent a concentrated exposure relative to the portfolio of purchased wholesale exposures.

Eligible securitization guarantor means:

(1) A sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, a Federal Home Loan Bank, Federal Agricultural Mortgage Corporation (Farmer Mac), a multilateral development bank, a depository institution, a bank holding company, a savings and loan holding company (as defined in 12 U.S.C. 1467a) provided all or substantially all of the holding company's activities are permissible for a financial holding company under 12 U.S.C. 1843(k), a foreign bank (as defined in § 211.2 of the Federal Reserve Board's Regulation K (12 CFR 211.2)), or a securities firm;

(2) Any other entity (other than a securitization SPE) that has issued and outstanding an unsecured long-term debt security without credit enhancement that has a long-term applicable external rating in one of the three highest investment-grade rating categories; or

(3) Any other entity (other than a securitization SPE) that has a PD assigned by the savings association that is lower than or equal to the PD associated with a long-term external rating in the third highest investment-grade rating category.

Eligible servicer cash advance facility means a servicer cash advance facility in which:

(1) The servicer is entitled to full reimbursement of advances, except that a servicer may be obligated to make non-reimbursable advances for a particular underlying exposure if any such advance is contractually limited to an insignificant amount of the outstanding principal balance of that exposure;

(2) The servicer's right to reimbursement is senior in right of payment to all other claims on the cash flows from the underlying exposures of the securitization; and

(3) The servicer has no legal obligation to, and does not make advances to the securitization if the servicer concludes the advances are unlikely to be repaid.

Equity derivative contract means an equity-linked swap, purchased equity-linked option, forward equity-linked contract, or any other instrument linked to equities that gives rise to similar counterparty credit risks.

Equity exposure means:

(1) A security or instrument (whether voting or non-voting) that represents a direct or indirect ownership interest in, and is a residual claim on, the assets and income of a company, unless:

(i) The issuing company is consolidated with the Federal savings association under GAAP;

(ii) The savings association is required to deduct the ownership interest from tier 1 or tier 2 capital under this appendix;

(iii) The ownership interest incorporates a payment or other similar obligation on the part of the issuing company (such as an obligation to make periodic payments); or

(iv) The ownership interest is a securitization exposure;

(2) A security or instrument that is mandatorily convertible into a security or instrument described in paragraph (1) of this definition;

(3) An option or warrant that is exercisable for a security or instrument described in paragraph (1) of this definition; or

(4) Any other security or instrument (other than a securitization exposure) to the extent the return on the security or instrument is based on the performance of a security or instrument described in paragraph (1) of this definition.

Excess spread for a period means:

(1) Gross finance charge collections and other income received by a securitization SPE (including market interchange fees) over a period minus interest paid to the holders

[2] This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute ''securities contracts'' under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231).

of the securitization exposures, servicing fees, charge-offs, and other senior trust or similar expenses of the SPE over the period; divided by:

(2) The principal balance of the underlying exposures at the end of the period.

Exchange rate derivative contract means a cross-currency interest rate swap, forward foreign-exchange contract, currency option purchased, or any other instrument linked to exchange rates that gives rise to similar counterparty credit risks.

Excluded mortgage exposure means any one- to four-family residential pre-sold construction loan for a residence for which the purchase contract is cancelled that would receive a 100 percent risk weight under section 618(a)(2) of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act and under 12 CFR 167.1 (definition of ''qualifying residential construction loan'') and 12 CFR 167.6(a)(1)(iv).

Expected credit loss (ECL) means:

(1) For a wholesale exposure to a non-defaulted obligor or segment of non-defaulted retail exposures that is carried at fair value with gains and losses flowing through earnings or that is classified as held-for-sale and is carried at the lower of cost or fair value with losses flowing through earnings, zero.

(2) For all other wholesale exposures to non-defaulted obligors or segments of non-defaulted retail exposures, the product of PD times LGD times EAD for the exposure or segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, the Federal savings association's impairment estimate for allowance purposes for the exposure or segment.

(4) Total ECL is the sum of expected credit losses for all wholesale and retail exposures other than exposures for which the savings association has applied the double default treatment in section 34 of this appendix.

Expected exposure (EE) means the expected value of the probability distribution of non-negative credit risk exposures to a counterparty at any specified future date before the maturity date of the longest term transaction in the netting set. Any negative market values in the probability distribution of market values to a counterparty at a specified future date are set to zero to convert the probability distribution of market values to the probability distribution of credit risk exposures.

Expected operational loss (EOL) means the expected value of the distribution of potential aggregate operational losses, as generated by the Federal savings association's operational risk quantification system using a one-year horizon.

Expected positive exposure (EPE) means the weighted average over time of expected (non-negative) exposures to a counterparty where the weights are the proportion of the time interval that an individual expected exposure represents. When calculating risk-based capital requirements, the average is taken over a one-year horizon.

Exposure at default (EAD). (1) For the on-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction, or eligible margin loan for which the Federal savings association determines EAD under section 32 of this appendix), EAD means:

(i) If the exposure or segment is a security classified as available-for-sale, the savings associations carrying value (including net accrued but unpaid interest and fees) for the exposure or segment less any unrealized gains on the exposure or segment and plus any unrealized losses on the exposure or segment; or

(ii) If the exposure or segment is not a security classified as available-for-sale, the savings association's carrying value (including net accrued but unpaid interest and fees) for the exposure or segment.

(2) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the savings association determines EAD under section 32 of this appendix) in the form of a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the savings association's best estimate of net additions to the outstanding amount owed the savings association, including estimated future additional draws of principal and accrued but unpaid interest and fees, that are likely to occur over a one-year horizon assuming the wholesale exposure or the retail exposures in the segment were to go into default. This estimate of net additions must reflect what would be expected during economic downturn conditions. Trade-related letters of credit are short-term, self-liquidating instruments that are used to finance the movement of goods and are collateralized by the underlying goods. Transaction-related contingencies relate to a particular transaction and include, among other things, performance bonds and performance-based letters of credit.

(3) For the off-balance sheet component of a wholesale exposure or segment of retail exposures (other than an OTC derivative contract, or a repo-style transaction or eligible margin loan for which the savings association determines EAD under section 32 of this appendix) in the form of anything other than a loan commitment, line of credit, trade-related letter of credit, or transaction-related contingency, EAD means the notional amount of the exposure or segment.

(4) EAD for OTC derivative contracts is calculated as described in section 32 of this appendix. A savings association also may determine EAD for repo-style transactions and eligible margin loans as described in section 32 of this appendix.

(5) For wholesale or retail exposures in which only the drawn balance has been securitized, the savings association must reflect its share of the exposures' undrawn balances in EAD. Undrawn balances of revolving exposures for which the drawn balances have been securitized must be allocated between the seller's and investors' interests on a pro rata basis, based on the proportions of the seller's and investors' shares of the securitized drawn balances.

Exposure category means any of the wholesale, retail, securitization, or equity exposure categories.

External operational loss event data means, with respect to a Federal savings association, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at organizations other than the savings association.

External rating means a credit rating that is assigned by an NRSRO to an exposure, provided:

(1) The credit rating fully reflects the entire amount of credit risk with regard to all payments owed to the holder of the exposure. If a holder is owed principal and interest on an exposure, the credit rating must fully reflect the credit risk associated with timely repayment of principal and interest. If a holder is owed only principal on an exposure, the credit rating must fully reflect only the credit risk associated with timely repayment of principal; and

(2) The credit rating is published in an accessible form and is or will be included in the transition matrices made publicly available by the NRSRO that summarize the historical performance of positions rated by the NRSRO.

Financial collateral means collateral:

(1) In the form of:

(i) Cash on deposit with the Federal savings association (including cash held for the savings association by a third-party custodian or trustee);

(ii) Gold bullion;

(iii) Long-term debt securities that have an applicable external rating of one category below investment grade or higher;

(iv) Short-term debt instruments that have an applicable external rating of at least investment grade;

(v) Equity securities that are publicly traded;

(vi) Convertible bonds that are publicly traded;

(vii) Money market mutual fund shares and other mutual fund shares if a price for the shares is publicly quoted daily; or

(viii) Conforming residential mortgages; and

(2) In which the savings association has a perfected, first priority security interest or, outside of the United States, the legal equivalent thereof (with the exception of cash on deposit and notwithstanding the prior security interest of any custodial agent).

GAAP means generally accepted accounting principles as used in the United States.

Gain-on-sale means an increase in the equity capital (as reported on Schedule RC of the Call Report or Schedule SC of the TFR, as appropriate) of a Federal savings association that results from a securitization (other than an increase in equity capital that results from the Federal savings association's receipt of cash in connection with the securitization).

Guarantee means a financial guarantee, letter of credit, insurance, or other similar financial instrument (other than a credit derivative) that allows one party (beneficiary) to transfer the credit risk of one or more specific exposures (reference exposure) to

another party (protection provider). See also *eligible guarantee.*

High volatility commercial real estate (HVCRE) exposure means a credit facility that finances or has financed the acquisition, development, or construction (ADC) of real property, unless the facility finances:

(1) One- to four-family residential properties; or

(2) Commercial real estate projects in which:

(i) The loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio in the OCC's real estate lending standards at 12 CFR 160.100–160.101;

(ii) The borrower has contributed capital to the project in the form of cash or unencumbered readily marketable assets (or has paid development expenses out-of-pocket) of at least 15 percent of the real estate's appraised ''as completed'' value; and

(iii) The borrower contributed the amount of capital required by paragraph (2)(ii) of this definition before the Federal savings association advances funds under the credit facility, and the capital contributed by the borrower, or internally generated by the project, is contractually required to remain in the project throughout the life of the project. The life of a project concludes only when the credit facility is converted to permanent financing or is sold or paid in full. Permanent financing may be provided by the savings association that provided the ADC facility as long as the permanent financing is subject to the savings association's underwriting criteria for long-term mortgage loans.

Inferred rating. A securitization exposure has an *inferred rating* equal to the external rating referenced in paragraph (2)(i) of this definition if:

(1) The securitization exposure does not have an external rating; and

(2) Another securitization exposure issued by the same issuer and secured by the same underlying exposures:

(i) Has an external rating;

(ii) Is subordinated in all respects to the unrated securitization exposure;

(iii) Does not benefit from any credit enhancement that is not available to the unrated securitization exposure; and

(iv) Has an effective remaining maturity that is equal to or longer than that of the unrated securitization exposure.

Interest rate derivative contract means a single-currency interest rate swap, basis swap, forward rate agreement, purchased interest rate option, when-issued securities, or any other instrument linked to interest rates that gives rise to similar counterparty credit risks.

Internal operational loss event data means, with respect to a Federal savings association, gross operational loss amounts, dates, recoveries, and relevant causal information for operational loss events occurring at the savings association.

Investing Federal savings association means, with respect to a securitization, a Federal savings association that assumes the credit risk of a securitization exposure (other than an originating savings association of the securitization). In the typical synthetic securitization, the investing savings association sells credit protection on a pool of underlying exposures to the originating savings association.

Investment fund means a company:

(1) All or substantially all of the assets of which are financial assets; and

(2) That has no material liabilities.

Investors' interest EAD means, with respect to a securitization, the EAD of the underlying exposures multiplied by the ratio of:

(1) The total amount of securitization exposures issued by the securitization SPE to investors; divided by

(2) The outstanding principal amount of underlying exposures.

Loss given default (LGD) means:

(1) For a wholesale exposure, the greatest of:

(i) Zero;

(ii) The savings association's empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the savings association would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the savings association to the exposure) were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The savings association's empirically based best estimate of the economic loss, per dollar of EAD, the savings association would expect to incur if the obligor (or a typical obligor in the loss severity grade assigned by the savings association to the exposure) were to default within a one-year horizon during economic downturn conditions.

(2) For a segment of retail exposures, the greatest of:

(i) Zero;

(ii) The savings association's empirically based best estimate of the long-run default-weighted average economic loss, per dollar of EAD, the savings association would expect to incur if the exposures in the segment were to default within a one-year horizon over a mix of economic conditions, including economic downturn conditions; or

(iii) The savings association's empirically based best estimate of the economic loss, per dollar of EAD, the savings association would expect to incur if the exposures in the segment were to default within a one-year horizon during economic downturn conditions.

(3) The economic loss on an exposure in the event of default is all material credit-related losses on the exposure (including accrued but unpaid interest or fees, losses on the sale of collateral, direct workout costs, and an appropriate allocation of indirect workout costs). Where positive or negative cash flows on a wholesale exposure to a defaulted obligor or a defaulted retail exposure (including proceeds from the sale of collateral, workout costs, additional extensions of credit to facilitate repayment of the exposure, and draw-downs of unused credit lines) occur after the date of default, the economic loss must reflect the net present value of cash flows as of the default date using a discount rate appropriate to the risk of the defaulted exposure.

Main index means the Standard & Poor's 500 Index, the FTSE All-World Index, and any other index for which the Federal savings association can demonstrate to the satisfaction of the OCC that the equities represented in the index have comparable liquidity, depth of market, and size of bid-ask spreads as equities in the Standard & Poor's 500 Index and FTSE All-World Index.

Multilateral development bank means the International Bank for Reconstruction and Development, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, and any other multilateral lending institution or regional development bank in which the U.S. government is a shareholder or contributing member or which the OCC determines poses comparable credit risk.

Nationally recognized statistical rating organization (NRSRO) means an entity registered with the SEC as a nationally recognized statistical rating organization under section 15E of the Securities Exchange Act of 1934 (15 U.S.C. 78o–7).

Netting set means a group of transactions with a single counterparty that are subject to a qualifying master netting agreement or qualifying cross-product master netting agreement. For purposes of the internal models methodology in paragraph (d) of section 32 of this appendix, each transaction that is not subject to such a master netting agreement is its own netting set.

Nth-to-default credit derivative means a credit derivative that provides credit protection only for the nth-defaulting reference exposure in a group of reference exposures.

Obligor means the legal entity or natural person contractually obligated on a wholesale exposure, except that a Federal savings association may treat the following exposures as having separate obligors:

(1) Exposures to the same legal entity or natural person denominated in different currencies;

(2)(i) An income-producing real estate exposure for which all or substantially all of the repayment of the exposure is reliant on the cash flows of the real estate serving as collateral for the exposure; the savings association, in economic substance, does not have recourse to the borrower beyond the real estate collateral; and no cross-default or cross-acceleration clauses are in place other than clauses obtained solely out of an abundance of caution; and

(ii) Other credit exposures to the same legal entity or natural person; and

(3)(i) A wholesale exposure authorized under section 364 of the U.S. Bankruptcy Code (11 U.S.C. 364) to a legal entity or natural person who is a debtor-in-possession for purposes of Chapter 11 of the Bankruptcy Code; and

(ii) Other credit exposures to the same legal entity or natural person.

Operational loss means a loss (excluding insurance or tax effects) resulting from an operational loss event. Operational loss includes all expenses associated with an

operational loss event except for opportunity costs, forgone revenue, and costs related to risk management and control enhancements implemented to prevent future operational losses.

Operational loss event means an event that results in loss and is associated with any of the following seven operational loss event type categories:

(1) Internal fraud, which means the operational loss event type category that comprises operational losses resulting from an act involving at least one internal party of a type intended to defraud, misappropriate property, or circumvent regulations, the law, or company policy, excluding diversity- and discrimination-type events.

(2) External fraud, which means the operational loss event type category that comprises operational losses resulting from an act by a third party of a type intended to defraud, misappropriate property, or circumvent the law. Retail credit card losses arising from non-contractual, third-party initiated fraud (for example, identity theft) are external fraud operational losses. All other third-party initiated credit losses are to be treated as credit risk losses.

(3) Employment practices and workplace safety, which means the operational loss event type category that comprises operational losses resulting from an act inconsistent with employment, health, or safety laws or agreements, payment of personal injury claims, or payment arising from diversity- and discrimination-type events.

(4) Clients, products, and business practices, which means the operational loss event type category that comprises operational losses resulting from the nature or design of a product or from an unintentional or negligent failure to meet a professional obligation to specific clients (including fiduciary and suitability requirements).

(5) Damage to physical assets, which means the operational loss event type category that comprises operational losses resulting from the loss of or damage to physical assets from natural disaster or other events.

(6) Business disruption and system failures, which means the operational loss event type category that comprises operational losses resulting from disruption of business or system failures.

(7) Execution, delivery, and process management, which means the operational loss event type category that comprises operational losses resulting from failed transaction processing or process management or losses arising from relations with trade counterparties and vendors.

Operational risk means the risk of loss resulting from inadequate or failed internal processes, people, and systems or from external events (including legal risk but excluding strategic and reputational risk).

Operational risk exposure means the 99.9th percentile of the distribution of potential aggregate operational losses, as generated by the Federal savings association's operational risk quantification system over a one-year horizon (and not incorporating eligible operational risk offsets or qualifying operational risk mitigants).

Originating Federal savings association, with respect to a securitization, means a savings association that:

(1) Directly or indirectly originated or securitized the underlying exposures included in the securitization; or

(2) Serves as an ABCP program sponsor to the securitization.

Other retail exposure means an exposure (other than a securitization exposure, an equity exposure, a residential mortgage exposure, an excluded mortgage exposure, a qualifying revolving exposure, or the residual value portion of a lease exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is either:

(1) An exposure to an individual for non-business purposes; or

(2) An exposure to an individual or company for business purposes if the Federal savings association's consolidated business credit exposure to the individual or company is $1 million or less.

Over-the-counter (OTC) derivative contract means a derivative contract that is not traded on an exchange that requires the daily receipt and payment of cash-variation margin.

Probability of default (PD) means:

(1) For a wholesale exposure to a non-defaulted obligor, the Federal savings association's empirically based best estimate of the long-run average one-year default rate for the rating grade assigned by the savings association to the obligor, capturing the average default experience for obligors in the rating grade over a mix of economic conditions (including economic downturn conditions) sufficient to provide a reasonable estimate of the average one-year default rate over the economic cycle for the rating grade.

(2) For a segment of non-defaulted retail exposures, the savings association's empirically based best estimate of the long-run average one-year default rate for the exposures in the segment, capturing the average default experience for exposures in the segment over a mix of economic conditions (including economic downturn conditions) sufficient to provide a reasonable estimate of the average one-year default rate over the economic cycle for the segment and adjusted upward as appropriate for segments for which seasoning effects are material. For purposes of this definition, a segment for which seasoning effects are material is a segment where there is a material relationship between the time since origination of exposures within the segment and the savings association's best estimate of the long-run average one-year default rate for the exposures in the segment.

(3) For a wholesale exposure to a defaulted obligor or segment of defaulted retail exposures, 100 percent.

Protection amount (P) means, with respect to an exposure hedged by an eligible guarantee or eligible credit derivative, the effective notional amount of the guarantee or credit derivative, reduced to reflect any currency mismatch, maturity mismatch, or lack of restructuring coverage (as provided in section 33 of this appendix).

Publicly traded means traded on:

(1) Any exchange registered with the SEC as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(2) Any non-U.S.-based securities exchange that:

(i) Is registered with, or approved by, a national securities regulatory authority; and

(ii) Provides a liquid, two-way market for the instrument in question, meaning that there are enough independent bona fide offers to buy and sell so that a sales price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined promptly and a trade can be settled at such a price within five business days.

Qualifying central counterparty means a counterparty (for example, a clearinghouse) that:

(1) Facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts;

(2) Requires all participants in its arrangements to be fully collateralized on a daily basis; and

(3) The Federal savings association demonstrates to the satisfaction of the OCC is in sound financial condition and is subject to effective oversight by a national supervisory authority.

Qualifying cross-product master netting agreement means a qualifying master netting agreement that provides for termination and close-out netting across multiple types of financial transactions or qualifying master netting agreements in the event of a counterparty's default, provided that:

(1) The underlying financial transactions are OTC derivative contracts, eligible margin loans, or repo-style transactions; and

(2) The Federal savings association obtains a written legal opinion verifying the validity and enforceability of the agreement under applicable law of the relevant jurisdictions if the counterparty fails to perform upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding.

Qualifying master netting agreement means any written, legally enforceable bilateral agreement, provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default, including bankruptcy, insolvency, or similar proceeding, of the counterparty;

(2) The agreement provides the Federal savings association the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default, including upon an event of bankruptcy, insolvency, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;

(3) The Federal savings association has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that:

(i) The agreement meets the requirements of paragraph (2) of this definition; and

(ii) In the event of a legal challenge (including one resulting from default or from

bankruptcy, insolvency, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions;

(4) The Federal savings association establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition; and

(5) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it would make otherwise under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement).

Qualifying revolving exposure (QRE) means an exposure (other than a securitization exposure or equity exposure) to an individual that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and:

(1) Is revolving (that is, the amount outstanding fluctuates, determined largely by the borrower's decision to borrow and repay, up to a pre-established maximum amount);

(2) Is unsecured and unconditionally cancelable by the Federal savings association to the fullest extent permitted by Federal law; and

(3) Has a maximum exposure amount (drawn plus undrawn) of up to $100,000.

Repo-style transaction means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the Federal savings association acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, gold, or conforming residential mortgages;

(2) The transaction is marked-to-market daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or the Federal Reserve Board's Regulation EE (12 CFR part 231); or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the savings association the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of default (including upon an event of bankruptcy, insolvency, or similar proceeding) of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions; or

(B) The transaction is:

(*1*) Either overnight or unconditionally cancelable at any time by the savings association; and

(*2*) Executed under an agreement that provides the savings association the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and

(4) The savings association has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient written documentation of that legal review) that the agreement meets the requirements of paragraph (3) of this definition and is legal, valid, binding, and enforceable under applicable law in the relevant jurisdictions.

Residential mortgage exposure means an exposure (other than a securitization exposure, equity exposure, or excluded mortgage exposure) that is managed as part of a segment of exposures with homogeneous risk characteristics, not on an individual-exposure basis, and is:

(1) An exposure that is primarily secured by a first or subsequent lien on one- to four-family residential property; or

(2) An exposure with an original and outstanding amount of $1 million or less that is primarily secured by a first or subsequent lien on residential property that is not one to four family.

Retail exposure means a residential mortgage exposure, a qualifying revolving exposure, or an other retail exposure.

Retail exposure subcategory means the residential mortgage exposure, qualifying revolving exposure, or other retail exposure subcategory.

Risk parameter means a variable used in determining risk-based capital requirements for wholesale and retail exposures, specifically probability of default (PD), loss given default (LGD), exposure at default (EAD), or effective maturity (M).

Scenario analysis means a systematic process of obtaining expert opinions from business managers and risk management experts to derive reasoned assessments of the likelihood and loss impact of plausible high-severity operational losses. Scenario analysis may include the well-reasoned evaluation and use of external operational loss event data, adjusted as appropriate to ensure relevance to a Federal savings association's operational risk profile and control structure.

SEC means the U.S. Securities and Exchange Commission.

Securitization means a traditional securitization or a synthetic securitization.

Securitization exposure means an on-balance sheet or off-balance sheet credit exposure that arises from a traditional or synthetic securitization (including credit-enhancing representations and warranties).

Securitization special purpose entity (securitization SPE) means a corporation, trust, or other entity organized for the specific purpose of holding underlying exposures of a securitization, the activities of which are limited to those appropriate to accomplish this purpose, and the structure of which is intended to isolate the underlying exposures held by the entity from the credit risk of the seller of the underlying exposures to the entity.

Senior securitization exposure means a securitization exposure that has a first priority claim on the cash flows from the underlying exposures. When determining whether a securitization exposure has a first priority claim on the cash flows from the underlying exposures, a Federal savings association is not required to consider amounts due under interest rate or currency derivative contracts, fees due, or other similar payments. Both the most senior commercial paper issued by an ABCP program and a liquidity facility that supports the ABCP program may be senior securitization exposures if the liquidity facility provider's right to reimbursement of the drawn amounts is senior to all claims on the cash flows from the underlying exposures except amounts due under interest rate or currency derivative contracts, fees due, or other similar payments.

Servicer cash advance facility means a facility under which the servicer of the underlying exposures of a securitization may advance cash to ensure an uninterrupted flow of payments to investors in the securitization, including advances made to cover foreclosure costs or other expenses to facilitate the timely collection of the underlying exposures. See also *eligible servicer cash advance facility.*

Sovereign entity means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

Sovereign exposure means:

(1) A direct exposure to a sovereign entity; or

(2) An exposure directly and unconditionally backed by the full faith and credit of a sovereign entity.

Subsidiary means, with respect to a company, a company controlled by that company.

Synthetic securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties through the use of one or more credit derivatives or guarantees (other than a guarantee that transfers only the credit risk of an individual retail exposure);

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures; and

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities).

Tier 1 capital is defined in subpart B of part 167, as modified in part II of this appendix.

Tier 2 capital is defined in subpart B of part 167, as modified in part II of this appendix.

Total qualifying capital means the sum of tier 1 capital and tier 2 capital, after all deductions required in this appendix.

Total risk-weighted assets means:

(1) The sum of:

(i) Credit risk-weighted assets; and

(ii) Risk-weighted assets for operational risk; minus

(2) Excess eligible credit reserves not included in tier 2 capital.

Total wholesale and retail risk-weighted assets means the sum of risk-weighted assets for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures; risk-weighted assets for wholesale exposures to defaulted obligors and segments of defaulted retail exposures; risk-weighted assets for assets not defined by an exposure category; and risk-weighted assets for non-material portfolios of exposures (all as determined in section 31 of this appendix) and risk-weighted assets for unsettled transactions (as determined in section 35 of this appendix) minus the amounts deducted from capital pursuant to subpart B of part 167 (excluding those deductions reversed in section 12 of this appendix).

Traditional securitization means a transaction in which:

(1) All or a portion of the credit risk of one or more underlying exposures is transferred to one or more third parties other than through the use of credit derivatives or guarantees;

(2) The credit risk associated with the underlying exposures has been separated into at least two tranches reflecting different levels of seniority;

(3) Performance of the securitization exposures depends upon the performance of the underlying exposures;

(4) All or substantially all of the underlying exposures are financial exposures (such as loans, commitments, credit derivatives, guarantees, receivables, asset-backed securities, mortgage-backed securities, other debt securities, or equity securities);

(5) The underlying exposures are not owned by an operating company;

(6) The underlying exposures are not owned by a small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682); and

(7) The underlying exposures are not owned by a firm an investment in which is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs.

(8) The OCC may determine that a transaction in which the underlying exposures are owned by an investment firm that exercises substantially unfettered control over the size and composition of its assets, liabilities, and off-balance sheet exposures is not a traditional securitization based on the transaction's leverage, risk profile, or economic substance.

(9) The OCC may deem a transaction that meets the definition of a traditional securitization, notwithstanding paragraph (5), (6), or (7) of this definition, to be a traditional securitization based on the transaction's leverage, risk profile, or economic substance.

Tranche means all securitization exposures associated with a securitization that have the same seniority level.

Underlying exposures means one or more exposures that have been securitized in a securitization transaction.

Unexpected operational loss (UOL) means the difference between the Federal savings association's operational risk exposure and the savings association's expected operational loss.

Unit of measure means the level (for example, organizational unit or operational loss event type) at which the Federal savings association's operational risk quantification system generates a separate distribution of potential operational losses.

Value-at-Risk (VaR) means the estimate of the maximum amount that the value of one or more exposures could decline due to market price or rate movements during a fixed holding period within a stated confidence interval.

Wholesale exposure means a credit exposure to a company, natural person, sovereign entity, or governmental entity (other than a securitization exposure, retail exposure, excluded mortgage exposure, or equity exposure). Examples of a wholesale exposure include:

(1) A non-tranched guarantee issued by a Federal savings association on behalf of a company;

(2) A repo-style transaction entered into by a Federal savings association with a company and any other transaction in which a savings association posts collateral to a company and faces counterparty credit risk;

(3) An exposure that a Federal savings association treats as a covered position under any applicable market risk rule for which there is a counterparty credit risk capital requirement;

(4) A sale of corporate loans by a Federal savings association to a third party in which the savings association retains full recourse;

(5) An OTC derivative contract entered into by a Federal savings association with a company;

(6) An exposure to an individual that is not managed by a Federal savings association as part of a segment of exposures with homogeneous risk characteristics; and

(7) A commercial lease.

Wholesale exposure subcategory means the HVCRE or non-HVCRE wholesale exposure subcategory.

Section 3. Minimum Risk-Based Capital Requirements

(a) Except as modified by paragraph (c) of this section or by section 23 of this appendix, each Federal savings association must meet a minimum ratio of:

(1) Total qualifying capital to total risk-weighted assets of 8.0 percent; and

(2) Tier 1 capital to total risk-weighted assets of 4.0 percent.

(b) Each Federal savings association must hold capital commensurate with the level and nature of all risks to which the savings association is exposed.

(c) When a Federal savings association subject to any applicable market risk rule calculates its risk-based capital requirements under this appendix, the savings association must also refer to any applicable market risk rule for supplemental rules to calculate risk-based capital requirements adjusted for market risk.

Part II. Qualifying Capital

Section 11. Additional Deductions

(a) *General.* A Federal savings association that uses this appendix must make the same deductions from its tier 1 capital and tier 2 capital required in subpart B of part 167, except that:

(1) A Federal savings association is not required to deduct certain equity investments and CEIOs (as provided in section 12 of this appendix); and

(2) A Federal savings association also must make the deductions from capital required by paragraphs (b) and (c) of this section.

(b) *Deductions from tier 1 capital.* A Federal savings association must deduct from tier 1 capital any gain-on-sale associated with a securitization exposure as provided in paragraph (a) of section 41 and paragraphs (a)(1), (c), (g)(1), and (h)(1) of section 42 of this appendix.

(c) *Deductions from tier 1 and tier 2 capital.* A Federal savings association must deduct the exposures specified in paragraphs (c)(1) through (c)(7) in this section 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the Federal savings association's actual tier 2 capital, however, the Federal savings association must deduct the excess from tier 1 capital.

(1) *Credit-enhancing interest-only strips (CEIOs).* In accordance with paragraphs (a)(1) and (c) of section 42 of this appendix, any CEIO that does not constitute gain-on-sale.

(2) *Non-qualifying securitization exposures.* In accordance with paragraphs (a)(4) and (c) of section 42 of this appendix, any securitization exposure that does not qualify for the Ratings-Based Approach, the Internal Assessment Approach, or the Supervisory Formula Approach under sections 43, 44, and 45 of this appendix, respectively.

(3) *Securitizations of non-IRB exposures.* In accordance with paragraphs (c) and (g)(4) of section 42 of this appendix, certain exposures to a securitization any underlying exposure of which is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure.

(4) *Low-rated securitization exposures.* In accordance with section 43 and paragraph (c) of section 42 of this appendix, any securitization exposure that qualifies for and must be deducted under the Ratings-Based Approach.

(5) *High-risk securitization exposures subject to the Supervisory Formula Approach.* In accordance with paragraphs (b) and (c) of section 45 of this appendix and paragraph (c) of section 42 of this appendix, certain high-risk securitization exposures (or portions thereof) that qualify for the Supervisory Formula Approach.

(6) *Eligible credit reserves shortfall.* In accordance with paragraph (a)(1) of section 13 of this appendix, any eligible credit reserves shortfall.

(7) *Certain failed capital markets transactions.* In accordance with paragraph (e)(3) of section 35 of this appendix, the

savings association's exposure on certain failed capital markets transactions.

Section 12. Deductions and Limitations Not Required

(a) *Deduction of CEIOs.* A Federal savings association is not required to make the deduction from capital for CEIOs in 12 CFR 167.5(a)(2)(iii) and 167.12(e).

(b) *Deduction for certain equity investments.* A Federal savings association is not required to deduct equity securities from capital under 12 CFR 167.5(c)(2)(ii). However, it must continue to deduct equity investments in real estate under that section. *See* 12 CFR 167.1, which defines equity investments, including equity securities and equity investments in real estate.

Section 13. Eligible Credit Reserves

(a) *Comparison of eligible credit reserves to expected credit losses* —(1) *Shortfall of eligible credit reserves.* If a Federal savings association's eligible credit reserves are less than the savings association's total expected credit losses, the savings association must deduct the shortfall amount 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the savings association's actual tier 2 capital, the savings association must deduct the excess amount from tier 1 capital.

(2) *Excess eligible credit reserves.* If a Federal savings association's eligible credit reserves exceed the savings association's total expected credit losses, the savings association may include the excess amount in tier 2 capital to the extent that the excess amount does not exceed 0.6 percent of the savings association's credit-risk-weighted assets.

(b) *Treatment of allowance for loan and lease losses.* Regardless of any provision in subpart B of part 167, the ALLL is included in tier 2 capital only to the extent provided in paragraph (a)(2) of this section and in section 24 of this appendix.

Part III. Qualification

Section 21. Qualification Process

(a) *Timing.* (1) A Federal savings association that is described in paragraph (b)(1) of section 1 of this appendix must adopt a written implementation plan no later than six months after the later of April 1, 2008, or the date the Federal savings association meets a criterion in that section. The implementation plan must incorporate an explicit first floor period start date no later than 36 months after the later of April 1, 2008, or the date the savings association meets at least one criterion under paragraph (b)(1) of section 1 of this appendix. The OCC may extend the first floor period start date.

(2) A Federal savings association that elects to be subject to this appendix under paragraph (b)(2) of section 1 of this appendix must adopt a written implementation plan.

(b) *Implementation plan.* (1) The savings association's implementation plan must address in detail how the savings association complies, or plans to comply, with the qualification requirements in section 22 of this appendix. The savings association also must maintain a comprehensive and sound planning and governance process to oversee the implementation efforts described in the plan. At a minimum, the plan must:

(i) Comprehensively address the qualification requirements in section 22 of this appendix for the savings association and each consolidated subsidiary (U.S. and foreign-based) of the savings association with respect to all portfolios and exposures of the savings association and each of its consolidated subsidiaries;

(ii) Justify and support any proposed temporary or permanent exclusion of business lines, portfolios, or exposures from application of the advanced approaches in this appendix (which business lines, portfolios, and exposures must be, in the aggregate, immaterial to the savings association);

(iii) Include the savings association's self-assessment of:

(A) The savings association's current status in meeting the qualification requirements in section 22 of this appendix; and

(B) The consistency of the savings association's current practices with the OCC's supervisory guidance on the qualification requirements;

(iv) Based on the savings association's self-assessment, identify and describe the areas in which the savings association proposes to undertake additional work to comply with the qualification requirements in section 22 of this appendix or to improve the consistency of the savings association's current practices with the OCC's supervisory guidance on the qualification requirements (gap analysis);

(v) Describe what specific actions the Federal savings association will take to address the areas identified in the gap analysis required by paragraph (b)(1)(iv) of this section;

(vi) Identify objective, measurable milestones, including delivery dates and a date when the savings association's implementation of the methodologies described in this appendix will be fully operational;

(vii) Describe resources that have been budgeted and are available to implement the plan; and

(viii) Receive approval of the savings association's board of directors.

(2) The savings association must submit the implementation plan, together with a copy of the minutes of the board of directors' approval, to the OCC at least 60 days before the savings association proposes to begin its parallel run, unless the OCC waives prior notice.

(c) *Parallel run.* Before determining its risk-based capital requirements under this appendix and following adoption of the implementation plan, the savings association must conduct a satisfactory parallel run. A satisfactory parallel run is a period of no less than four consecutive calendar quarters during which the savings association complies with the qualification requirements in section 22 of this appendix to the satisfaction of the OCC. During the parallel run, the savings association must report to the OCC on a calendar quarterly basis its risk-based capital ratios using subpart B of part 167 and the risk-based capital requirements described in this appendix. During this period, the savings association is subject to subpart B of part 167.

(d) *Approval to calculate risk-based capital requirements under this appendix.* The OCC will notify the savings association of the date that the savings association may begin its first floor period if the OCC determines that:

(1) The savings association fully complies with all the qualification requirements in section 22 of this appendix;

(2) The savings association has conducted a satisfactory parallel run under paragraph (c) of this section; and

(3) The savings association has an adequate process to ensure ongoing compliance with the qualification requirements in section 22 of this appendix.

(e) *Transitional floor periods.* Following a satisfactory parallel run, a Federal savings association is subject to three transitional floor periods.

(1) *Risk-based capital ratios during the transitional floor periods* —(i) *Tier 1 risk-based capital ratio.* During a Federal savings association's transitional floor periods, the savings association's tier 1 risk-based capital ratio is equal to the lower of:

(A) The savings association's floor-adjusted tier 1 risk-based capital ratio; or

(B) The savings association's advanced approaches tier 1 risk-based capital ratio.

(ii) *Total risk-based capital ratio.* During a savings association's transitional floor periods, the savings association's total risk-based capital ratio is equal to the lower of:

(A) The savings association's floor-adjusted total risk-based capital ratio; or

(B) The savings association's advanced approaches total risk-based capital ratio.

(2) *Floor-adjusted risk-based capital ratios.* (i) A Federal savings association's floor-adjusted tier 1 risk-based capital ratio during a transitional floor period is equal to the savings association's tier 1 capital as calculated under subpart B of part 167, divided by the product of:

(A) The savings association's total risk-weighted assets as calculated under subpart B of part 167; and

(B) The appropriate transitional floor percentage in Table 1.

(ii) A Federal savings association's floor-adjusted total risk-based capital ratio during a transitional floor period is equal to the sum of the savings association's tier 1 and tier 2 capital as calculated under subpart B of part 167, divided by the product of:

(A) The savings association's total risk-weighted assets as calculated under subpart B of part 167; and

(B) The appropriate transitional floor percentage in Table 1.

(iii) A Federal savings association that meets the criteria in paragraph (b)(1) or (b)(2) of section 1 of this appendix as of April 1, 2008, must use subpart B of part 167 during the parallel run and as the basis for its transitional floors.

TABLE 1—TRANSITIONAL FLOORS

Transitional floor period	Transitional floor percentage
First floor period	95 per

TABLE 1—TRANSITIONAL FLOORS—Continued

Transitional floor period	Transitional floor percentage
Second floor period	90 per
Third floor period	85 per

(3) *Advanced approaches risk-based capital ratios.* (i) A Federal savings association's advanced approaches tier 1 risk-based capital ratio equals the savings association's tier 1 risk-based capital ratio as calculated under this appendix (other than this section on transitional floor periods).

(ii) A Federal savings association's advanced approaches total risk-based capital ratio equals the savings association's total risk-based capital ratio as calculated under this appendix (other than this section on transitional floor periods).

(4) *Reporting.* During the transitional floor periods, a Federal savings association must report to the OCC on a calendar quarterly basis both floor-adjusted risk-based capital ratios and both advanced approaches risk-based capital ratios.

(5) *Exiting a transitional floor period.* A Federal savings association may not exit a transitional floor period until the savings association has spent a minimum of four consecutive calendar quarters in the period and the OCC has determined that the savings association may exit the floor period. The OCC's determination will be based on an assessment of the savings association's ongoing compliance with the qualification requirements in section 22 of this appendix.

(6) *Interagency study.* After the end of the second transition year (2010), the Federal banking agencies will publish a study that evaluates the advanced approaches to determine if there are any material deficiencies. For any primary Federal supervisor to authorize any institution to exit the third transitional floor period, the study must determine that there are no such material deficiencies that cannot be addressed by then-existing tools, or, if such deficiencies are found, they are first remedied by changes to this appendix. Notwithstanding the preceding sentence, a primary Federal supervisor that disagrees with the finding of material deficiency may not authorize any institution under its jurisdiction to exit the third transitional floor period unless it provides a public report explaining its reasoning.

Section 22. Qualification Requirements

(a) *Process and systems requirements.* (1) A Federal savings association must have a rigorous process for assessing its overall capital adequacy in relation to its risk profile and a comprehensive strategy for maintaining an appropriate level of capital.

(2) The systems and processes used by a Federal savings association for risk-based capital purposes under this appendix must be consistent with the savings association's internal risk management processes and management information reporting systems.

(3) Each Federal savings association must have an appropriate infrastructure with risk measurement and management processes that meet the qualification requirements of this section and are appropriate given the savings association's size and level of complexity. Regardless of whether the systems and models that generate the risk parameters necessary for calculating a Federal savings association's risk-based capital requirements are located at any affiliate of the savings association, the savings association itself must ensure that the risk parameters and reference data used to determine its risk-based capital requirements are representative of its own credit risk and operational risk exposures.

(b) *Risk rating and segmentation systems for wholesale and retail exposures.* (1) A Federal savings association must have an internal risk rating and segmentation system that accurately and reliably differentiates among degrees of credit risk for the savings association's wholesale and retail exposures.

(2) For wholesale exposures:

(i) A Federal savings association must have an internal risk rating system that accurately and reliably assigns each obligor to a single rating grade (reflecting the obligor's likelihood of default). A Federal savings association may elect, however, not to assign to a rating grade an obligor to whom the savings association extends credit based solely on the financial strength of a guarantor, provided that all of the savings association's exposures to the obligor are fully covered by eligible guarantees, the savings association applies the PD substitution approach in paragraph (c)(1) of section 33 of this appendix to all exposures to that obligor, and the savings association immediately assigns the obligor to a rating grade if a guarantee can no longer be recognized under this appendix. The savings association's wholesale obligor rating system must have at least seven discrete rating grades for non-defaulted obligors and at least one rating grade for defaulted obligors.

(ii) Unless the savings association has chosen to directly assign LGD estimates to each wholesale exposure, the savings association must have an internal risk rating system that accurately and reliably assigns each wholesale exposure to a loss severity rating grade (reflecting the savings association's estimate of the LGD of the exposure). A Federal savings association employing loss severity rating grades must have a sufficiently granular loss severity grading system to avoid grouping together exposures with widely ranging LGDs.

(3) For retail exposures, a Federal savings association must have an internal system that groups retail exposures into the appropriate retail exposure subcategory, groups the retail exposures in each retail exposure subcategory into separate segments with homogeneous risk characteristics, and assigns accurate and reliable PD and LGD estimates for each segment on a consistent basis. The savings association's system must identify and group in separate segments by subcategories exposures identified in paragraphs (c)(2)(ii) and (iii) of section 31 of this appendix.

(4) The savings association's internal risk rating policy for wholesale exposures must describe the savings association's rating philosophy (that is, must describe how wholesale obligor rating assignments are affected by the savings association's choice of the range of economic, business, and industry conditions that are considered in the obligor rating process).

(5) The savings association's internal risk rating system for wholesale exposures must provide for the review and update (as appropriate) of each obligor rating and (if applicable) each loss severity rating whenever the savings association receives new material information, but no less frequently than annually. The savings association's retail exposure segmentation system must provide for the review and update (as appropriate) of assignments of retail exposures to segments whenever the savings association receives new material information, but generally no less frequently than quarterly.

(c) *Quantification of risk parameters for wholesale and retail exposures.* (1) The Federal savings association must have a comprehensive risk parameter quantification process that produces accurate, timely, and reliable estimates of the risk parameters for the savings association's wholesale and retail exposures.

(2) Data used to estimate the risk parameters must be relevant to the savings association's actual wholesale and retail exposures, and of sufficient quality to support the determination of risk-based capital requirements for the exposures.

(3) The savings association's risk parameter quantification process must produce appropriately conservative risk parameter estimates where the savings association has limited relevant data, and any adjustments that are part of the quantification process must not result in a pattern of bias toward lower risk parameter estimates.

(4) The savings association's risk parameter estimation process should not rely on the possibility of U.S. government financial assistance, except for the financial assistance that the U.S. government has a legally binding commitment to provide.

(5) Where the savings association's quantifications of LGD directly or indirectly incorporate estimates of the effectiveness of its credit risk management practices in reducing its exposure to troubled obligors prior to default, the savings association must support such estimates with empirical analysis showing that the estimates are consistent with its historical experience in dealing with such exposures during economic downturn conditions.

(6) PD estimates for wholesale obligors and retail segments must be based on at least five years of default data. LGD estimates for wholesale exposures must be based on at least seven years of loss severity data, and LGD estimates for retail segments must be based on at least five years of loss severity data. EAD estimates for wholesale exposures must be based on at least seven years of exposure amount data, and EAD estimates for retail segments must be based on at least five years of exposure amount data.

(7) Default, loss severity, and exposure amount data must include periods of economic downturn conditions, or the savings association must adjust its estimates

of risk parameters to compensate for the lack of data from periods of economic downturn conditions.

(8) The savings association's PD, LGD, and EAD estimates must be based on the definition of default in this appendix.

(9) The savings association must review and update (as appropriate) its risk parameters and its risk parameter quantification process at least annually.

(10) The savings association must at least annually conduct a comprehensive review and analysis of reference data to determine relevance of reference data to the savings association's exposures, quality of reference data to support PD, LGD, and EAD estimates, and consistency of reference data to the definition of default contained in this appendix.

(d) *Counterparty credit risk model.* A Federal savings association must obtain the prior written approval of the OCC under section 32 of this appendix to use the internal models methodology for counterparty credit risk.

(e) *Double default treatment.* A Federal savings association must obtain the prior written approval of the OCC under section 34 of this appendix to use the double default treatment.

(f) *Securitization exposures.* A Federal savings association must obtain the prior written approval of the OCC under section 44 of this appendix to use the Internal Assessment Approach for securitization exposures to ABCP programs.

(g) *Equity exposures model.* A Federal savings association must obtain the prior written approval of the OCC under section 53 of this appendix to use the Internal Models Approach for equity exposures.

(h) *Operational risk*—(1) *Operational risk management processes.* A Federal savings association must:

(i) Have an operational risk management function that:

(A) Is independent of business line management; and

(B) Is responsible for designing, implementing, and overseeing the savings association's operational risk data and assessment systems, operational risk quantification systems, and related processes;

(ii) Have and document a process (which must capture business environment and internal control factors affecting the savings association's operational risk profile) to identify, measure, monitor, and control operational risk in savings association products, activities, processes, and systems; and

(iii) Report operational risk exposures, operational loss events, and other relevant operational risk information to business unit management, senior management, and the board of directors (or a designated committee of the board).

(2) *Operational risk data and assessment systems.* A Federal savings association must have operational risk data and assessment systems that capture operational risks to which the savings association is exposed. The savings association's operational risk data and assessment systems must:

(i) Be structured in a manner consistent with the savings association's current business activities, risk profile, technological processes, and risk management processes; and

(ii) Include credible, transparent, systematic, and verifiable processes that incorporate the following elements on an ongoing basis:

(A) *Internal operational loss event data.* The Federal savings association must have a systematic process for capturing and using internal operational loss event data in its operational risk data and assessment systems.

(*1*) The savings association's operational risk data and assessment systems must include a historical observation period of at least five years for internal operational loss event data (or such shorter period approved by the OCC to address transitional situations, such as integrating a new business line).

(*2*) The Federal savings association must be able to map its internal operational loss event data into the seven operational loss event type categories.

(*3*) The savings association may refrain from collecting internal operational loss event data for individual operational losses below established dollar threshold amounts if the savings association can demonstrate to the satisfaction of the OCC that the thresholds are reasonable, do not exclude important internal operational loss event data, and permit the savings association to capture substantially all the dollar value of the savings association's operational losses.

(B) *External operational loss event data.* The Federal savings association must have a systematic process for determining its methodologies for incorporating external operational loss event data into its operational risk data and assessment systems.

(C) *Scenario analysis.* The Federal savings association must have a systematic process for determining its methodologies for incorporating scenario analysis into its operational risk data and assessment systems.

(D) *Business environment and internal control factors.* The Federal savings association must incorporate business environment and internal control factors into its operational risk data and assessment systems. The Federal savings association must also periodically compare the results of its prior business environment and internal control factor assessments against its actual operational losses incurred in the intervening period.

(3) *Operational risk quantification systems.* (i) The Federal savings association's operational risk quantification systems:

(A) Must generate estimates of the savings association's operational risk exposure using its operational risk data and assessment systems;

(B) Must employ a unit of measure that is appropriate for the savings association's range of business activities and the variety of operational loss events to which it is exposed, and that does not combine business activities or operational loss events with demonstrably different risk profiles within the same loss distribution;

(C) Must include a credible, transparent, systematic, and verifiable approach for weighting each of the four elements, described in paragraph (h)(2)(ii) of this section, that a savings association is required to incorporate into its operational risk data and assessment systems;

(D) May use internal estimates of dependence among operational losses across and within units of measure if the savings association can demonstrate to the satisfaction of the OCC that its process for estimating dependence is sound, robust to a variety of scenarios, and implemented with integrity, and allows for the uncertainty surrounding the estimates. If the savings association has not made such a demonstration, it must sum operational risk exposure estimates across units of measure to calculate its total operational risk exposure; and

(E) Must be reviewed and updated (as appropriate) whenever the savings association becomes aware of information that may have a material effect on the savings association's estimate of operational risk exposure, but the review and update must occur no less frequently than annually.

(ii) With the prior written approval of the OCC, a Federal savings association may generate an estimate of its operational risk exposure using an alternative approach to that specified in paragraph (h)(3)(i) of this section. A savings association proposing to use such an alternative operational risk quantification system must submit a proposal to the OCC. In determining whether to approve a savings association's proposal to use an alternative operational risk quantification system, the OCC will consider the following principles:

(A) Use of the alternative operational risk quantification system will be allowed only on an exception basis, considering the size, complexity, and risk profile of the savings association;

(B) The savings association must demonstrate that its estimate of its operational risk exposure generated under the alternative operational risk quantification system is appropriate and can be supported empirically; and

(C) A savings association must not use an allocation of operational risk capital requirements that includes entities other than depository institutions or the benefits of diversification across entities.

(i) *Data management and maintenance.* (1) A Federal savings association must have data management and maintenance systems that adequately support all aspects of its advanced systems and the timely and accurate reporting of risk-based capital requirements.

(2) A Federal savings association must retain data using an electronic format that allows timely retrieval of data for analysis, validation, reporting, and disclosure purposes.

(3) A Federal savings association must retain sufficient data elements related to key risk drivers to permit adequate monitoring, validation, and refinement of its advanced systems.

(j) *Control, oversight, and validation mechanisms.* (1) The Federal savings association's senior management must ensure that all components of the savings association's advanced systems function effectively and comply with the qualification requirements in this section.

(2) The savings association's board of directors (or a designated committee of the board) must at least annually review the effectiveness of, and approve, the savings association's advanced systems.

(3) A savings association must have an effective system of controls and oversight that:

(i) Ensures ongoing compliance with the qualification requirements in this section;

(ii) Maintains the integrity, reliability, and accuracy of the savings association's advanced systems; and

(iii) Includes adequate governance and project management processes.

(4) The Federal savings association must validate, on an ongoing basis, its advanced systems. The savings association's validation process must be independent of the advanced systems' development, implementation, and operation, or the validation process must be subjected to an independent review of its adequacy and effectiveness. Validation must include:

(i) An evaluation of the conceptual soundness of (including developmental evidence supporting) the advanced systems;

(ii) An ongoing monitoring process that includes verification of processes and benchmarking; and

(iii) An outcomes analysis process that includes back-testing.

(5) The Federal savings association must have an internal audit function independent of business-line management that at least annually assesses the effectiveness of the controls supporting the savings association's advanced systems and reports its findings to the savings association's board of directors (or a committee thereof).

(6) The Federal savings association must periodically stress test its advanced systems. The stress testing must include a consideration of how economic cycles, especially downturns, affect risk-based capital requirements (including migration across rating grades and segments and the credit risk mitigation benefits of double default treatment).

(k) *Documentation.* The Federal savings association must adequately document all material aspects of its advanced systems.

Section 23. Ongoing Qualification

(a) *Changes to advanced systems.* A Federal savings association must meet all the qualification requirements in section 22 of this appendix on an ongoing basis. A savings association must notify the OCC when the savings association makes any change to an advanced system that would result in a material change in the savings association's risk-weighted asset amount for an exposure type, or when the savings association makes any significant change to its modeling assumptions.

(b) *Failure to comply with qualification requirements.* (1) If the OCC determines that a Federal savings association that uses this appendix and has conducted a satisfactory parallel run fails to comply with the qualification requirements in section 22 of this appendix, the OCC will notify the savings association in writing of the savings association's failure to comply.

(2) The Federal savings association must establish and submit a plan satisfactory to the OCC to return to compliance with the qualification requirements.

(3) In addition, if the OCC determines that the savings association's risk-based capital requirements are not commensurate with the savings association's credit, market, operational, or other risks, the OCC may require such a savings association to calculate its risk-based capital requirements:

(i) Under subpart B of part 167; or

(ii) Under this appendix with any modifications provided by the OCC.

Section 24. Merger and Acquisition Transitional Arrangements

(a) *Mergers and acquisitions of companies without advanced systems.* If a Federal savings association merges with or acquires a company that does not calculate its risk-based capital requirements using advanced systems, the savings association may use subpart B of part 167 to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company's exposures for up to 24 months after the calendar quarter during which the merger or acquisition consummates. The OCC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the savings association must submit to the OCC an implementation plan for using its advanced systems for the acquired company. During the period when subpart A of this part applies to the merged or acquired company, any ALLL associated with the merged or acquired company's exposures may be included in the savings association's tier 2 capital up to 1.25 percent of the acquired company's risk-weighted assets. All general allowances of the merged or acquired company must be excluded from the savings association's eligible credit reserves. In addition, the risk-weighted assets of the merged or acquired company are not included in the savings association's credit-risk-weighted assets but are included in total risk-weighted assets. If a savings association relies on this paragraph, the savings association must disclose publicly the amounts of risk-weighted assets and qualifying capital calculated under this appendix for the acquiring savings association and under subpart B of part 167 for the acquired company.

(b) *Mergers and acquisitions of companies with advanced systems*—(1) If a Federal savings association merges with or acquires a company that calculates its risk-based capital requirements using advanced systems, the savings association may use the acquired company's advanced systems to determine the risk-weighted asset amounts for, and deductions from capital associated with, the merged or acquired company's exposures for up to 24 months after the calendar quarter during which the acquisition or merger consummates. The OCC may extend this transition period for up to an additional 12 months. Within 90 days of consummating the merger or acquisition, the savings association must submit to the OCC an implementation plan for using its advanced systems for the merged or acquired company.

(2) If the acquiring Federal savings association is not subject to the advanced approaches in this appendix at the time of acquisition or merger, during the period when subpart B of part 167 apply to the acquiring savings association, the ALLL associated with the exposures of the merged or acquired company may not be directly included in tier 2 capital. Rather, any excess eligible credit reserves associated with the merged or acquired company's exposures may be included in the savings association's tier 2 capital up to 0.6 percent of the credit-risk-weighted assets associated with those exposures.

Part IV. Risk-Weighted Assets for General Credit Risk

Section 31. Mechanics for Calculating Total Wholesale and Retail Risk-Weighted Assets

(a) *Overview.* A Federal savings association must calculate its total wholesale and retail risk-weighted asset amount in four distinct phases:

(1) Phase 1—categorization of exposures;

(2) Phase 2—assignment of wholesale obligors and exposures to rating grades and segmentation of retail exposures;

(3) Phase 3—assignment of risk parameters to wholesale exposures and segments of retail exposures; and

(4) Phase 4—calculation of risk-weighted asset amounts.

(b) *Phase 1—Categorization.* The Federal savings association must determine which of its exposures are wholesale exposures, retail exposures, securitization exposures, or equity exposures. The savings association must categorize each retail exposure as a residential mortgage exposure, a QRE, or an other retail exposure. The savings association must identify which wholesale exposures are HVCRE exposures, sovereign exposures, OTC derivative contracts, repo-style transactions, eligible margin loans, eligible purchased wholesale exposures, unsettled transactions to which section 35 of this appendix applies, and eligible guarantees or eligible credit derivatives that are used as credit risk mitigants. The savings association must identify any on-balance sheet asset that does not meet the definition of a wholesale, retail, equity, or securitization exposure, as well as any non-material portfolio of exposures described in paragraph (e)(4) of this section.

(c) *Phase 2—Assignment of wholesale obligors and exposures to rating grades and retail exposures to segments—(1) Assignment of wholesale obligors and exposures to rating grades.*

(i) The savings association must assign each obligor of a wholesale exposure to a single obligor rating grade and must assign each wholesale exposure to which it does not directly assign an LGD estimate to a loss severity rating grade.

(ii) The savings association must identify which of its wholesale obligors are in default.

(2) *Segmentation of retail exposures.* (i) The savings association must group the retail exposures in each retail subcategory into segments that have homogeneous risk characteristics.

(ii) The savings association must identify which of its retail exposures are in default. The savings association must segment defaulted retail exposures separately from non-defaulted retail exposures.

(iii) If the savings association determines the EAD for eligible margin loans using the approach in paragraph (b) of section 32 of this appendix, the savings association must identify which of its retail exposures are eligible margin loans for which the savings association uses this EAD approach and must segment such eligible margin loans separately from other retail exposures.

(3) *Eligible purchased wholesale exposures.* A Federal savings association may group its eligible purchased wholesale exposures into segments that have homogeneous risk characteristics. A Federal savings association must use the wholesale exposure formula in Table 2 in this section to determine the risk-based capital requirement for each segment of eligible purchased wholesale exposures.

(d) *Phase 3—Assignment of risk parameters to wholesale exposures and segments of retail exposures*—(1) *Quantification process.* Subject to the limitations in this paragraph (d), the Federal savings association must:

(i) Associate a PD with each wholesale obligor rating grade;

(ii) Associate an LGD with each wholesale loss severity rating grade or assign an LGD to each wholesale exposure;

(iii) Assign an EAD and M to each wholesale exposure; and

(iv) Assign a PD, LGD, and EAD to each segment of retail exposures.

(2) *Floor on PD assignment.* The PD for each wholesale obligor or retail segment may not be less than 0.03 percent, except for exposures to or directly and unconditionally guaranteed by a sovereign entity, the Bank for International Settlements, the International Monetary Fund, the European Commission, the European Central Bank, or a multilateral development bank, to which the savings association assigns a rating grade associated with a PD of less than 0.03 percent.

(3) *Floor on LGD estimation.* The LGD for each segment of residential mortgage exposures (other than segments of residential mortgage exposures for which all or substantially all of the principal of each exposure is directly and unconditionally guaranteed by the full faith and credit of a sovereign entity) may not be less than 10 percent.

(4) *Eligible purchased wholesale exposures.* A Federal savings association must assign a PD, LGD, EAD, and M to each segment of eligible purchased wholesale exposures. If the savings association can estimate ECL (but not PD or LGD) for a segment of eligible purchased wholesale exposures, the savings association must assume that the LGD of the segment equals 100 percent and that the PD of the segment equals ECL divided by EAD. The estimated ECL must be calculated for the exposures without regard to any assumption of recourse or guarantees from the seller or other parties.

(5) *Credit risk mitigation—credit derivatives, guarantees, and collateral.* (i) A Federal savings association may take into account the risk reducing effects of eligible guarantees and eligible credit derivatives in support of a wholesale exposure by applying the PD substitution or LGD adjustment treatment to the exposure as provided in section 33 of this appendix or, if applicable, applying double default treatment to the exposure as provided in section 34 of this appendix. A Federal savings association may decide separately for each wholesale exposure that qualifies for the double default treatment under section 34 of this appendix whether to apply the double default treatment or to use the PD substitution or LGD adjustment treatment without recognizing double default effects.

(ii) A Federal savings association may take into account the risk reducing effects of guarantees and credit derivatives in support of retail exposures in a segment when quantifying the PD and LGD of the segment.

(iii) Except as provided in paragraph (d)(6) of this section, a Federal savings association may take into account the risk reducing effects of collateral in support of a wholesale exposure when quantifying the LGD of the exposure and may take into account the risk reducing effects of collateral in support of retail exposures when quantifying the PD and LGD of the segment.

(6) *EAD for OTC derivative contracts, repo-style transactions, and eligible margin loans.* (i) A Federal savings association must calculate its EAD for an OTC derivative contract as provided in paragraphs (c) and (d) of section 32 of this appendix. A Federal savings association may take into account the risk-reducing effects of financial collateral in support of a repo-style transaction or eligible margin loan and of any collateral in support of a repo-style transaction that is included in the savings association's VaR-based measure under any applicable market risk rule through an adjustment to EAD as provided in paragraphs (b) and (d) of section 32 of this appendix. A savings association that takes collateral into account through such an adjustment to EAD under section 32 of this appendix may not reflect such collateral in LGD.

(ii) A Federal savings association may attribute an EAD of zero to:

(A) Derivative contracts that are publicly traded on an exchange that requires the daily receipt and payment of cash-variation margin;

(B) Derivative contracts and repo-style transactions that are outstanding with a qualifying central counterparty (but not for those transactions that a qualifying central counterparty has rejected); and

(C) Credit risk exposures to a qualifying central counterparty in the form of clearing deposits and posted collateral that arise from transactions described in paragraph (d)(6)(ii)(B) of this section.

(7) *Effective maturity.* An exposure's M must be no greater than five years and no less than one year, except that an exposure's M must be no less than one day if the exposure has an original maturity of less than one year and is not part of a Federal savings association's ongoing financing of the obligor. An exposure is not part of a Federal savings association's ongoing financing of the obligor if the savings association:

(i) Has a legal and practical ability not to renew or roll over the exposure in the event of credit deterioration of the obligor;

(ii) Makes an independent credit decision at the inception of the exposure and at every renewal or roll over; and

(iii) Has no substantial commercial incentive to continue its credit relationship with the obligor in the event of credit deterioration of the obligor.

(e) *Phase 4—Calculation of risk-weighted assets*—(1) *Non-defaulted exposures.* (i) A Federal savings association must calculate the dollar risk-based capital requirement for each of its wholesale exposures to a non-defaulted obligor (except eligible guarantees and eligible credit derivatives that hedge another wholesale exposure and exposures to which the savings association applies the double default treatment in section 34 of this appendix) and segments of non-defaulted retail exposures by inserting the assigned risk parameters for the wholesale obligor and exposure or retail segment into the appropriate risk-based capital formula specified in Table 2 and multiplying the output of the formula (K) by the EAD of the exposure or segment. Alternatively, a Federal savings association may apply a 300 percent risk weight to the EAD of an eligible margin loan if the savings association is not able to meet the agencies' requirements for estimation of PD and LGD for the margin loan.

Table 2 – IRB Risk-Based Capital Formulas for Wholesale Exposures to Non-Defaulted Obligors and Segments of Non-Defaulted Retail Exposures[1]

Retail	**Capital Requirement (K) Non-Defaulted Exposures**	$K = \left[LGD \times N\left(\frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right]$
	Correlation Factor (R)	For residential mortgage exposures: $R = 0.15$
		For qualifying revolving exposures: $R = 0.04$
		For other retail exposures: $R = 0.03 + 0.13 \times e^{-35 \times PD}$
Wholesale	**Capital Requirement (K) Non-Defaulted Exposures**	$K = \left[LGD \times N\left(\frac{N^{-1}(PD) + \sqrt{R} \times N^{-1}(0.999)}{\sqrt{1-R}} \right) - (LGD \times PD) \right] \times \left(\frac{1 + (M - 2.5) \times b}{1 - 1.5 \times b} \right)$
	Correlation Factor (R)	For HVCRE exposures: $R = 0.12 + 0.18 \times e^{-50 \times PD}$
		For wholesale exposures other than HVCRE exposures: $R = 0.12 + 0.12 \times e^{-50 \times PD}$
	Maturity Adjustment (b)	$b = (0.11852 - 0.05478 \times \ln(PD))^2$

[1] N(.) means the cumulative distribution function for a standard normal random variable. N^{-1}(.) means the inverse cumulative distribution function for a standard normal random variable. The symbol e refers to the base of the natural logarithms, and the function ln(.) refers to the natural logarithm of the expression within parentheses. The formulas apply when PD is greater than zero. If PD equals zero, the capital requirement K is set equal to zero.

(ii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a non-defaulted obligor and segment of non-defaulted retail exposures calculated in paragraph (e)(1)(i) of this section and in paragraph (e) of section 34 of this appendix equals the total dollar risk-based capital requirement for those exposures and segments.

(iii) The aggregate risk-weighted asset amount for wholesale exposures to non-defaulted obligors and segments of non-defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(1)(ii) of this section multiplied by 12.5.

(2) *Wholesale exposures to defaulted obligors and segments of defaulted retail exposures.* (i) The dollar risk-based capital requirement for each wholesale exposure to a defaulted obligor equals 0.08 multiplied by the EAD of the exposure.

(ii) The dollar risk-based capital requirement for a segment of defaulted retail exposures equals 0.08 multiplied by the EAD of the segment.

(iii) The sum of all the dollar risk-based capital requirements for each wholesale exposure to a defaulted obligor calculated in paragraph (e)(2)(i) of this section plus the dollar risk-based capital requirements for each segment of defaulted retail exposures calculated in paragraph (e)(2)(ii) of this section equals the total dollar risk-based capital requirement for those exposures and segments.

(iv) The aggregate risk-weighted asset amount for wholesale exposures to defaulted obligors and segments of defaulted retail exposures equals the total dollar risk-based capital requirement calculated in paragraph (e)(2)(iii) of this section multiplied by 12.5.

(3) *Assets not included in a defined exposure category.* (i) A Federal savings association may assign a risk-weighted asset amount of zero to cash owned and held in all offices of the savings association or in transit and for gold bullion held in the savings association's own vaults, or held in another savings association's vaults on an allocated basis, to the extent the gold bullion assets are offset by gold bullion liabilities.

(ii) The risk-weighted asset amount for the residual value of a retail lease exposure equals such residual value.

(iii) The risk-weighted asset amount for any other on-balance-sheet asset that does not meet the definition of a wholesale, retail, securitization, or equity exposure equals the carrying value of the asset.

(4) *Non-material portfolios of exposures.* The risk-weighted asset amount of a portfolio of exposures for which the Federal savings association has demonstrated to the OCC's satisfaction that the portfolio (when combined with all other portfolios of exposures that the savings association seeks to treat under this paragraph) is not material to the savings association is the sum of the carrying values of on-balance sheet exposures plus the notional amounts of off-balance sheet exposures in the portfolio. For purposes of this paragraph (e)(4), the notional amount of an OTC derivative contract that is not a credit derivative is the EAD of the derivative as calculated in section 32 of this appendix.

Section 32. Counterparty Credit Risk of Repo-Style Transactions, Eligible Margin Loans, and OTC Derivative Contracts

(a) *In General.* (1) This section describes two methodologies—a collateral haircut approach and an internal models methodology—that a Federal savings association may use instead of an LGD estimation methodology to recognize the benefits of financial collateral in mitigating the counterparty credit risk of repo-style transactions, eligible margin loans,

collateralized OTC derivative contracts, and single product netting sets of such transactions and to recognize the benefits of any collateral in mitigating the counterparty credit risk of repo-style transactions that are included in a Federal savings association's VaR-based measure under any applicable market risk rule. A third methodology, the simple VaR methodology, is available for single product netting sets of repo-style transactions and eligible margin loans.

(2) This section also describes the methodology for calculating EAD for an OTC derivative contract or a set of OTC derivative contracts subject to a qualifying master netting agreement. A Federal savings association also may use the internal models methodology to estimate EAD for qualifying cross-product master netting agreements.

(3) A Federal savings association may only use the standard supervisory haircut approach with a minimum 10-business-day holding period to recognize in EAD the benefits of conforming residential mortgage collateral that secures repo-style transactions (other than repo-style transactions included in the savings association's VaR-based measure under any applicable market risk rule), eligible margin loans, and OTC derivative contracts.

(4) A Federal savings association may use any combination of the three methodologies for collateral recognition; however, it must use the same methodology for similar exposures.

(b) *EAD for eligible margin loans and repo-style transactions*—(1) *General.* A Federal savings association may recognize the credit risk mitigation benefits of financial collateral that secures an eligible margin loan, repo-style transaction, or single-product netting set of such transactions by factoring the collateral into its LGD estimates for the exposure. Alternatively, a savings association may estimate an unsecured LGD for the exposure, as well as for any repo-style transaction that is included in the savings association's VaR-based measure under any applicable market risk rule, and determine the EAD of the exposure using:

(i) The collateral haircut approach described in paragraph (b)(2) of this section;

(ii) For netting sets only, the simple VaR methodology described in paragraph (b)(3) of this section; or

(iii) The internal models methodology described in paragraph (d) of this section.

(2) *Collateral haircut approach*—(i) *EAD equation.* A Federal savings association may determine EAD for an eligible margin loan, repo-style transaction, or netting set by setting EAD equal to max $\{0, [(\Sigma E - \Sigma C) + \Sigma(Es \times Hs) + \Sigma(Efx \times Hfx)]\}$, where:

(A) ΣE equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the Federal savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty under the transaction (or netting set));

(B) ΣC equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the Federal savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the transaction (or netting set));

(C) Es equals the absolute value of the net position in a given instrument or in gold (where the net position in a given instrument or in gold equals the sum of the current market values of the instrument or gold the Federal savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of that same instrument or gold the savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty);

(D) Hs equals the market price volatility haircut appropriate to the instrument or gold referenced in Es;

(E) Efx equals the absolute value of the net position of instruments and cash in a currency that is different from the settlement currency (where the net position in a given currency equals the sum of the current market values of any instruments or cash in the currency the Federal savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty minus the sum of the current market values of any instruments or cash in the currency the savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty); and

(F) Hfx equals the haircut appropriate to the mismatch between the currency referenced in Efx and the settlement currency.

(ii) *Standard supervisory haircuts.* (A) Under the standard supervisory haircuts approach:

(*1*) A Federal savings association must use the haircuts for market price volatility (Hs) in Table 3, as adjusted in certain circumstances as provided in paragraph (b)(2)(ii)(A)(*3*) and (*4*) of this section;

TABLE 3—STANDARD SUPERVISORY MARKET PRICE VOLATILITY HAIRCUTS [1]

Applicable external rating grade category for debt securities	Residual maturity for debt securities	Issuers exempt from the 3 basis point floor	Other issuers
Two highest investment-grade rating categories for long-term ratings/highest investment-grade rating category for short-term ratings.	≤ 1 year	0.005	0.01
	>1 year, ≤ 5 years	0.02	0.04
	> 5 years	0.04	0.08
Two lowest investment-grade rating categories for both short- and long-term ratings.	≤ 1 year	0.01	0.02
	> 1 year, ≤ 5 years	0.03	0.06
	> 5 years	0.06	0.12
One rating category below investment grade	All	0.15	0.25
Main index equities (including convertible bonds) and gold		0.15	
Other publicly traded equities (including convertible bonds), conforming residential mortgages, and nonfinancial collateral.		0.25	
Mutual funds		Highest haircut applicable to any security in which the fund can invest.	
Cash on deposit with the Federal savings association (including a certificate of deposit issued by the savings association).		0	

[1] The market price volatility haircuts in Table 3 are based on a ten-business-day holding period.

(*2*) For currency mismatches, a Federal savings association must use a haircut for foreign exchange rate volatility (Hfx) of 8 percent, as adjusted in certain circumstances as provided in paragraph (b)(2)(ii)(A)(*3*) and (*4*) of this section.

(*3*) For repo-style transactions, a Federal savings association may multiply the supervisory haircuts provided in paragraphs (b)(2)(ii)(A)(*1*) and (*2*) of this section by the square root of ½ (which equals 0.707107).

(*4*) A Federal savings association must adjust the supervisory haircuts upward on the basis of a holding period longer than ten business days (for eligible margin loans) or five business days (for repo-style transactions) where and as appropriate to take into account the illiquidity of an instrument.

(iii) *Own internal estimates for haircuts.* With the prior written approval of the OCC, a Federal savings association may calculate haircuts (Hs and Hfx) using its own internal estimates of the volatilities of market prices and foreign exchange rates.

(A) To receive the OCC's approval to use its own internal estimates, a Federal savings association must satisfy the following minimum quantitative standards:

(*1*) A Federal savings association must use a 99th percentile one-tailed confidence interval.

(*2*) The minimum holding period for a repo-style transaction is five business days and for an eligible margin loan is ten business days. When a Federal savings association calculates an own-estimates haircut on a T_N-day holding period, which is different from the minimum holding period for the transaction type, the applicable haircut (H_M) is calculated using the following square root of time formula:

$$H_M = H_N \sqrt{\frac{T_M}{T_N}}, \text{ where}$$

(*i*) T_M equals 5 for repo-style transactions and 10 for eligible margin loans;

(*ii*) T_N equals the holding period used by the savings association to derive H_N; and

(*iii*) H_N equals the haircut based on the holding period T_N.

(*3*) A Federal savings association must adjust holding periods upwards where and as appropriate to take into account the illiquidity of an instrument.

(*4*) The historical observation period must be at least one year.

(*5*) A Federal savings association must update its data sets and recompute haircuts no less frequently than quarterly and must also reassess data sets and haircuts whenever market prices change materially.

(B) With respect to debt securities that have an applicable external rating of investment grade, a Federal savings association may calculate haircuts for categories of securities. For a category of securities, the savings association must calculate the haircut on the basis of internal volatility estimates for securities in that category that are representative of the securities in that category that the savings association has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. In determining relevant categories, the savings association must at a minimum take into account:

(*1*) The type of issuer of the security;

(*2*) The applicable external rating of the security;

(*3*) The maturity of the security; and

(*4*) The interest rate sensitivity of the security.

(C) With respect to debt securities that have an applicable external rating of below investment grade and equity securities, a Federal savings association must calculate a separate haircut for each individual security.

(D) Where an exposure or collateral (whether in the form of cash or securities) is denominated in a currency that differs from the settlement currency, the Federal savings association must calculate a separate currency mismatch haircut for its net position in each mismatched currency based on estimated volatilities of foreign exchange rates between the mismatched currency and the settlement currency.

(E) A Federal savings association's own estimates of market price and foreign exchange rate volatilities may not take into account the correlations among securities and foreign exchange rates on either the exposure or collateral side of a transaction (or netting set) or the correlations among securities and foreign exchange rates between the exposure and collateral sides of the transaction (or netting set).

(3) *Simple VaR methodology* . With the prior written approval of the OCC, a Federal savings association may estimate EAD for a netting set using a VaR model that meets the requirements in paragraph (b)(3)(iii) of this section. In such event, the savings association must set EAD equal to max {0, [(ΣE − ΣC) + PFE]}, where:

(i) ΣE equals the value of the exposure (the sum of the current market values of all instruments, gold, and cash the savings association has lent, sold subject to repurchase, or posted as collateral to the counterparty under the netting set);

(ii) ΣC equals the value of the collateral (the sum of the current market values of all instruments, gold, and cash the savings association has borrowed, purchased subject to resale, or taken as collateral from the counterparty under the netting set); and

(iii) PFE (potential future exposure) equals the savings association's empirically based best estimate of the 99th percentile, one-tailed confidence interval for an increase in the value of (ΣE − ΣC) over a five-business-day holding period for repo-style transactions or over a ten-business-day holding period for eligible margin loans using a minimum one-year historical observation period of price data representing the instruments that the savings association has lent, sold subject to repurchase, posted as collateral, borrowed, purchased subject to resale, or taken as collateral. The savings association must validate its VaR model, including by establishing and maintaining a rigorous and regular back-testing regime.

(c) *EAD for OTC derivative contracts.* (1) A Federal savings association must determine the EAD for an OTC derivative contract that is not subject to a qualifying master netting agreement using the current exposure methodology in paragraph (c)(5) of this section or using the internal models methodology described in paragraph (d) of this section.

(2) A Federal savings association must determine the EAD for multiple OTC derivative contracts that are subject to a qualifying master netting agreement using the current exposure methodology in paragraph (c)(6) of this section or using the internal models methodology described in paragraph (d) of this section.

(3) *Counterparty credit risk for credit derivatives.* Notwithstanding the above:

(i) A Federal savings association that purchases a credit derivative that is recognized under section 33 or 34 of this appendix as a credit risk mitigant for an exposure that is not a covered position under any applicable market risk rule need not compute a separate counterparty credit risk capital requirement under this section so long as the savings association does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes.

(ii) A Federal savings association that is the protection provider in a credit derivative must treat the credit derivative as a wholesale exposure to the reference obligor and need not compute a counterparty credit risk capital requirement for the credit derivative under this section, so long as it does so consistently for all such credit derivatives and either includes all or excludes all such credit derivatives that are subject to a master netting agreement from any measure used to determine counterparty credit risk exposure to all relevant counterparties for risk-based capital purposes (unless the savings association is treating the credit derivative as a covered position under any applicable market risk rule, in which case the savings association must compute a supplemental counterparty credit risk capital requirement under this section).

(4) *Counterparty credit risk for equity derivatives.* A Federal savings association must treat an equity derivative contract as an equity exposure and compute a risk-weighted asset amount for the equity derivative contract under part VI (unless the savings association is treating the contract as a covered position under any applicable market risk rule). In addition, if the savings association is treating the contract as a covered position under any applicable market risk rule and in certain other cases described in section 55 of this appendix, the savings association must also calculate a risk-based capital requirement for the counterparty credit risk of an equity derivative contract under this part.

(5) *Single OTC derivative contract.* Except as modified by paragraph (c)(7) of this section, the EAD for a single OTC derivative contract that is not subject to a qualifying master netting agreement is equal to the sum of the Federal savings association's current credit exposure and potential future credit exposure (PFE) on the derivative contract.

(i) *Current credit exposure.* The current credit exposure for a single OTC derivative contract is the greater of the mark-to-market value of the derivative contract or zero.

(ii) *PFE.* The PFE for a single OTC derivative contract, including an OTC derivative contract with a negative mark-to-market value, is calculated by multiplying the notional principal amount of the derivative contract by the appropriate conversion factor in Table 4. For purposes of calculating either the PFE under this paragraph or the gross PFE under paragraph (c)(6) of this section for exchange rate contracts and other similar contracts in which the notional principal amount is equivalent to the cash flows, notional principal amount is the net receipts to each party falling due on each value date in each currency. For any OTC derivative contract that does not fall within one of the specified categories in Table 4, the PFE must be calculated using the ''other'' conversion factors. A Federal savings association must use an OTC derivative contract's effective notional principal amount (that is, its apparent or stated notional principal amount multiplied by any multiplier in the OTC derivative contract) rather than its apparent or stated notional principal amount in calculating PFE. PFE of the protection provider of a credit derivative is capped at the net present value of the amount of unpaid premiums.

TABLE 4—CONVERSION FACTOR MATRIX FOR OTC DERIVATIVE CONTRACTS[1]

Remaining maturity[2]	Interest rate	Foreign exchange rate and gold	Credit (investment-grade reference obligor)[3]	Credit (non-investment-grade reference obligor)	Equity	Precious metals (except gold)	Other
One year or less	0.00	0.01	0.05	0.10	0.06	0.07	0.10
Over one to five years	0.005	0.05	0.05	0.10	0.08	0.07	0.12
Over five years	0.015	0.075	0.05	0.10	0.10	0.08	0.15

[1] For an OTC derivative contract with multiple exchanges of principal, the conversion factor is multiplied by the number of remaining payments in the derivative contract.

[2] For an OTC derivative contract that is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the contract is zero, the remaining maturity equals the time until the next reset date. For an interest rate derivative contract with a remaining maturity of greater than one year that meets these criteria, the minimum conversion factor is 0.005.

[3] A Federal savings association must use the column labeled ''Credit (investment-grade reference obligor)'' for a credit derivative whose reference obligor has an outstanding unsecured long-term debt security without credit enhancement that has a long-term applicable external rating of at least investment grade. A savings association must use the column labeled ''Credit (non-investment-grade reference obligor)'' for all other credit derivatives.

(6) *Multiple OTC derivative contracts subject to a qualifying master netting agreement.* Except as modified by paragraph (c)(7) of this section, the EAD for multiple OTC derivative contracts subject to a qualifying master netting agreement is equal to the sum of the net current credit exposure and the adjusted sum of the PFE exposure for all OTC derivative contracts subject to the qualifying master netting agreement.

(i) *Net current credit exposure.* The net current credit exposure is the greater of:

(A) The net sum of all positive and negative mark-to-market values of the individual OTC derivative contracts subject to the qualifying master netting agreement; or

(B) Zero.

(ii) *Adjusted sum of the PFE.* The adjusted sum of the PFE, Anet, is calculated as Anet = (0.4 × Agross)+(0.6 × NGR × Agross), where:

(A) Agross = the gross PFE (that is, the sum of the PFE amounts (as determined under paragraph (c)(5)(ii) of this section) for each individual OTC derivative contract subject to the qualifying master netting agreement); and

(B) NGR = the net to gross ratio (that is, the ratio of the net current credit exposure to the gross current credit exposure). In calculating the NGR, the gross current credit exposure equals the sum of the positive current credit exposures (as determined under paragraph (c)(5)(i) of this section) of all individual OTC derivative contracts subject to the qualifying master netting agreement.

(7) *Collateralized OTC derivative contracts.* A Federal savings association may recognize the credit risk mitigation benefits of financial collateral that secures an OTC derivative contract or single-product netting set of OTC derivatives by factoring the collateral into its LGD estimates for the contract or netting set. Alternatively, a Federal savings association may recognize the credit risk mitigation benefits of financial collateral that secures such a contract or netting set that is marked to market on a daily basis and subject to a daily margin maintenance requirement by estimating an unsecured LGD for the contract or netting set and adjusting the EAD calculated under paragraph (c)(5) or (c)(6) of this section using the collateral haircut approach in paragraph (b)(2) of this section. The savings association must substitute the EAD calculated under paragraph (c)(5) or (c)(6) of this section for ΣE in the equation in paragraph (b)(2)(i) of this section and must use a ten-business-day minimum holding period (T_M= 10).

(d) *Internal models methodology.* (1) With prior written approval from the OCC, a Federal savings association may use the internal models methodology in this paragraph (d) to determine EAD for counterparty credit risk for OTC derivative contracts (collateralized or uncollateralized) and single-product netting sets thereof, for eligible margin loans and single-product netting sets thereof, and for repo-style transactions and single-product netting sets thereof. A Federal savings association that uses the internal models methodology for a particular transaction type (OTC derivative contracts, eligible margin loans, or repo-style transactions) must use the internal models methodology for all transactions of that transaction type. A Federal savings association may choose to use the internal models methodology for one or two of these three types of exposures and not the other types. A Federal savings association may also use the internal models methodology for OTC derivative contracts, eligible margin loans, and repo-style transactions subject to a qualifying cross-product netting agreement if:

(i) The savings association effectively integrates the risk mitigating effects of cross-product netting into its risk management and other information technology systems; and

(ii) The savings association obtains the prior written approval of the OCC. A savings association that uses the internal models methodology for a transaction type must receive approval from the OCC to cease using the methodology for that transaction type or to make a material change to its internal model.

(2) Under the internal models methodology, a Federal savings association uses an internal model to estimate the expected exposure (EE) for a netting set and then calculates EAD based on that EE.

(i) The savings association must use its internal model's probability distribution for changes in the market value of a netting set that are attributable to changes in market variables to determine EE.

(ii) Under the internal models methodology, EAD = α x effective EPE, or, subject to the OCC's approval as provided in paragraph (d)(7), a more conservative measure of EAD.

$$\text{(A) Effective EPE}_{t_k} = \sum_{i=1}^{n} \text{Effective EE}_{t_k} \times \Delta t_k$$

(that is, effective EPE is the time-weighted average of effective EE where the weights are the proportion that an individual effective EE represents in a one-year time interval) where:

(*1*) Effective EE_tk = max (Effective EE_tk − 1, EE_tk) (that is, for a specific $date_tk$, effective EE is the greater of EE at that date or the effective EE at the previous date); and

(*2*) $_tk$ represents the kth future time period in the model and there are n time periods represented in the model over the first year; and

(B) α = 1.4 except as provided in paragraph (d)(6), or when the OCC has determined that the Federal savings association must set α higher based on the savings association's specific characteristics of counterparty credit risk.

(iii) A Federal savings association may include financial collateral currently posted by the counterparty as collateral (but may not include other forms of collateral) when calculating EE.

(iv) If a Federal savings association hedges some or all of the counterparty credit risk associated with a netting set using an eligible credit derivative, the savings association may take the reduction in exposure to the counterparty into account when estimating EE. If the savings association recognizes this reduction in exposure to the counterparty in its estimate of EE, it must also use its internal model to estimate a separate EAD for the savings association's exposure to the protection provider of the credit derivative.

(3) To obtain the OCC's approval to calculate the distributions of exposures upon which the EAD calculation is based, the Federal savings association must demonstrate to the satisfaction of the OCC that it has been using for at least one year an internal model that broadly meets the following minimum standards, with which the savings association must maintain compliance:

(i) The model must have the systems capability to estimate the expected exposure to the counterparty on a daily basis (but is

not expected to estimate or report expected exposure on a daily basis).

(ii) The model must estimate expected exposure at enough future dates to reflect accurately all the future cash flows of contracts in the netting set.

(iii) The model must account for the possible non-normality of the exposure distribution, where appropriate.

(iv) The savings association must measure, monitor, and control current counterparty exposure and the exposure to the counterparty over the whole life of all contracts in the netting set.

(v) The savings association must be able to measure and manage current exposures gross and net of collateral held, where appropriate. The savings association must estimate expected exposures for OTC derivative contracts both with and without the effect of collateral agreements.

(vi) The savings association must have procedures to identify, monitor, and control specific wrong-way risk throughout the life of an exposure. Wrong-way risk in this context is the risk that future exposure to a counterparty will be high when the counterparty's probability of default is also high.

(vii) The model must use current market data to compute current exposures. When estimating model parameters based on historical data, at least three years of historical data that cover a wide range of economic conditions must be used and must be updated quarterly or more frequently if market conditions warrant. The savings association should consider using model parameters based on forward-looking measures, where appropriate.

(viii) A savings association must subject its internal model to an initial validation and annual model review process. The model review should consider whether the inputs and risk factors, as well as the model outputs, are appropriate.

(4) *Maturity.* (i) If the remaining maturity of the exposure or the longest-dated contract in the netting set is greater than one year, the Federal savings association must set M for the exposure or netting set equal to the lower of five years or M(EPE) [3] where:

$$(A)\quad M(EPE) = 1 + \frac{\sum_{t_k > 1\,year}^{maturity} EE_k \times \Delta t_k \times df_k}{\sum_{t_k \le 1\,year} \sum_{k=1} effectiveEE_k \times \Delta t_k \times df_k}$$

(B) dfk is the risk-free discount factor for future time period tk; and

(C) $\Delta t k = t k - t k - 1$.

(ii) If the remaining maturity of the exposure or the longest-dated contract in the netting set is one year or less, the savings association must set M for the exposure or netting set equal to one year, except as provided in paragraph (d)(7) of section 31 of this appendix.

(5) *Collateral agreements.* A Federal savings association may capture the effect on EAD of a collateral agreement that requires receipt of collateral when exposure to the counterparty increases but may not capture the effect on EAD of a collateral agreement that requires receipt of collateral when counterparty credit quality deteriorates. For this purpose, a collateral agreement means a legal contract that specifies the time when, and circumstances under which, the counterparty is required to pledge collateral to the savings association for a single financial contract or for all financial contracts in a netting set and confers upon the savings association a perfected, first priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the savings association with a right to close out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the savings association's exercise of rights under the agreement may be stayed or avoided under applicable law in the relevant jurisdictions. Two methods are available to capture the effect of a collateral agreement:

(i) With prior written approval from the OCC, a savings association may include the effect of a collateral agreement within its internal model used to calculate EAD. The savings association may set EAD equal to the expected exposure at the end of the margin period of risk. The margin period of risk means, with respect to a netting set subject to a collateral agreement, the time period from the most recent exchange of collateral with a counterparty until the next required exchange of collateral plus the period of time required to sell and realize the proceeds of the least liquid collateral that can be delivered under the terms of the collateral agreement and, where applicable, the period of time required to re-hedge the resulting market risk, upon the default of the counterparty. The minimum margin period of risk is five business days for repo-style transactions and ten business days for other transactions when liquid financial collateral is posted under a daily margin maintenance requirement. This period should be extended to cover any additional time between margin calls; any potential closeout difficulties; any delays in selling collateral, particularly if the collateral is illiquid; and any impediments to prompt re-hedging of any market risk.

(ii) A savings association that can model EPE without collateral agreements but cannot achieve the higher level of modeling sophistication to model EPE with collateral agreements can set effective EPE for a collateralized netting set equal to the lesser of:

(A) The threshold, defined as the exposure amount at which the counterparty is required to post collateral under the collateral agreement, if the threshold is positive, plus an add-on that reflects the potential increase in exposure of the netting set over the margin period of risk. The add-on is computed as the expected increase in the netting set's exposure beginning from current exposure of zero over the margin period of risk. The margin period of risk must be at least five business days for netting sets consisting only of repo-style transactions subject to daily re-margining and daily marking-to-market, and ten business days for all other netting sets; or

(B) Effective EPE without a collateral agreement.

(6) *Own estimate of alpha.* With prior written approval of the OCC, a Federal savings association may calculate alpha as the ratio of economic capital from a full simulation of counterparty exposure across counterparties that incorporates a joint simulation of market and credit risk factors (numerator) and economic capital based on EPE (denominator), subject to a floor of 1.2. For purposes of this calculation, economic capital is the unexpected losses for all counterparty credit risks measured at a 99.9 percent confidence level over a one-year horizon. To receive approval, the savings association must meet the following minimum standards to the satisfaction of the OCC:

(i) The savings association's own estimate of alpha must capture in the numerator the effects of:

(A) The material sources of stochastic dependency of distributions of market values of transactions or portfolios of transactions across counterparties;

(B) Volatilities and correlations of market risk factors used in the joint simulation, which must be related to the credit risk factor used in the simulation to reflect potential increases in volatility or correlation in an economic downturn, where appropriate; and

(C) The granularity of exposures (that is, the effect of a concentration in the proportion of each counterparty's exposure that is driven by a particular risk factor).

(ii) The savings association must assess the potential model uncertainty in its estimates of alpha.

(iii) The savings association must calculate the numerator and denominator of alpha in a consistent fashion with respect to modeling methodology, parameter specifications, and portfolio composition.

[3] Alternatively, a Federal savings association that uses an internal model to calculate a one-sided credit valuation adjustment may use the effective credit duration estimated by the model as M(EPE) in place of the formula in paragraph (d)(4).

(iv) The savings association must review and adjust as appropriate its estimates of the numerator and denominator of alpha on at least a quarterly basis and more frequently when the composition of the portfolio varies over time.

(7) *Other measures of counterparty exposure.* With prior written approval of the OCC, a Federal savings association may set EAD equal to a measure of counterparty credit risk exposure, such as peak EAD, that is more conservative than an alpha of 1.4 (or higher under the terms of paragraph (d)(2)(ii)(B) of this section) times EPE for every counterparty whose EAD will be measured under the alternative measure of counterparty exposure. The savings association must demonstrate the conservatism of the measure of counterparty credit risk exposure used for EAD. For material portfolios of new OTC derivative products, the savings association may assume that the current exposure methodology in paragraphs (c)(5) and (c)(6) of this section meets the conservatism requirement of this paragraph for a period not to exceed 180 days. For immaterial portfolios of OTC derivative contracts, the savings association generally may assume that the current exposure methodology in paragraphs (c)(5) and (c)(6) of this section meets the conservatism requirement of this paragraph.

Section 33. Guarantees and Credit Derivatives: PD Substitution and LGD Adjustment Approaches

(a) *Scope.* (1) This section applies to wholesale exposures for which:

(i) Credit risk is fully covered by an eligible guarantee or eligible credit derivative; or

(ii) Credit risk is covered on a pro rata basis (that is, on a basis in which the Federal savings association and the protection provider share losses proportionately) by an eligible guarantee or eligible credit derivative.

(2) Wholesale exposures on which there is a tranching of credit risk (reflecting at least two different levels of seniority) are securitization exposures subject to the securitization framework in part V.

(3) A Federal savings association may elect to recognize the credit risk mitigation benefits of an eligible guarantee or eligible credit derivative covering an exposure described in paragraph (a)(1) of this section by using the PD substitution approach or the LGD adjustment approach in paragraph (c) of this section or, if the transaction qualifies, using the double default treatment in section 34 of this appendix. A savings association's PD and LGD for the hedged exposure may not be lower than the PD and LGD floors described in paragraphs (d)(2) and (d)(3) of section 31 of this appendix.

(4) If multiple eligible guarantees or eligible credit derivatives cover a single exposure described in paragraph (a)(1) of this section, a Federal savings association may treat the hedged exposure as multiple separate exposures each covered by a single eligible guarantee or eligible credit derivative and may calculate a separate risk-based capital requirement for each separate exposure as described in paragraph (a)(3) of this section.

(5) If a single eligible guarantee or eligible credit derivative covers multiple hedged wholesale exposures described in paragraph (a)(1) of this section, a Federal savings association must treat each hedged exposure as covered by a separate eligible guarantee or eligible credit derivative and must calculate a separate risk-based capital requirement for each exposure as described in paragraph (a)(3) of this section.

(6) A Federal savings association must use the same risk parameters for calculating ECL as it uses for calculating the risk-based capital requirement for the exposure.

(b) *Rules of recognition.* (1) A Federal savings association may only recognize the credit risk mitigation benefits of eligible guarantees and eligible credit derivatives.

(2) A Federal savings association may only recognize the credit risk mitigation benefits of an eligible credit derivative to hedge an exposure that is different from the credit derivative's reference exposure used for determining the derivative's cash settlement value, deliverable obligation, or occurrence of a credit event if:

(i) The reference exposure ranks pari passu (that is, equally) with or is junior to the hedged exposure; and

(ii) The reference exposure and the hedged exposure are exposures to the same legal entity, and legally enforceable cross-default or cross-acceleration clauses are in place to assure payments under the credit derivative are triggered when the obligor fails to pay under the terms of the hedged exposure.

(c) *Risk parameters for hedged exposures*—(1) *PD substitution approach*—(i) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, a Federal savings association may recognize the guarantee or credit derivative in determining the savings association's risk-based capital requirement for the hedged exposure by substituting the PD associated with the rating grade of the protection provider for the PD associated with the rating grade of the obligor in the risk-based capital formula applicable to the guarantee or credit derivative in Table 2 and using the appropriate LGD as described in paragraph (c)(1)(iii) of this section. If the savings association determines that full substitution of the protection provider's PD leads to an inappropriate degree of risk mitigation, the savings association may substitute a higher PD than that of the protection provider.

(ii) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the Federal savings association must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The savings association must calculate its risk-based capital requirement for the protected exposure under section 31 of this appendix, where PD is the protection provider's PD, LGD is determined under paragraph (c)(1)(iii) of this section, and EAD is P. If the savings association determines that full substitution leads to an inappropriate degree of risk mitigation, the savings association may use a higher PD than that of the protection provider.

(B) The savings association must calculate its risk-based capital requirement for the unprotected exposure under section 31 of this appendix, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(C) The treatment in this paragraph (c)(1)(ii) is applicable when the credit risk of a wholesale exposure is covered on a partial pro rata basis or when an adjustment is made to the effective notional amount of the guarantee or credit derivative under paragraph (d), (e), or (f) of this section.

(iii) *LGD of hedged exposures.* The LGD of a hedged exposure under the PD substitution approach is equal to:

(A) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the Federal savings association with the option to receive immediate payout upon triggering the protection; or

(B) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the Federal savings association with the option to receive immediate payout upon triggering the protection.

(2) *LGD adjustment approach*—(i) *Full coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is greater than or equal to the EAD of the hedged exposure, the Federal savings association's risk-based capital requirement for the hedged exposure is the greater of:

(A) The risk-based capital requirement for the exposure as calculated under section 31 of this appendix, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative; or

(B) The risk-based capital requirement for a direct exposure to the protection provider as calculated under section 31 of this appendix, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD equal to the EAD of the hedged exposure.

(ii) *Partial coverage.* If an eligible guarantee or eligible credit derivative meets the conditions in paragraphs (a) and (b) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the Federal savings association must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize the credit risk mitigation benefit of the guarantee or credit derivative.

(A) The savings association's risk-based capital requirement for the protected exposure would be the greater of:

(*1*) The risk-based capital requirement for the protected exposure as calculated under

section 31 of this appendix, with the LGD of the exposure adjusted to reflect the guarantee or credit derivative and EAD set equal to P; or

(*2*) The risk-based capital requirement for a direct exposure to the guarantor as calculated under section 31 of this appendix, using the PD for the protection provider, the LGD for the guarantee or credit derivative, and an EAD set equal to P.

(B) The savings association must calculate its risk-based capital requirement for the unprotected exposure under section 31 of this appendix, where PD is the obligor's PD, LGD is the hedged exposure's LGD (not adjusted to reflect the guarantee or credit derivative), and EAD is the EAD of the original hedged exposure minus P.

(3) *M of hedged exposures.* The M of the hedged exposure is the same as the M of the exposure if it were unhedged.

(d) *Maturity mismatch.* (1) A Federal savings association that recognizes an eligible guarantee or eligible credit derivative in determining its risk-based capital requirement for a hedged exposure must adjust the effective notional amount of the credit risk mitigant to reflect any maturity mismatch between the hedged exposure and the credit risk mitigant.

(2) A maturity mismatch occurs when the residual maturity of a credit risk mitigant is less than that of the hedged exposure(s).

(3) The residual maturity of a hedged exposure is the longest possible remaining time before the obligor is scheduled to fulfill its obligation on the exposure. If a credit risk mitigant has embedded options that may reduce its term, the savings association (protection purchaser) must use the shortest possible residual maturity for the credit risk mitigant. If a call is at the discretion of the protection provider, the residual maturity of the credit risk mitigant is at the first call date. If the call is at the discretion of the savings association (protection purchaser), but the terms of the arrangement at origination of the credit risk mitigant contain a positive incentive for the savings association to call the transaction before contractual maturity, the remaining time to the first call date is the residual maturity of the credit risk mitigant. For example, where there is a step-up in cost in conjunction with a call feature or where the effective cost of protection increases over time even if credit quality remains the same or improves, the residual maturity of the credit risk mitigant will be the remaining time to the first call.

(4) A credit risk mitigant with a maturity mismatch may be recognized only if its original maturity is greater than or equal to one year and its residual maturity is greater than three months.

(5) When a maturity mismatch exists, the savings association must apply the following adjustment to the effective notional amount of the credit risk mitigant: $Pm = E \times (t - 0.25)/(T - 0.25)$, where:

(i) Pm = effective notional amount of the credit risk mitigant, adjusted for maturity mismatch;

(ii) E = effective notional amount of the credit risk mitigant;

(iii) t = the lesser of T or the residual maturity of the credit risk mitigant, expressed in years; and

(iv) T = the lesser of five or the residual maturity of the hedged exposure, expressed in years.

(e) *Credit derivatives without restructuring as a credit event.* If a Federal savings association recognizes an eligible credit derivative that does not include as a credit event a restructuring of the hedged exposure involving forgiveness or postponement of principal, interest, or fees that results in a credit loss event (that is, a charge-off, specific provision, or other similar debit to the profit and loss account), the savings association must apply the following adjustment to the effective notional amount of the credit derivative: $Pr = Pm \times 0.60$, Where:

(1) Pr = effective notional amount of the credit risk mitigant, adjusted for lack of restructuring event (and maturity mismatch, if applicable); and

(2) Pm = effective notional amount of the credit risk mitigant adjusted for maturity mismatch (if applicable).

(f) *Currency mismatch.* (1) If a Federal savings association recognizes an eligible guarantee or eligible credit derivative that is denominated in a currency different from that in which the hedged exposure is denominated, the savings association must apply the following formula to the effective notional amount of the guarantee or credit derivative: $Pc = Pr \times (1 - H_{FX})$, where:

(i) Pc = effective notional amount of the credit risk mitigant, adjusted for currency mismatch (and maturity mismatch and lack of restructuring event, if applicable);

(ii) Pr = effective notional amount of the credit risk mitigant (adjusted for maturity mismatch and lack of restructuring event, if applicable); and

(iii) H_{FX} = haircut appropriate for the currency mismatch between the credit risk mitigant and the hedged exposure.

(2) A Federal savings association must set H_{FX} equal to 8 percent unless it qualifies for the use of and uses its own internal estimates of foreign exchange volatility based on a ten-business-day holding period and daily marking-to-market and remargining. A savings association qualifies for the use of its own internal estimates of foreign exchange volatility if it qualifies for:

(i) The own-estimates haircuts in paragraph (b)(2)(iii) of section 32 of this appendix;

(ii) The simple VaR methodology in paragraph (b)(3) of section 32 of this appendix; or

(iii) The internal models methodology in paragraph (d) of section 32 of this appendix.

(3) A Federal savings association must adjust H_{FX} calculated in paragraph (f)(2) of this section upward if the savings association revalues the guarantee or credit derivative less frequently than once every ten business days using the square root of time formula provided in paragraph (b)(2)(iii)(A)(*2*) of section 32 of this appendix.

Section 34. Guarantees and Credit Derivatives: Double Default Treatment

(a) *Eligibility and operational criteria for double default treatment.* A Federal savings association may recognize the credit risk mitigation benefits of a guarantee or credit derivative covering an exposure described in paragraph (a)(1) of section 33 of this appendix by applying the double default treatment in this section if all the following criteria are satisfied.

(1) The hedged exposure is fully covered or covered on a pro rata basis by:

(i) An eligible guarantee issued by an eligible double default guarantor; or

(ii) An eligible credit derivative that meets the requirements of paragraph (b)(2) of section 33 of this appendix and is issued by an eligible double default guarantor.

(2) The guarantee or credit derivative is:

(i) An uncollateralized guarantee or uncollateralized credit derivative (for example, a credit default swap) that provides protection with respect to a single reference obligor; or

(ii) An nth-to-default credit derivative (subject to the requirements of paragraph (m) of section 42 of this appendix).

(3) The hedged exposure is a wholesale exposure (other than a sovereign exposure).

(4) The obligor of the hedged exposure is not:

(i) An eligible double default guarantor or an affiliate of an eligible double default guarantor; or

(ii) An affiliate of the guarantor.

(5) The Federal savings association does not recognize any credit risk mitigation benefits of the guarantee or credit derivative for the hedged exposure other than through application of the double default treatment as provided in this section.

(6) The Federal savings association has implemented a process (which has received the prior, written approval of the OCC) to detect excessive correlation between the creditworthiness of the obligor of the hedged exposure and the protection provider. If excessive correlation is present, the savings association may not use the double default treatment for the hedged exposure.

(b) *Full coverage.* If the transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is at least equal to the EAD of the hedged exposure, the Federal savings association may determine its risk-weighted asset amount for the hedged exposure under paragraph (e) of this section.

(c) *Partial coverage.* If the transaction meets the criteria in paragraph (a) of this section and the protection amount (P) of the guarantee or credit derivative is less than the EAD of the hedged exposure, the Federal savings association must treat the hedged exposure as two separate exposures (protected and unprotected) in order to recognize double default treatment on the protected portion of the exposure.

(1) For the protected exposure, the savings association must set EAD equal to P and calculate its risk-weighted asset amount as provided in paragraph (e) of this section.

(2) For the unprotected exposure, the savings association must set EAD equal to the EAD of the original exposure minus P and then calculate its risk-weighted asset amount as provided in section 31 of this appendix.

(d) *Mismatches.* For any hedged exposure to which a Federal savings association applies double default treatment, the savings association must make applicable adjustments to the protection amount as

required in paragraphs (d), (e), and (f) of section 33 of this appendix.

(e) *The double default dollar risk-based capital requirement.* The dollar risk-based capital requirement for a hedged exposure to which a Federal savings association has applied double default treatment is K_{DD} multiplied by the EAD of the exposure. K_{DD} is calculated according to the following formula: $K_{DD} = K_o \times (0.15 + 160 \times PD_g)$,

Where:

(1)

$$K_O = LGD_g \times \left[N\left(\frac{N^{-1}(PD_o) + N^{-1}(0.999)\sqrt{\rho_{os}}}{\sqrt{1-\rho_{os}}} \right) - PD_o \right] \times \left[\frac{1 + (M - 2.5) \times b}{1 - 1.5 \times b} \right]$$

(2) PD_g = PD of the protection provider.

(3) PD_o = PD of the obligor of the hedged exposure.

(4) LGD_g = (i) The lower of the LGD of the hedged exposure (not adjusted to reflect the guarantee or credit derivative) and the LGD of the guarantee or credit derivative, if the guarantee or credit derivative provides the savings association with the option to receive immediate payout on triggering the protection; or

(ii) The LGD of the guarantee or credit derivative, if the guarantee or credit derivative does not provide the savings association with the option to receive immediate payout on triggering the protection.

(5) ρ_{OS} (asset value correlation of the obligor) is calculated according to the appropriate formula for (R) provided in Table 2 in section 31 of this appendix, with PD equal to PD_o.

(6) b (maturity adjustment coefficient) is calculated according to the formula for b provided in Table 2 in section 31 of this appendix, with PD equal to the lesser of PD_o and PD_g.

(7) M (maturity) is the effective maturity of the guarantee or credit derivative, which may not be less than one year or greater than five years.

Section 35. Risk-Based Capital Requirement for Unsettled Transactions

(a) *Definitions.* For purposes of this section:

(1) *Delivery-versus-payment (DvP) transaction* means a securities or commodities transaction in which the buyer is obligated to make payment only if the seller has made delivery of the securities or commodities and the seller is obligated to deliver the securities or commodities only if the buyer has made payment.

(2) *Payment-versus-payment (PvP) transaction* means a foreign exchange transaction in which each counterparty is obligated to make a final transfer of one or more currencies only if the other counterparty has made a final transfer of one or more currencies.

(3) *Normal settlement period.* A transaction has a *normal settlement period* if the contractual settlement period for the transaction is equal to or less than the market standard for the instrument underlying the transaction and equal to or less than five business days.

(4) *Positive current exposure.* The positive current exposure of a Federal savings association for a transaction is the difference between the transaction value at the agreed settlement price and the current market price of the transaction, if the difference results in a credit exposure of the savings association to the counterparty.

(b) *Scope.* This section applies to all transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement or delivery. This section does not apply to:

(1) Transactions accepted by a qualifying central counterparty that are subject to daily marking-to-market and daily receipt and payment of variation margin;

(2) Repo-style transactions, including unsettled repo-style transactions (which are addressed in sections 31 and 32 of this appendix);

(3) One-way cash payments on OTC derivative contracts (which are addressed in sections 31 and 32 of this appendix); or

(4) Transactions with a contractual settlement period that is longer than the normal settlement period (which are treated as OTC derivative contracts and addressed in sections 31 and 32 of this appendix).

(c) *System-wide failures.* In the case of a system-wide failure of a settlement or clearing system, the OCC may waive risk-based capital requirements for unsettled and failed transactions until the situation is rectified.

(d) *Delivery-versus-payment (DvP) and payment-versus-payment (PvP) transactions.* A Federal savings association must hold risk-based capital against any DvP or PvP transaction with a normal settlement period if the savings association's counterparty has not made delivery or payment within five business days after the settlement date. The savings association must determine its risk-weighted asset amount for such a transaction by multiplying the positive current exposure of the transaction for the savings association by the appropriate risk weight in Table 5.

TABLE 5—RISK WEIGHTS FOR UNSETTLED DVP AND PVP TRANSACTIONS

Number of business days after contractual settlement date	Risk weight to be applied to positive current exposure (percent)
From 5 to 15	100
From 16 to 30	625
From 31 to 45	937.5
46 or more	1,250

(e) *Non-DvP/non-PvP (non-delivery-versus-payment/non-payment-versus-payment) transactions.* (1) A Federal savings association must hold risk-based capital against any non-DvP/non-PvP transaction with a normal settlement period if the savings association has delivered cash, securities, commodities, or currencies to its counterparty but has not received its corresponding deliverables by the end of the same business day. The savings association must continue to hold risk-based capital against the transaction until the savings association has received its corresponding deliverables.

(2) From the business day after the savings association has made its delivery until five business days after the counterparty delivery is due, the savings association must calculate its risk-based capital requirement for the transaction by treating the current market value of the deliverables owed to the savings association as a wholesale exposure.

(i) A savings association may assign an obligor rating to a counterparty for which it is not otherwise required under this appendix to assign an obligor rating on the basis of the applicable external rating of any outstanding unsecured long-term debt security without credit enhancement issued by the counterparty.

(ii) A savings association may use a 45 percent LGD for the transaction rather than estimating LGD for the transaction provided the savings association uses the 45 percent LGD for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(iii) A savings association may use a 100 percent risk weight for the transaction provided the savings association uses this risk weight for all transactions described in paragraphs (e)(1) and (e)(2) of this section.

(3) If the savings association has not received its deliverables by the fifth business day after the counterparty delivery was due, the savings association must deduct the current market value of the deliverables owed to the savings association 50 percent from tier 1 capital and 50 percent from tier 2 capital.

(f) *Total risk-weighted assets for unsettled transactions.* Total risk-weighted assets for unsettled transactions is the sum of the risk-weighted asset amounts of all DvP, PvP, and non-DvP/non-PvP transactions.

Part V. Risk-Weighted Assets for Securitization Exposures

Section 41. Operational Criteria for Recognizing the Transfer of Risk

(a) *Operational criteria for traditional securitizations.* A Federal savings association that transfers exposures it has originated or purchased to a securitization SPE or other third party in connection with a traditional securitization may exclude the exposures from the calculation of its risk-weighted assets only if each of the conditions in this paragraph (a) is satisfied. A savings association that meets these conditions must hold risk-based capital against any

securitization exposures it retains in connection with the securitization. A savings association that fails to meet these conditions must hold risk-based capital against the transferred exposures as if they had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the transaction. The conditions are:

(1) The transfer is considered a sale under GAAP;

(2) The savings association has transferred to third parties credit risk associated with the underlying exposures; and

(3) Any clean-up calls relating to the securitization are eligible clean-up calls.

(b) *Operational criteria for synthetic securitizations.* For synthetic securitizations, a Federal savings association may recognize for risk-based capital purposes the use of a credit risk mitigant to hedge underlying exposures only if each of the conditions in this paragraph (b) is satisfied. A savings association that fails to meet these conditions must hold risk-based capital against the underlying exposures as if they had not been synthetically securitized. The conditions are:

(1) The credit risk mitigant is financial collateral, an eligible credit derivative from an eligible securitization guarantor or an eligible guarantee from an eligible securitization guarantor;

(2) The savings association transfers credit risk associated with the underlying exposures to third parties, and the terms and conditions in the credit risk mitigants employed do not include provisions that:

(i) Allow for the termination of the credit protection due to deterioration in the credit quality of the underlying exposures;

(ii) Require the savings association to alter or replace the underlying exposures to improve the credit quality of the pool of underlying exposures;

(iii) Increase the savings association's cost of credit protection in response to deterioration in the credit quality of the underlying exposures;

(iv) Increase the yield payable to parties other than the savings association in response to a deterioration in the credit quality of the underlying exposures; or

(v) Provide for increases in a retained first loss position or credit enhancement provided by the savings association after the inception of the securitization;

(3) The savings association obtains a well-reasoned opinion from legal counsel that confirms the enforceability of the credit risk mitigant in all relevant jurisdictions; and

(4) Any clean-up calls relating to the securitization are eligible clean-up calls.

Section 42. Risk-Based Capital Requirement for Securitization Exposures

(a) *Hierarchy of approaches.* Except as provided elsewhere in this section:

(1) A Federal savings association must deduct from tier 1 capital any after-tax gain-on-sale resulting from a securitization and must deduct from total capital in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute gain-on-sale.

(2) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and qualifies for the Ratings-Based Approach in section 43 of this appendix, a Federal savings association must apply the Ratings-Based Approach to the exposure.

(3) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the Ratings-Based Approach, the Federal savings association may either apply the Internal Assessment Approach in section 44 of this appendix to the exposure (if the savings association, the exposure, and the relevant ABCP program qualify for the Internal Assessment Approach) or the Supervisory Formula Approach in section 45 of this appendix to the exposure (if the savings association and the exposure qualify for the Supervisory Formula Approach).

(4) If a securitization exposure does not require deduction under paragraph (a)(1) of this section and does not qualify for the Ratings-Based Approach, the Internal Assessment Approach, or the Supervisory Formula Approach, the Federal savings association must deduct the exposure from total capital in accordance with paragraph (c) of this section.

(5) If a securitization exposure is an OTC derivative contract (other than a credit derivative) that has a first priority claim on the cash flows from the underlying exposures (notwithstanding amounts due under interest rate or currency derivative contracts, fees due, or other similar payments), with approval of the OCC, a Federal savings association may choose to set the risk-weighted asset amount of the exposure equal to the amount of the exposure as determined in paragraph (e) of this section rather than apply the hierarchy of approaches described in paragraphs (a) (1) through (4) of this section.

(b) *Total risk-weighted assets for securitization exposures.* A Federal savings association's total risk-weighted assets for securitization exposures is equal to the sum of its risk-weighted assets calculated using the Ratings-Based Approach in section 43 of this appendix, the Internal Assessment Approach in section 44 of this appendix, and the Supervisory Formula Approach in section 45 of this appendix, and its risk-weighted assets amount for early amortization provisions calculated in section 47 of this appendix.

(c) *Deductions.* (1) If a Federal savings association must deduct a securitization exposure from total capital, the savings association must take the deduction 50 percent from tier 1 capital and 50 percent from tier 2 capital. If the amount deductible from tier 2 capital exceeds the savings association's tier 2 capital, the savings association must deduct the excess from tier 1 capital.

(2) A Federal savings association may calculate any deduction from tier 1 capital and tier 2 capital for a securitization exposure net of any deferred tax liabilities associated with the securitization exposure.

(d) *Maximum risk-based capital requirement.* Regardless of any other provisions of this part, unless one or more underlying exposures does not meet the definition of a wholesale, retail, securitization, or equity exposure, the total risk-based capital requirement for all securitization exposures held by a single Federal savings association associated with a single securitization (including any risk-based capital requirements that relate to an early amortization provision of the securitization but excluding any risk-based capital requirements that relate to the savings association's gain-on-sale or CEIOs associated with the securitization) may not exceed the sum of:

(1) The savings association's total risk-based capital requirement for the underlying exposures as if the savings association directly held the underlying exposures; and

(2) The total ECL of the underlying exposures.

(e) *Amount of a securitization exposure.* (1) The amount of an on-balance sheet securitization exposure that is not a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is:

(i) The Federal savings association's carrying value minus any unrealized gains and plus any unrealized losses on the exposure, if the exposure is a security classified as available-for-sale; or

(ii) The Federal savings association's carrying value, if the exposure is not a security classified as available-for-sale.

(2) The amount of an off-balance sheet securitization exposure that is not an OTC derivative contract (other than a credit derivative) is the notional amount of the exposure. For an off-balance-sheet securitization exposure to an ABCP program, such as a liquidity facility, the notional amount may be reduced to the maximum potential amount that the Federal savings association could be required to fund given the ABCP program's current underlying assets (calculated without regard to the current credit quality of those assets).

(3) The amount of a securitization exposure that is a repo-style transaction, eligible margin loan, or OTC derivative contract (other than a credit derivative) is the EAD of the exposure as calculated in section 32 of this appendix.

(f) *Overlapping exposures.* If a Federal savings association has multiple securitization exposures that provide duplicative coverage of the underlying exposures of a securitization (such as when a savings association provides a program-wide credit enhancement and multiple pool-specific liquidity facilities to an ABCP program), the savings association is not required to hold duplicative risk-based capital against the overlapping position. Instead, the savings association may apply to the overlapping position the applicable risk-based capital treatment that results in the highest risk-based capital requirement.

(g) *Securitizations of non-IRB exposures.* If a Federal savings association has a securitization exposure where any underlying exposure is not a wholesale exposure, retail exposure, securitization exposure, or equity exposure, the savings association must:

(1) If the Federal savings association is an originating savings association, deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization and deduct

from total capital in accordance with paragraph (c) of this section the portion of any CEIO that does not constitute gain-on-sale;

(2) If the securitization exposure does not require deduction under paragraph (g)(1), apply the RBA in section 43 of this appendix to the securitization exposure if the exposure qualifies for the RBA;

(3) If the securitization exposure does not require deduction under paragraph (g)(1) and does not qualify for the RBA, apply the IAA in section 44 of this appendix to the exposure (if the Federal savings association, the exposure, and the relevant ABCP program qualify for the IAA); and

(4) If the securitization exposure does not require deduction under paragraph (g)(1) and does not qualify for the RBA or the IAA, deduct the exposure from total capital in accordance with paragraph (c) of this section.

(h) *Implicit support.* If a Federal savings association provides support to a securitization in excess of the savings association's contractual obligation to provide credit support to the securitization (implicit support):

(1) The savings association must hold regulatory capital against all of the underlying exposures associated with the securitization as if the exposures had not been securitized and must deduct from tier 1 capital any after-tax gain-on-sale resulting from the securitization; and

(2) The savings association must disclose publicly:

(i) That it has provided implicit support to the securitization; and

(ii) The regulatory capital impact to the savings association of providing such implicit support.

(i) *Eligible servicer cash advance facilities.* Regardless of any other provisions of this part, a Federal savings association is not required to hold risk-based capital against the undrawn portion of an eligible servicer cash advance facility.

(j) *Interest-only mortgage-backed securities.* Regardless of any other provisions of this part, the risk weight for a non-credit-enhancing interest-only mortgage-backed security may not be less than 100 percent.

(k) *Small-business loans and leases on personal property transferred with recourse.* (1) Regardless of any other provisions of this appendix, a Federal savings association that has transferred small-business loans and leases on personal property (small-business obligations) with recourse must include in risk-weighted assets only the contractual amount of retained recourse if all the following conditions are met:

(i) The transaction is a sale under GAAP.

(ii) The savings association establishes and maintains, pursuant to GAAP, a non-capital reserve sufficient to meet the savings association's reasonably estimated liability under the recourse arrangement.

(iii) The loans and leases are to businesses that meet the criteria for a small-business concern established by the Small Business Administration under section 3(a) of the Small Business Act (15 U.S.C. 632).

(iv) The savings association is well capitalized, as defined in the OCC's prompt corrective action regulation at 12 CFR part 165. For purposes of determining whether a savings association is well capitalized for purposes of this paragraph, the savings association's capital ratios must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (k)(1) of this section.

(2) The total outstanding amount of recourse retained by a Federal savings association on transfers of small-business obligations receiving the capital treatment specified in paragraph (k)(1) of this section cannot exceed 15 percent of the savings association's total qualifying capital.

(3) If a Federal savings association ceases to be well capitalized or exceeds the 15 percent capital limitation, the preferential capital treatment specified in paragraph (k)(1) of this section will continue to apply to any transfers of small-business obligations with recourse that occurred during the time that the savings association was well capitalized and did not exceed the capital limit.

(4) The risk-based capital ratios of the savings association must be calculated without regard to the capital treatment for transfers of small-business obligations with recourse specified in paragraph (k)(1) of this section as provided in 12 CFR 167.6(b)(5)(v).

(l) *Nth-to-default credit derivatives*—(1) *First-to-default credit derivatives*—(i) *Protection purchaser.* A Federal savings association that obtains credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-based capital requirement for the underlying exposures as if the savings association synthetically securitized the underlying exposure with the lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) *Protection provider.* A Federal savings association that provides credit protection on a group of underlying exposures through a first-to-default credit derivative must determine its risk-weighted asset amount for the derivative by applying the RBA in section 43 of this appendix (if the derivative qualifies for the RBA) or, if the derivative does not qualify for the RBA, by setting its risk-weighted asset amount for the derivative equal to the product of:

(A) The protection amount of the derivative;

(B) 12.5; and

(C) The sum of the risk-based capital requirements of the individual underlying exposures, up to a maximum of 100 percent.

(2) *Second-or-subsequent-to-default credit derivatives*—(i) *Protection purchaser.* (A) A Federal savings association that obtains credit protection on a group of underlying exposures through a nth-to-default credit derivative (other than a first-to-default credit derivative) may recognize the credit risk mitigation benefits of the derivative only if:

(*1*) The savings association also has obtained credit protection on the same underlying exposures in the form of first-through-(n-1)-to-default credit derivatives; or

(*2*) If n-1 of the underlying exposures have already defaulted.

(B) If a savings association satisfies the requirements of paragraph (m)(2)(i)(A) of this section, the savings association must determine its risk-based capital requirement for the underlying exposures as if the savings association had only synthetically securitized the underlying exposure with the nth lowest risk-based capital requirement and had obtained no credit risk mitigant on the other underlying exposures.

(ii) *Protection provider.* A savings association that provides credit protection on a group of underlying exposures through a nth-to-default credit derivative (other than a first-to-default credit derivative) must determine its risk-weighted asset amount for the derivative by applying the RBA in section 43 of this appendix (if the derivative qualifies for the RBA) or, if the derivative does not qualify for the RBA, by setting its risk-weighted asset amount for the derivative equal to the product of:

(A) The protection amount of the derivative;

(B) 12.5; and

(C) The sum of the risk-based capital requirements of the individual underlying exposures (excluding the n-1 underlying exposures with the lowest risk-based capital requirements), up to a maximum of 100 percent.

Section 43. Ratings-Based Approach (RBA)

(a) *Eligibility requirements for use of the RBA*—(1) *Originating Federal savings association.* An originating Federal savings association must use the RBA to calculate its risk-based capital requirement for a securitization exposure if the exposure has two or more external ratings or inferred ratings (and may not use the RBA if the exposure has fewer than two external ratings or inferred ratings).

(2) *Investing Federal savings association.* An investing Federal savings association must use the RBA to calculate its risk-based capital requirement for a securitization exposure if the exposure has one or more external or inferred ratings (and may not use the RBA if the exposure has no external or inferred rating).

(b) *Ratings-based approach.* (1) A Federal savings association must determine the risk-weighted asset amount for a securitization exposure by multiplying the amount of the exposure (as defined in paragraph (e) of section 42 of this appendix) by the appropriate risk weight provided in Table 6 and Table 7.

(2) A Federal savings association must apply the risk weights in Table 6 when the securitization exposure's applicable external or applicable inferred rating represents a long-term credit rating, and must apply the risk weights in Table 7 when the securitization exposure's applicable external or applicable inferred rating represents a short-term credit rating.

(i) A Federal savings association must apply the risk weights in column 1 of Table 6 or Table 7 to the securitization exposure if:

(A) N (as calculated under paragraph (e)(6) of section 45 of this appendix) is six or more (for purposes of this section only, if the notional number of underlying exposures is 25 or more or if all of the underlying exposures are retail exposures, a Federal savings association may assume that N is six

or more unless the savings association knows or has reason to know that N is less than six); and

(B) The securitization exposure is a senior securitization exposure.

(ii) A Federal savings association must apply the risk weights in column 3 of Table 6 or Table 7 to the securitization exposure if N is less than six, regardless of the seniority of the securitization exposure.

(iii) Otherwise, a Federal savings association must apply the risk weights in column 2 of Table 6 or Table 7.

TABLE 6—LONG-TERM CREDIT RATING RISK WEIGHTS UNDER RBA AND IAA

Applicable external or inferred rating (illustrative rating example)	Column 1	Column 2	Column 3	Applicable external or inferred rating (illustrative rating example)
	Risk weights for senior securitization exposures backed by granular pools	Risk weights for non-senior securitization exposures backed by granular pools	Risk weights for securitization exposures backed by non-granular pools	
Highest investment grade (for example, AAA)	7%	12%	20%	
Second highest investment grade (for example, AA)	8%	15%	25%	
Third-highest investment grade—positive designation (for example, A+).	10%	18%	35%	
Third-highest investment grade (for example, A)	12%	20%		
Third-highest investment grade—negative designation (for example, A−).	20%	35%		
Lowest investment grade—positive designation (for example, BBB+).	35%	50%		
Lowest investment grade (for example, BBB)	60%	75%		
Lowest investment grade—negative designation (for example, BBB−).	100%			
One category below investment grade—positive designation (for example, BB+).	250%			
One category below investment grade (for example, BB)	425%			
One category below investment grade—negative designation (for example, BB−).	650%			
More than one category below investment grade	Deduction from tier 1 and tier 2 capital.			

TABLE 7—SHORT-TERM CREDIT RATING RISK WEIGHTS UNDER RBA AND IAA

Applicable external or inferred rating (illustrative rating example)	Column 1	Column 2	Column 3	Applicable external or inferred rating (illustrative rating example)
	Risk weights for senior securitization exposures backed by granular pools	Risk weights for non-senior securitization exposures backed by granular pools	Risk weights for securitization exposures backed by non-granular pools	
Highest investment grade (for example, A1)	7%	12%	20%	
Second highest investment grade (for example, A2)	12%	20%	35%	
Third highest investment grade (for example, A3)	60%	75%	75%	
All other ratings	Deduction from tier 1 and tier 2 capital.			

Section 44. Internal Assessment Approach (IAA)

(a) *Eligibility requirements.* A Federal savings association may apply the IAA to calculate the risk-weighted asset amount for a securitization exposure that the savings association has to an ABCP program (such as a liquidity facility or credit enhancement) if the savings association, the ABCP program, and the exposure qualify for use of the IAA.

(1) *Federal savings association qualification criteria.* A Federal savings association qualifies for use of the IAA if the savings association has received the prior written approval of the OCC. To receive such approval, the savings association must demonstrate to the OCC's satisfaction that the savings association's internal assessment process meets the following criteria:

(i) The savings association's internal credit assessments of securitization exposures must be based on publicly available rating criteria used by an NRSRO.

(ii) The savings association's internal credit assessments of securitization exposures used for risk-based capital purposes must be consistent with those used in the savings association's internal risk management process, management information reporting systems, and capital adequacy assessment process.

(iii) The savings association's internal credit assessment process must have sufficient granularity to identify gradations of risk. Each of the savings association's internal credit assessment categories must correspond to an external rating of an NRSRO.

(iv) The savings association's internal credit assessment process, particularly the stress test factors for determining credit enhancement requirements, must be at least as conservative as the most conservative of the publicly available rating criteria of the NRSROs that have provided external ratings to the commercial paper issued by the ABCP program.

(A) Where the commercial paper issued by an ABCP program has an external rating from two or more NRSROs and the different NRSROs' benchmark stress factors require

different levels of credit enhancement to achieve the same external rating equivalent, the savings association must apply the NRSRO stress factor that requires the highest level of credit enhancement.

(B) If any NRSRO that provides an external rating to the ABCP program's commercial paper changes its methodology (including stress factors), the savings association must evaluate whether to revise its internal assessment process.

(v) The Federal savings association must have an effective system of controls and oversight that ensures compliance with these operational requirements and maintains the integrity and accuracy of the internal credit assessments. The savings association must have an internal audit function independent from the ABCP program business line and internal credit assessment process that assesses at least annually whether the controls over the internal credit assessment process function as intended.

(vi) The Federal savings association must review and update each internal credit assessment whenever new material information is available, but no less frequently than annually.

(vii) The Federal savings association must validate its internal credit assessment process on an ongoing basis and at least annually.

(2) *ABCP-program qualification criteria.* An ABCP program qualifies for use of the IAA if all commercial paper issued by the ABCP program has an external rating.

(3) *Exposure qualification criteria.* A securitization exposure qualifies for use of the IAA if the exposure meets the following criteria:

(i) The Federal savings association initially rated the exposure at least the equivalent of investment grade.

(ii) The ABCP program has robust credit and investment guidelines (that is, underwriting standards) for the exposures underlying the securitization exposure.

(iii) The ABCP program performs a detailed credit analysis of the sellers of the exposures underlying the securitization exposure.

(iv) The ABCP program's underwriting policy for the exposures underlying the securitization exposure establishes minimum asset eligibility criteria that include the prohibition of the purchase of assets that are significantly past due or of assets that are defaulted (that is, assets that have been charged off or written down by the seller prior to being placed into the ABCP program or assets that would be charged off or written down under the program's governing contracts), as well as limitations on concentration to individual obligors or geographic areas and the tenor of the assets to be purchased.

(v) The aggregate estimate of loss on the exposures underlying the securitization exposure considers all sources of potential risk, such as credit and dilution risk.

(vi) Where relevant, the ABCP program incorporates structural features into each purchase of exposures underlying the securitization exposure to mitigate potential credit deterioration of the underlying exposures. Such features may include wind-down triggers specific to a pool of underlying exposures.

(b) *Mechanics.* A Federal savings association that elects to use the IAA to calculate the risk-based capital requirement for any securitization exposure must use the IAA to calculate the risk-based capital requirements for all securitization exposures that qualify for the IAA approach. Under the IAA, a savings association must map its internal assessment of such a securitization exposure to an equivalent external rating from an NRSRO. Under the IAA, a savings association must determine the risk-weighted asset amount for such a securitization exposure by multiplying the amount of the exposure (as defined in paragraph (e) of section 42 of this appendix) by the appropriate risk weight in Table 6 and Table 7 in paragraph (b) of section 43 of this appendix.

Section 45. Supervisory Formula Approach (SFA)

(a) *Eligibility requirements.* A Federal savings association may use the SFA to determine its risk-based capital requirement for a securitization exposure only if the savings association can calculate on an ongoing basis each of the SFA parameters in paragraph (e) of this section.

(b) *Mechanics.* Under the SFA, a securitization exposure incurs a deduction from total capital (as described in paragraph (c) of section 42 of this appendix) and/or an SFA risk-based capital requirement, as determined in paragraph (c) of this section. The risk-weighted asset amount for the securitization exposure equals the SFA risk-based capital requirement for the exposure multiplied by 12.5.

(c) *The SFA risk-based capital requirement.* (1) If K_{IRB} is greater than or equal to L + T, the entire exposure must be deducted from total capital.

(2) If K_{IRB} is less than or equal to L, the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) 0.0056 * T; or

(ii) S[L + T] − S[L].

(3) If K_{IRB} is greater than L and less than L + T, the Federal savings association must deduct from total capital an amount equal to UE*TP*(K_{IRB} − L), and the exposure's SFA risk-based capital requirement is UE multiplied by TP multiplied by the greater of:

(i) 0.0056 * (T − (K_{IRB} − L)); or

(ii) S[L + T] − S[K_{IRB}].

(d) *The supervisory formula:*

$$(1)\ S[Y] = \begin{cases} Y & \text{when } Y \le K_{IRB} \\ K_{IRB} + K[Y] - K[K_{IRB}] + \frac{d \cdot K_{IRB}}{20}\left(1 - e^{\frac{20 \cdot (K_{IRB} - Y)}{K_{IRB}}}\right) & \text{when } Y > K_{IRB} \end{cases}$$

$$(2)\ K[Y] = (1-h) \cdot \left[\left(1 - \beta[Y; a, b]\right) \cdot Y + \beta[Y; a+1, b] \cdot c\right]$$

$$(3)\ h = \left(1 - \frac{K_{IRB}}{EWALGD}\right)^{N}$$

$$(4)\ a = g \cdot c$$

$$(5)\ b = g \cdot (1-c)$$

$$(6)\ c = \frac{K_{IRB}}{1-h}$$

$$(7)\ g = \frac{(1-c) \cdot c}{f} - 1$$

$$(8)\ f = \frac{v + K_{IRB}^{\ 2}}{1-h} - c^2 + \frac{(1-K_{IRB}) \cdot K_{IRB} - v}{(1-h) \cdot 1000}$$

$$(9)\ v = K_{IRB} \cdot \frac{(EWALGD - K_{IRB}) + .25 \cdot (1 - EWALGD)}{N}$$

$$(10)\ d = 1 - (1-h) \cdot (1 - \beta[K_{IRB}; a, b]).$$

(1) In these expressions, β[Y; a, b] refers to the cumulative beta distribution with parameters a and b evaluated at Y. In the case where N = 1 and EWALGD = 100 percent, S[Y] in formula (1) must be calculated with K[Y] set equal to the product of K_{IRB} and Y, and d set equal to $1 - K_{IRB}$.

(2) [Reserved]

(e) *SFA parameters*—(1) *Amount of the underlying exposures (UE).* UE is the EAD of any underlying exposures that are wholesale and retail exposures (including the amount of any funded spread accounts, cash collateral accounts, and other similar funded credit enhancements) plus the amount of any underlying exposures that are securitization exposures (as defined in paragraph (e) of section 42 of this appendix) plus the adjusted carrying value of any underlying exposures that are equity exposures (as defined in paragraph (b) of section 51 of this appendix).

(2) *Tranche percentage (TP).* TP is the ratio of the amount of the Federal savings association's securitization exposure to the amount of the tranche that contains the securitization exposure.

(3) *Capital requirement on underlying exposures (K_{IRB}).* (i) $K_{IRB}$is the ratio of:

(A) The sum of the risk-based capital requirements for the underlying exposures plus the expected credit losses of the underlying exposures (as determined under this appendix as if the underlying exposures were directly held by the Federal savings association); to

(B) UE.

(ii) The calculation of K_{IRB} must reflect the effects of any credit risk mitigant applied to the underlying exposures (either to an individual underlying exposure, to a group of underlying exposures, or to the entire pool of underlying exposures).

(iii) All assets related to the securitization are treated as underlying exposures, including assets in a reserve account (such as a cash collateral account).

(4) *Credit enhancement level (L).* (i) L is the ratio of:

(A) The amount of all securitization exposures subordinated to the tranche that contains the Federal savings association's securitization exposure; to

(B) UE.

(ii) A Federal savings association must determine L before considering the effects of any tranche-specific credit enhancements.

(iii) Any gain-on-sale or CEIO associated with the securitization may not be included in L.

(iv) Any reserve account funded by accumulated cash flows from the underlying exposures that is subordinated to the tranche that contains the Federal savings association's securitization exposure may be included in the numerator and denominator of L to the extent cash has accumulated in the account. Unfunded reserve accounts (that is, reserve accounts that are to be funded from future cash flows from the underlying exposures) may not be included in the calculation of L.

(v) In some cases, the purchase price of receivables will reflect a discount that provides credit enhancement (for example, first loss protection) for all or certain tranches of the securitization. When this arises, L should be calculated inclusive of this discount if the discount provides credit enhancement for the securitization exposure.

(5) *Thickness of tranche (T).* T is the ratio of:

(i) The amount of the tranche that contains the Federal savings association's securitization exposure; to

(ii) UE.

(6) *Effective number of exposures (N).* (i) Unless the Federal savings association elects to use the formula provided in paragraph (f) of this section,

$$N = \frac{\left(\sum_i EAD_i\right)^2}{\sum_i EAD_i^2}$$

Where EAD_i represents the EAD associated with the ith instrument in the pool of underlying exposures.

(ii) Multiple exposures to one obligor must be treated as a single underlying exposure.

(iii) In the case of a re-securitization (that is, a securitization in which some or all of the underlying exposures are themselves securitization exposures), the savings association must treat each underlying exposure as a single underlying exposure and must not look through to the originally securitized underlying exposures.

(7) *Exposure-weighted average loss given default (EWALGD).* EWALGD is calculated as:

$$EWALGD = \frac{\sum_i LGD_i \cdot EAD_i}{\sum_i EAD_i}$$

Where LGD_i represents the average LGD associated with all exposures to the ith obligor. In the case of a re-securitization, an LGD of 100 percent must be assumed for the underlying exposures that are themselves securitization exposures.

(f) *Simplified method for computing N and EWALGD.* (1) If all underlying exposures of a securitization are retail exposures, a Federal savings association may apply the SFA using the following simplifications:

(i) h = 0; and

(ii) v = 0.

(2) Under the conditions in paragraphs (f)(3) and (f)(4) of this section, a Federal savings association may employ a simplified method for calculating N and EWALGD.

(3) If C_1 is no more than 0.03, a Federal savings association may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure or EWALGD = 1 if one or more of the underlying exposures is a securitization exposure, and may set N equal to the following amount:

$$N = \frac{1}{C_1 C_m + \left(\frac{C_m - C_1}{m-1}\right)\max(1 - mC_1, 0)}$$

Where:

(i) C_m is the ratio of the sum of the amounts of the 'm' largest underlying exposures to UE; and

(ii) The level of m is to be selected by the Federal savings association.

(4) Alternatively, if only C_1 is available and C_1 is no more than 0.03, the Federal savings association may set EWALGD = 0.50 if none of the underlying exposures is a securitization exposure or EWALGD = 1 if one or more of the underlying exposures is a securitization exposure and may set N = $1/C_1$.

Section 46. Recognition of Credit Risk Mitigants for Securitization Exposures

(a) *General.* An originating Federal savings association that has obtained a credit risk mitigant to hedge its securitization exposure to a synthetic or traditional securitization that satisfies the operational criteria in section 41 of this appendix may recognize the credit risk mitigant, but only as provided in this section. An investing savings association that has obtained a credit risk mitigant to hedge a securitization exposure may recognize the credit risk mitigant, but only as provided in this section. A savings association that has used the RBA in section 43 of this appendix or the IAA in section 44 of this appendix to calculate its risk-based capital requirement for a securitization exposure whose external or inferred rating (or equivalent internal rating under the IAA) reflects the benefits of a credit risk mitigant provided to the associated securitization or that supports some or all of the underlying exposures may not use the credit risk mitigation rules in this section to further reduce its risk-based capital requirement for the exposure to reflect that credit risk mitigant.

(b) *Collateral*—(1) *Rules of recognition.* A Federal savings association may recognize financial collateral in determining the savings association's risk-based capital requirement for a securitization exposure (other than a repo-style transaction, an eligible margin loan, or an OTC derivative contract for which the savings association has reflected collateral in its determination of exposure amount under section 32 of this appendix) as follows. The savings association's risk-based capital requirement for the collateralized securitization exposure is equal to the risk-based capital requirement for the securitization exposure as calculated under the RBA in section 43 of this appendix or under the SFA in section 45 of this appendix multiplied by the ratio of adjusted exposure amount (SE*) to original exposure amount (SE), where:

(i) SE* = max {0, [SE—C x (1 − Hs − Hfx)]};

(ii) SE = the amount of the securitization exposure calculated under paragraph (e) of section 42 of this appendix;

(iii) C = the current market value of the collateral;

(iv) Hs = the haircut appropriate to the collateral type; and

(v) Hfx = the haircut appropriate for any currency mismatch between the collateral and the exposure.

(2) *Mixed collateral.* Where the collateral is a basket of different asset types or a basket of assets denominated in different currencies, the haircut on the basket will be

$$H = \sum_i a_i H_i,$$

Where a_i is the current market value of the asset in the basket divided by the current market value of all assets in the basket and H_i is the haircut applicable to that asset.

(3) *Standard supervisory haircuts.* Unless a Federal savings association qualifies for use of and uses own-estimates haircuts in paragraph (b)(4) of this section:

(i) A savings association must use the collateral type haircuts (Hs) in Table 3;

(ii) A savings association must use a currency mismatch haircut (Hfx) of 8 percent if the exposure and the collateral are denominated in different currencies;

(iii) A savings association must multiply the supervisory haircuts obtained in paragraphs (b)(3)(i) and (ii) by the square root of 6.5 (which equals 2.549510); and

(iv) A savings association must adjust the supervisory haircuts upward on the basis of a holding period longer than 65 business days where and as appropriate to take into account the illiquidity of the collateral.

(4) *Own estimates for haircuts.* With the prior written approval of the OCC, a Federal savings association may calculate haircuts using its own internal estimates of market price volatility and foreign exchange volatility, subject to paragraph (b)(2)(iii) of section 32 of this appendix. The minimum holding period (TM) for securitization exposures is 65 business days.

(c) *Guarantees and credit derivatives*—(1) *Limitations on recognition.* A Federal savings association may only recognize an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the savings association's risk-based capital requirement for a securitization exposure.

(2) *ECL for securitization exposures.* When a Federal savings association recognizes an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the savings association's risk-based capital requirement for a securitization exposure, the savings association must also:

(i) Calculate ECL for the protected portion of the exposure using the same risk parameters that it uses for calculating the risk-weighted asset amount of the exposure as described in paragraph (c)(3) of this section; and

(ii) Add the exposure's ECL to the Federal savings association's total ECL.

(3) *Rules of recognition.* A Federal savings association may recognize an eligible guarantee or eligible credit derivative provided by an eligible securitization guarantor in determining the savings association's risk-based capital requirement for the securitization exposure as follows:

(i) *Full coverage.* If the protection amount of the eligible guarantee or eligible credit derivative equals or exceeds the amount of the securitization exposure, the Federal savings association may set the risk-weighted asset amount for the securitization exposure equal to the risk-weighted asset amount for a direct exposure to the eligible securitization guarantor (as determined in the wholesale risk weight function described in section 31 of this appendix), using the savings association's PD for the guarantor, the savings association's LGD for the guarantee or credit derivative, and an EAD equal to the amount of the securitization exposure (as determined in paragraph (e) of section 42 of this appendix).

(ii) *Partial coverage.* If the protection amount of the eligible guarantee or eligible credit derivative is less than the amount of the securitization exposure, the savings association may set the risk-weighted asset amount for the securitization exposure equal to the sum of:

(A) *Covered portion.* The risk-weighted asset amount for a direct exposure to the eligible securitization guarantor (as determined in the wholesale risk weight function described in section 31 of this appendix), using the Federal savings association's PD for the guarantor, the savings association's LGD for the guarantee

or credit derivative, and an EAD equal to the protection amount of the credit risk mitigant; and

(B) *Uncovered portion.* (*1*) 1.0 minus the ratio of the protection amount of the eligible guarantee or eligible credit derivative to the amount of the securitization exposure); multiplied by

(*2*) The risk-weighted asset amount for the securitization exposure without the credit risk mitigant (as determined in sections 42–45 of this appendix).

(4) *Mismatches.* The Federal savings association must make applicable adjustments to the protection amount as required in paragraphs (d), (e), and (f) of section 33 of this appendix for any hedged securitization exposure and any more senior securitization exposure that benefits from the hedge. In the context of a synthetic securitization, when an eligible guarantee or eligible credit derivative covers multiple hedged exposures that have different residual maturities, the savings association must use the longest residual maturity of any of the hedged exposures as the residual maturity of all the hedged exposures.

Section 47. Risk-Based Capital Requirement for Early Amortization Provisions

(a) *General.* (1) An originating Federal savings association must hold risk-based capital against the sum of the originating savings association's interest and the investors' interest in a securitization that:

(i) Includes one or more underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit; and

(ii) Contains an early amortization provision.

(2) For securitizations described in paragraph (a)(1) of this section, an originating Federal savings association must calculate the risk-based capital requirement for the originating savings association's interest under sections 42–45 of this appendix, and the risk-based capital requirement for the investors' interest under paragraph (b) of this section.

(b) *Risk-weighted asset amount for investors' interest.* The originating Federal savings association's risk-weighted asset amount for the investors' interest in the securitization is equal to the product of the following 5 quantities:

(1) The investors' interest EAD;

(2) The appropriate conversion factor in paragraph (c) of this section;

(3) K_{IRB}(as defined in paragraph (e)(3) of section 45 of this appendix);

(4) 12.5; and

(5) The proportion of the underlying exposures in which the borrower is permitted to vary the drawn amount within an agreed limit under a line of credit.

(c) *Conversion factor.* (1) (i) Except as provided in paragraph (c)(2) of this section, to calculate the appropriate conversion factor, a Federal savings association must use Table 8 for a securitization that contains a controlled early amortization provision and must use Table 9 for a securitization that contains a non-controlled early amortization provision. In circumstances where a securitization contains a mix of retail and nonretail exposures or a mix of committed and uncommitted exposures, a Federal savings association may take a pro rata approach to determining the conversion factor for the securitization's early amortization provision. If a pro rata approach is not feasible, a Federal savings association must treat the mixed securitization as a securitization of nonretail exposures if a single underlying exposure is a nonretail exposure and must treat the mixed securitization as a securitization of committed exposures if a single underlying exposure is a committed exposure.

(ii) To find the appropriate conversion factor in the tables, a Federal savings association must divide the three-month average annualized excess spread of the securitization by the excess spread trapping point in the securitization structure. In securitizations that do not require excess spread to be trapped, or that specify trapping points based primarily on performance measures other than the three-month average annualized excess spread, the excess spread trapping point is 4.5 percent.

TABLE 8—CONTROLLED EARLY AMORTIZATION PROVISIONS

	Uncommitted	Committed
Retail Credit Lines	Three-month average annualized excess spread Conversion Factor (CF) 133.33% of trapping point or more, 0% CF. less than 133.33% to 100% of trapping point, 1% CF. less than 100% to 75% of trapping point, 2% CF. less than 75% to 50% of trapping point, 10% CF. less than 50% to 25% of trapping point, 20% CF. less than 25% of trapping point, 40% CF.	90% CF
Non-retail Credit Lines	90% CF	90% CF

TABLE 9—NON-CONTROLLED EARLY AMORTIZATION PROVISIONS

	Uncommitted	Committed
Retail Credit Lines	Three-month average annualized excess spread Conversion Factor (CF) 133.33% of trapping point or more, 0% CF. less than 133.33% to 100% of trapping point, 5% CF. less than 100% to 75% of trapping point, 15% CF. less than 75% to 50% of trapping point, 50% CF. less than 50% of trapping point, 100% CF.	100% CF
Non-retail Credit Lines	100% CF	100% CF

(2) For a securitization for which all or substantially all of the underlying exposures are residential mortgage exposures, a Federal savings association may calculate the appropriate conversion factor using paragraph (c)(1) of this section or may use a conversion factor of 10 percent. If the savings association chooses to use a conversion factor of 10 percent, it must use that conversion factor for all securitizations for which all or substantially all of the underlying exposures are residential mortgage exposures.

Part VI. Risk-Weighted Assets for Equity Exposures

Section 51. Introduction and Exposure Measurement

(a) *General.* To calculate its risk-weighted asset amounts for equity exposures that are not equity exposures to investment funds, a Federal savings association may apply either the Simple Risk Weight Approach (SRWA) in section 52 of this appendix or, if it qualifies to do so, the Internal Models Approach (IMA) in section 53 of this appendix. A Federal savings association must use the look-through approaches in section 54 of this appendix to calculate its risk-weighted asset amounts for equity exposures to investment funds.

(b) *Adjusted carrying value.* For purposes of this part, the adjusted carrying value of an equity exposure is:

(1) For the on-balance sheet component of an equity exposure, the savings association's carrying value of the exposure reduced by any unrealized gains on the exposure that are reflected in such carrying value but excluded

from the savings association's tier 1 and tier 2 capital; and

(2) For the off-balance sheet component of an equity exposure, the effective notional principal amount of the exposure, the size of which is equivalent to a hypothetical on-balance sheet position in the underlying equity instrument that would evidence the same change in fair value (measured in dollars) for a given small change in the price of the underlying equity instrument, minus the adjusted carrying value of the on-balance sheet component of the exposure as calculated in paragraph (b)(1) of this section. For unfunded equity commitments that are unconditional, the effective notional principal amount is the notional amount of the commitment. For unfunded equity commitments that are conditional, the effective notional principal amount is the savings association's best estimate of the amount that would be funded under economic downturn conditions.

Section 52. Simple Risk Weight Approach (SRWA)

(a) *General.* Under the SRWA, a Federal savings association's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of the risk-weighted asset amounts for each of the savings association's individual equity exposures (other than equity exposures to an investment fund) as determined in this section and the risk-weighted asset amounts for each of the savings association's individual equity exposures to an investment fund as determined in section 54 of this appendix.

(b) *SRWA computation for individual equity exposures.* A Federal savings association must determine the risk-weighted asset amount for an individual equity exposure (other than an equity exposure to an investment fund) by multiplying the adjusted carrying value of the equity exposure or the effective portion and ineffective portion of a hedge pair (as defined in paragraph (c) of this section) by the lowest applicable risk weight in this paragraph (b).

(1) *0 percent risk weight equity exposures.* An equity exposure to an entity whose credit exposures are exempt from the 0.03 percent PD floor in paragraph (d)(2) of section 31 of this appendix is assigned a 0 percent risk weight.

(2) *20 percent risk weight equity exposures.* An equity exposure to a Federal Home Loan Bank or Farmer Mac is assigned a 20 percent risk weight.

(3) *100 percent risk weight equity exposures.* The following equity exposures are assigned a 100 percent risk weight:

(i) An equity exposure that is designed primarily to promote community welfare, including the welfare of low- and moderate-income communities or families, such as by providing services or jobs, excluding equity exposures to an unconsolidated small business investment company and equity exposures held through a consolidated small business investment company described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682).

(ii) *Effective portion of hedge pairs.* The effective portion of a hedge pair.

(iii) *Non-significant equity exposures.* Equity exposures, excluding exposures to an investment firm that would meet the definition of a traditional securitization were it not for the OCC's application of paragraph (8) of that definition and has greater than immaterial leverage, to the extent that the aggregate adjusted carrying value of the exposures does not exceed 10 percent of the savings association's tier 1 capital plus tier 2 capital.

(A) To compute the aggregate adjusted carrying value of a Federal savings association's equity exposures for purposes of this paragraph (b)(3)(iii), the savings association may exclude equity exposures described in paragraphs (b)(1), (b)(2), (b)(3)(i), and (b)(3)(ii) of this section, the equity exposure in a hedge pair with the smaller adjusted carrying value, and a proportion of each equity exposure to an investment fund equal to the proportion of the assets of the investment fund that are not equity exposures or that meet the criterion of paragraph (b)(3)(i) of this section. If a savings association does not know the actual holdings of the investment fund, the savings association may calculate the proportion of the assets of the fund that are not equity exposures based on the terms of the prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. If the sum of the investment limits for all exposure classes within the fund exceeds 100 percent, the savings association must assume for purposes of this paragraph (b)(3)(iii) that the investment fund invests to the maximum extent possible in equity exposures.

(B) When determining which of a Federal savings association's equity exposures qualify for a 100 percent risk weight under this paragraph, a savings association first must include equity exposures to unconsolidated small business investment companies or held through consolidated small business investment companies described in section 302 of the Small Business Investment Act of 1958 (15 U.S.C. 682), then must include publicly traded equity exposures (including those held indirectly through investment funds), and then must include non-publicly traded equity exposures (including those held indirectly through investment funds).

(4) *300 percent risk weight equity exposures.* A publicly traded equity exposure (other than an equity exposure described in paragraph (b)(6) of this section and including the ineffective portion of a hedge pair) is assigned a 300 percent risk weight.

(5) *400 percent risk weight equity exposures.* An equity exposure (other than an equity exposure described in paragraph (b)(6) of this section) that is not publicly traded is assigned a 400 percent risk weight.

(6) *600 percent risk weight equity exposures.* An equity exposure to an investment firm that:

(i) Would meet the definition of a traditional securitization were it not for the OCC's application of paragraph (8) of that definition; and

(ii) Has greater than immaterial leverage is assigned a 600 percent risk weight.

(c) *Hedge transactions*—(1) *Hedge pair.* A hedge pair is two equity exposures that form an effective hedge so long as each equity exposure is publicly traded or has a return that is primarily based on a publicly traded equity exposure.

(2) *Effective hedge.* Two equity exposures form an effective hedge if the exposures either have the same remaining maturity or each has a remaining maturity of at least three months; the hedge relationship is formally documented in a prospective manner (that is, before the Federal savings association acquires at least one of the equity exposures); the documentation specifies the measure of effectiveness (E) the Federal savings association will use for the hedge relationship throughout the life of the transaction; and the hedge relationship has an E greater than or equal to 0.8. A Federal savings association must measure E at least quarterly and must use one of three alternative measures of E:

(i) Under the dollar-offset method of measuring effectiveness, the Federal savings association must determine the ratio of value change (RVC). The RVC is the ratio of the cumulative sum of the periodic changes in value of one equity exposure to the cumulative sum of the periodic changes in the value of the other equity exposure. If RVC is positive, the hedge is not effective and E equals 0. If RVC is negative and greater than or equal to -1 (that is, between zero and -1), then E equals the absolute value of RVC. If RVC is negative and less than -1, then E equals 2 plus RVC.

(ii) Under the variability-reduction method of measuring effectiveness:

$$E = 1 - \frac{\sum_{t=1}^{T} \left(X_t - X_{t-1}\right)^2}{\sum_{t=1}^{T} \left(A_t - A_{t-1}\right)^2}, \text{ where}$$

(A) $X_t = A_t - B_t$;

(B) A_t = the value at time t of one exposure in a hedge pair; and

(C) B_t = the value at time t of the other exposure in a hedge pair.

(iii) Under the regression method of measuring effectiveness, E equals the coefficient of determination of a regression in

which the change in value of one exposure in a hedge pair is the dependent variable and the change in value of the other exposure in a hedge pair is the independent variable. However, if the estimated regression coefficient is positive, then the value of E is zero.

(3) The effective portion of a hedge pair is E multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

(4) The ineffective portion of a hedge pair is (1 − E) multiplied by the greater of the adjusted carrying values of the equity exposures forming a hedge pair.

Section 53. Internal Models Approach (IMA)

(a) *General.* A Federal savings association may calculate its risk-weighted asset amount for equity exposures using the IMA by modeling publicly traded and non-publicly traded equity exposures (in accordance with paragraph (c) of this section) or by modeling only publicly traded equity exposures (in accordance with paragraph (d) of this section).

(b) *Qualifying criteria.* To qualify to use the IMA to calculate risk-based capital requirements for equity exposures, a Federal savings association must receive prior written approval from the OCC. To receive such approval, the savings association must demonstrate to the OCC's satisfaction that the savings association meets the following criteria:

(1) The savings association must have one or more models that:

(i) Assess the potential decline in value of its modeled equity exposures;

(ii) Are commensurate with the size, complexity, and composition of the savings association's modeled equity exposures; and

(iii) Adequately capture both general market risk and idiosyncratic risk.

(2) The savings association's model must produce an estimate of potential losses for its modeled equity exposures that is no less than the estimate of potential losses produced by a VaR methodology employing a 99.0 percent, one-tailed confidence interval of the distribution of quarterly returns for a benchmark portfolio of equity exposures comparable to the savings association's modeled equity exposures using a long-term sample period.

(3) The number of risk factors and exposures in the sample and the data period used for quantification in the savings association's model and benchmarking exercise must be sufficient to provide confidence in the accuracy and robustness of the savings association's estimates.

(4) The savings association's model and benchmarking process must incorporate data that are relevant in representing the risk profile of the savings association's modeled equity exposures, and must include data from at least one equity market cycle containing adverse market movements relevant to the risk profile of the savings association's modeled equity exposures. In addition, the savings association's benchmarking exercise must be based on daily market prices for the benchmark portfolio. If the savings association's model uses a scenario methodology, the savings association must demonstrate that the model produces a conservative estimate of potential losses on the savings association's modeled equity exposures over a relevant long-term market cycle. If the savings association employs risk factor models, the savings association must demonstrate through empirical analysis the appropriateness of the risk factors used.

(5) The savings association must be able to demonstrate, using theoretical arguments and empirical evidence, that any proxies used in the modeling process are comparable to the savings association's modeled equity exposures and that the savings association has made appropriate adjustments for differences. The savings association must derive any proxies for its modeled equity exposures and benchmark portfolio using historical market data that are relevant to the savings association's modeled equity exposures and benchmark portfolio (or, where not, must use appropriately adjusted data), and such proxies must be robust estimates of the risk of the savings association's modeled equity exposures.

(c) *Risk-weighted assets calculation for a Federal savings association modeling publicly traded and non-publicly traded equity exposures.* If a Federal savings association models publicly traded and non-publicly traded equity exposures, the savings association's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 (as determined under section 52 of this appendix) and each equity exposure to an investment fund (as determined under section 54 of this appendix); and

(2) The greater of:

(i) The estimate of potential losses on the savings association's equity exposures (other than equity exposures referenced in paragraph (c)(1) of this section) generated by the savings association's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the savings association's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund;

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs; and

(C) 300 percent multiplied by the aggregate adjusted carrying value of the savings association's equity exposures that are not publicly traded, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund.

(d) *Risk-weighted assets calculation for a Federal savings association using the IMA only for publicly traded equity exposures.* If a Federal savings association models only publicly traded equity exposures, the savings association's aggregate risk-weighted asset amount for its equity exposures is equal to the sum of:

(1) The risk-weighted asset amount of each equity exposure that qualifies for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 (as determined under section 52 of this appendix), each equity exposure that qualifies for a 400 percent risk weight under paragraph (b)(5) of section 52 or a 600 percent risk weight under paragraph (b)(6) of section 52 (as determined under section 52 of this appendix), and each equity exposure to an investment fund (as determined under section 54 of this appendix); and

(2) The greater of:

(i) The estimate of potential losses on the Federal savings association's equity exposures (other than equity exposures referenced in paragraph (d)(1) of this section) generated by the savings association's internal equity exposure model multiplied by 12.5; or

(ii) The sum of:

(A) 200 percent multiplied by the aggregate adjusted carrying value of the Federal savings association's publicly traded equity exposures that do not belong to a hedge pair, do not qualify for a 0 percent, 20 percent, or 100 percent risk weight under paragraphs (b)(1) through (b)(3)(i) of section 52 of this appendix, and are not equity exposures to an investment fund; and

(B) 200 percent multiplied by the aggregate ineffective portion of all hedge pairs.

Section 54. Equity Exposures to Investment Funds

(a) *Available approaches.* (1) Unless the exposure meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 of this appendix, a Federal savings association must determine the risk-weighted asset amount of an equity exposure to an investment fund under the Full Look-Through Approach in paragraph (b) of this section, the Simple Modified Look-Through Approach in paragraph (c) of this section, the Alternative Modified Look-Through Approach in paragraph (d) of this section, or, if the investment fund qualifies for the Money Market Fund Approach, the Money Market Fund Approach in paragraph (e) of this section.

(2) The risk-weighted asset amount of an equity exposure to an investment fund that meets the requirements for a community development equity exposure in paragraph (b)(3)(i) of section 52 of this appendix is its adjusted carrying value.

(3) If an equity exposure to an investment fund is part of a hedge pair and the Federal savings association does not use the Full Look-Through Approach, the savings association may use the ineffective portion of the hedge pair as determined under paragraph (c) of section 52 of this appendix as the adjusted carrying value for the equity exposure to the investment fund. The risk-weighted asset amount of the effective portion of the hedge pair is equal to its adjusted carrying value.

(b) *Full Look-Through Approach.* A Federal savings association that is able to

calculate a risk-weighted asset amount for its proportional ownership share of each exposure held by the investment fund (as calculated under this appendix as if the proportional ownership share of each exposure were held directly by the savings association) may either:

(1) Set the risk-weighted asset amount of the Federal savings association's exposure to the fund equal to the product of:

(i) The aggregate risk-weighted asset amounts of the exposures held by the fund as if they were held directly by the savings association; and

(ii) The savings association's proportional ownership share of the fund; or

(2) Include the savings association's proportional ownership share of each exposure held by the fund in the savings association's IMA.

(c) *Simple Modified Look-Through Approach.* Under this approach, the risk-weighted asset amount for a Federal savings association's equity exposure to an investment fund equals the adjusted carrying value of the equity exposure multiplied by the highest risk weight in Table 10 that applies to any exposure the fund is permitted to hold under its prospectus, partnership agreement, or similar contract that defines the fund's permissible investments (excluding derivative contracts that are used for hedging rather than speculative purposes and that do not constitute a material portion of the fund's exposures).

TABLE 10—MODIFIED LOOK-THROUGH APPROACHES FOR EQUITY EXPOSURES TO INVESTMENT FUNDS

Risk weight (percent)	Exposure class
0	Sovereign exposures with a long-term applicable external rating in the highest investment-grade rating category and sovereign exposures of the United States.
20	Non-sovereign exposures with a long-term applicable external rating in the highest or second-highest investment-grade rating category; exposures with a short-term applicable external rating in the highest investment-grade rating category; and exposures to, or guaranteed by, depository institutions, foreign banks (as defined in 12 CFR 211.2), or securities firms subject to consolidated supervision and regulation comparable to that imposed on U.S. securities broker-dealers that are repo-style transactions or bankers' acceptances.
50	Exposures with a long-term applicable external rating in the third-highest investment-grade rating category or a short-term applicable external rating in the second-highest investment-grade rating category.
100	Exposures with a long-term or short-term applicable external rating in the lowest investment-grade rating category.
200	Exposures with a long-term applicable external rating one rating category below investment grade.
300	Publicly traded equity exposures.
400	Non-publicly traded equity exposures; exposures with a long-term applicable external rating two rating categories or more below investment grade; and exposures without an external rating (excluding publicly traded equity exposures).
1,250	OTC derivative contracts and exposures that must be deducted from regulatory capital or receive a risk weight greater than 400 percent under this appendix.

(d) *Alternative Modified Look-Through Approach.* Under this approach, a Federal savings association may assign the adjusted carrying value of an equity exposure to an investment fund on a pro rata basis to different risk weight categories in Table 10 based on the investment limits in the fund's prospectus, partnership agreement, or similar contract that defines the fund's permissible investments. The risk-weighted asset amount for the savings association's equity exposure to the investment fund equals the sum of each portion of the adjusted carrying value assigned to an exposure class multiplied by the applicable risk weight. If the sum of the investment limits for exposure classes within the fund exceeds 100 percent, the savings association must assume that the fund invests to the maximum extent permitted under its investment limits in the exposure class with the highest risk weight under Table 10, and continues to make investments in order of the exposure class with the next highest risk weight under Table 10 until the maximum total investment level is reached. If more than one exposure class applies to an exposure, the Federal savings association must use the highest applicable risk weight. A Federal savings association may exclude derivative contracts held by the fund that are used for hedging rather than for speculative purposes and do not constitute a material portion of the fund's exposures.

(e) *Money Market Fund Approach.* The risk-weighted asset amount for a Federal savings association's equity exposure to an investment fund that is a money market fund subject to 17 CFR 270.2a–7 and that has an applicable external rating in the highest investment-grade rating category equals the adjusted carrying value of the equity exposure multiplied by 7 percent.

Section 55. Equity Derivative Contracts

Under the IMA, in addition to holding risk-based capital against an equity derivative contract under this part, a Federal savings association must hold risk-based capital against the counterparty credit risk in the equity derivative contract by also treating the equity derivative contract as a wholesale exposure and computing a supplemental risk-weighted asset amount for the contract under part IV. Under the SRWA, a Federal savings association may choose not to hold risk-based capital against the counterparty credit risk of equity derivative contracts, as long as it does so for all such contracts. Where the equity derivative contracts are subject to a qualified master netting agreement, a Federal savings association using the SRWA must either include all or exclude all of the contracts from any measure used to determine counterparty credit risk exposure.

Part VII. Risk-Weighted Assets for Operational Risk

Section 61. Qualification Requirements for Incorporation of Operational Risk Mitigants

(a) *Qualification to use operational risk mitigants.* A Federal savings association may adjust its estimate of operational risk exposure to reflect qualifying operational risk mitigants if:

(1) The savings association's operational risk quantification system is able to generate an estimate of the savings association's operational risk exposure (which does not incorporate qualifying operational risk mitigants) and an estimate of the savings association's operational risk exposure adjusted to incorporate qualifying operational risk mitigants; and

(2) The savings association's methodology for incorporating the effects of insurance, if the savings association uses insurance as an operational risk mitigant, captures through appropriate discounts to the amount of risk mitigation:

(i) The residual term of the policy, where less than one year;

(ii) The cancellation terms of the policy, where less than one year;

(iii) The policy's timeliness of payment;

(iv) The uncertainty of payment by the provider of the policy; and

(v) Mismatches in coverage between the policy and the hedged operational loss event.

(b) *Qualifying operational risk mitigants.* Qualifying operational risk mitigants are:

(1) Insurance that:

(i) Is provided by an unaffiliated company that has a claims payment ability that is rated in one of the three highest rating categories by a NRSRO;

(ii) Has an initial term of at least one year and a residual term of more than 90 days;

(iii) Has a minimum notice period for cancellation by the provider of 90 days;

(iv) Has no exclusions or limitations based upon regulatory action or for the receiver or liquidator of a failed depository institution; and

(v) Is explicitly mapped to a potential operational loss event; and

(2) Operational risk mitigants other than insurance for which the OCC has given prior written approval. In evaluating an

operational risk mitigant other than insurance, the OCC will consider whether the operational risk mitigant covers potential operational losses in a manner equivalent to holding regulatory capital.

Section 62. Mechanics of Risk-Weighted Asset Calculation

(a) If a Federal savings association does not qualify to use or does not have qualifying operational risk mitigants, the savings association's dollar risk-based capital requirement for operational risk is its operational risk exposure minus eligible operational risk offsets (if any).

(b) If a Federal savings association qualifies to use operational risk mitigants and has qualifying operational risk mitigants, the savings association's dollar risk-based capital requirement for operational risk is the greater of:

(1) The Federal savings association's operational risk exposure adjusted for qualifying operational risk mitigants minus eligible operational risk offsets (if any); or

(2) 0.8 multiplied by the difference between:

(i) The Federal savings association's operational risk exposure; and

(ii) Eligible operational risk offsets (if any).

(c) The Federal savings association's risk-weighted asset amount for operational risk equals the savings association's dollar risk-based capital requirement for operational risk determined under paragraph (a) or (b) of this section multiplied by 12.5.

Part VIII. Disclosure

Section 71. Disclosure Requirements

(a) Each Federal savings association must publicly disclose each quarter its total and tier 1 risk-based capital ratios and their components (that is, tier 1 capital, tier 2 capital, total qualifying capital, and total risk-weighted assets).[4]

(b) A Federal savings association must comply with paragraph (c) of section 71 of this appendix unless it is a consolidated subsidiary of a depository institution or bank holding company that is subject to these requirements.

(c)(1) Each consolidated Federal savings association described in paragraph (b) of this section that is not a subsidiary of a non-U.S. banking organization that is subject to comparable public disclosure requirements in its home jurisdiction and has successfully completed its parallel run must provide timely public disclosures each calendar quarter of the information in tables 11.1–11.11 below. If a significant change occurs, such that the most recent reported amounts are no longer reflective of the savings association's capital adequacy and risk profile, then a brief discussion of this change and its likely impact must be provided as soon as practicable thereafter. Qualitative disclosures that typically do not change each quarter (for example, a general summary of the savings association's risk management objectives and policies, reporting system, and definitions) may be disclosed annually, provided any significant changes to these are disclosed in the interim. Management is encouraged to provide all of the disclosures required by this appendix in one place on the savings association's public Web site.[5] The savings association must make these disclosures publicly available for each of the last three years (twelve quarters) or such shorter period since it began its first floor period.

(2) Each Federal savings association is required to have a formal disclosure policy approved by the board of directors that addresses its approach for determining the disclosures it makes. The policy must address the associated internal controls and disclosure controls and procedures. The board of directors and senior management are responsible for establishing and maintaining an effective internal control structure over financial reporting, including the disclosures required by this appendix, and must ensure that appropriate review of the disclosures takes place. One or more senior officers of the savings association must attest that the disclosures required by this appendix meet the requirements of this appendix.

(3) If a Federal savings association believes that disclosure of specific commercial or financial information would prejudice seriously its position by making public information that is either proprietary or confidential in nature, the savings association need not disclose those specific items, but must disclose more general information about the subject matter of the requirement, together with the fact that, and the reason why, the specific items of information have not been disclosed.

TABLE 11.1—SCOPE OF APPLICATION

Qualitative Disclosures	(a) The name of the top corporate entity in the group to which the appendix applies.
	(b) An outline of differences in the basis of consolidation for accounting and regulatory purposes, with a brief description of the entities[6] within the group that are fully consolidated; that are deconsolidated and deducted; for which the regulatory capital requirement is deducted; and that are neither consolidated nor deducted (for example, where the investment is risk-weighted).
	(c) Any restrictions, or other major impediments, on transfer of funds or regulatory capital within the group.
Quantitative Disclosures	(d) The aggregate amount of surplus capital of insurance subsidiaries (whether deducted or subjected to an alternative method) included in the regulatory capital of the consolidated group.
	(e) The aggregate amount by which actual regulatory capital is less than the minimum regulatory capital requirement in all subsidiaries with regulatory capital requirements and the name(s) of the subsidiaries with such deficiencies.

TABLE 11.2—CAPITAL STRUCTURE

Qualitative Disclosures	(a) Summary information on the terms and conditions of the main features of all capital instruments, especially in the case of innovative, complex or hybrid capital instruments.
Quantitative Disclosures	(b) The amount of tier 1 capital, with separate disclosure of: • Common stock/surplus; • Retained earnings; • Minority interests in the equity of subsidiaries; • Regulatory calculation differences deducted from tier 1 capital;[7] and • Other amounts deducted from tier 1 capital, including goodwill and certain intangibles.
	(c) The total amount of tier 2 capital.
	(d) Other deductions from capital.[8]

[4] Other public disclosure requirements continue to apply—for example, Federal securities law and regulatory reporting requirements.

[5] Alternatively, a Federal savings association may provide the disclosures in more than one place, as some of them may be included in public financial reports (for example, in Management's Discussion and Analysis included in SEC filings) or other regulatory reports. The savings association must provide a summary table on its public Web site that specifically indicates where all the disclosures may be found (for example, regulatory report schedules, page numbers in annual reports).

[6] Entities include securities, insurance and other financial subsidiaries, commercial subsidiaries (where permitted), and significant minority equity investments in insurance, financial and commercial entities.

TABLE 11.2—CAPITAL STRUCTURE—Continued

	(e) Total eligible capital.

TABLE 11.3—CAPITAL ADEQUACY

Qualitative disclosures	(a) A summary discussion of the Federal savings association's approach to assessing the adequacy of its capital to support current and future activities.
Quantitative disclosures	(b) Risk-weighted assets for credit risk from: • Wholesale exposures; • Residential mortgage exposures; • Qualifying revolving exposures; • Other retail exposures; • Securitization exposures; • Equity exposures; • Equity exposures subject to the simple risk weight approach; and • Equity exposures subject to the internal models approach. (c) Risk-weighted assets for market risk as calculated under any applicable market risk rule: [9] • Standardized approach for specific risk; and • Internal models approach for specific risk. (d) Risk-weighted assets for operational risk. (e) Total and tier 1 risk-based capital ratios: [10] • For the top consolidated group; and • For each DI subsidiary.

[7] Representing 50 percent of the amount, if any, by which total expected credit losses as calculated within the IRB approach exceed eligible credit reserves, which must be deducted from tier 1 capital.

[8] Including 50 percent of the amount, if any, by which total expected credit losses as calculated within the IRB approach exceed eligible credit reserves, which must be deducted from tier 2 capital.

[9] Risk-weighted assets determined under any applicable market risk rule are to be disclosed only for the approaches used.

[10] Total risk-weighted assets should also be disclosed.

General qualitative disclosure requirement

For each separate risk area described in tables 11.4 through 11.11, the Federal savings association must describe its risk management objectives and policies, including:

- Strategies and processes;
- The structure and organization of the relevant risk management function;
- The scope and nature of risk reporting and/or measurement systems;
- Policies for hedging and/or mitigating risk and strategies and processes for monitoring the continuing effectiveness of hedges/mitigants.

TABLE 11.4 [11]—CREDIT RISK: GENERAL DISCLOSURES

Qualitative Disclosures	(a) The general qualitative disclosure requirement with respect to credit risk (excluding counterparty credit risk disclosed in accordance with Table 11.6), including: • Definitions of past due and impaired (for accounting purposes); • Description of approaches followed for allowances, including statistical methods used where applicable; and • Discussion of the Federal savings association's credit risk management policy.
Quantitative Disclosures	(b) Total credit risk exposures and average credit risk exposures, after accounting offsets in accordance with GAAP,[12] and without taking into account the effects of credit risk mitigation techniques (for example, collateral and netting), over the period broken down by major types of credit exposure.[13] (c) Geographic [14] distribution of exposures, broken down in significant areas by major types of credit exposure. (d) Industry or counterparty type distribution of exposures, broken down by major types of credit exposure. (e) Remaining contractual maturity breakdown (for example, one year or less) of the whole portfolio, broken down by major types of credit exposure.
.....	(f) By major industry or counterparty type: • Amount of impaired loans; • Amount of past due loans; [15] • Allowances; and • Charge-offs during the period.
.....	(g) Amount of impaired loans and, if available, the amount of past due loans broken down by significant geographic areas including, if practical, the amounts of allowances related to each geographical area.[16]
.....	(h) Reconciliation of changes in the allowance for loan and lease losses.[17]

[11] Table 4 does not include equity exposures.

[12] For example, FASB Interpretations 39 and 41.

[13] For example, savings associations could apply a breakdown similar to that used for accounting purposes.

Such a breakdown might, for instance, be (a) loans, off-balance sheet commitments, and other non-derivative off-balance sheet exposures, (b) debt securities, and (c) OTC derivatives.

[14] Geographical areas may comprise individual countries, groups of countries, or regions within countries.

A Federal savings association might choose to define the geographical areas based on the way the company's portfolio is geographically managed. The criteria used to allocate the loans to geographical areas must be specified.

[15] A Federal savings association is encouraged also to provide an analysis of the aging of past-due loans.

[16] The portion of general allowance that is not allocated to a geographical area should be disclosed separately.

[17] The reconciliation should include the following: A description of the allowance; the opening balance of the allowance; charge-offs taken against the allowance during the period; amounts provided (or reversed) for estimated probable loan losses during the period; any other adjustments (for example, exchange rate differences, business combinations, acquisitions and disposals of subsidiaries), including transfers between allowances; and the closing balance of the allowance. Charge-offs and recoveries that have been recorded directly to the income statement should be disclosed separately.

TABLE 11.5—CREDIT RISK: DISCLOSURES FOR PORTFOLIOS SUBJECT TO IRB RISK-BASED CAPITAL FORMULAS

Qualitative disclosures	(a) Explanation and review of the: • Structure of internal rating systems and relation between internal and external ratings; • Use of risk parameter estimates other than for regulatory capital purposes; • Process for managing and recognizing credit risk mitigation (see table 11.7); and • Control mechanisms for the rating system, including discussion of independence, accountability, and rating systems review. (b) Description of the internal ratings process, provided separately for the following: • Wholesale category; • Retail subcategories; • Residential mortgage exposures; • Qualifying revolving exposures; and • Other retail exposures. For each category and subcategory the description should include: • The types of exposure included in the category/subcategories; and • The definitions, methods and data for estimation and validation of PD, LGD, and EAD, including assumptions employed in the derivation of these variables.[18]
Quantitative disclosures: risk assessment.	(c) For wholesale exposures, present the following information across a sufficient number of PD grades (including default) to allow for a meaningful differentiation of credit risk:[19] • Total EAD;[20] • Exposure-weighted average LGD (percentage); • Exposure-weighted average risk weight; and • Amount of undrawn commitments and exposure-weighted average EAD for wholesale exposures. For each retail subcategory, present the disclosures outlined above across a sufficient number of segments to allow for a meaningful differentiation of credit risk.
Quantitative disclosures: historical results.	(d) Actual losses in the preceding period for each category and subcategory and how this differs from past experience. A discussion of the factors that impacted the loss experience in the preceding period—for example, has the Federal savings association experienced higher than average default rates, loss rates or EADs. (e) Federal savings association's estimates compared against actual outcomes over a longer period.[21] At a minimum, this should include information on estimates of losses against actual losses in the wholesale category and each retail subcategory over a period sufficient to allow for a meaningful assessment of the performance of the internal rating processes for each category/subcategory.[22] Where appropriate, the savings association should further decompose this to provide analysis of PD, LGD, and EAD outcomes against estimates provided in the quantitative risk assessment disclosures above.[23]

[18] This disclosure does not require a detailed description of the model in full—it should provide the reader with a broad overview of the model approach, describing definitions of the variables and methods for estimating and validating those variables set out in the quantitative risk disclosures below. This should be done for each of the four category/subcategories. The Federal savings association should disclose any significant differences in approach to estimating these variables within each category/subcategories.

[19] The PD, LGD and EAD disclosures in Table 11.5(c) should reflect the effects of collateral, qualifying master netting agreements, eligible guarantees and eligible credit derivatives as defined in part I. Disclosure of each PD grade should include the exposure-weighted average PD for each grade. Where a Federal savings association aggregates PD grades for the purposes of disclosure, this should be a representative breakdown of the distribution of PD grades used for regulatory capital purposes.

[20] Outstanding loans and EAD on undrawn commitments can be presented on a combined basis for these disclosures.

[21] These disclosures are a way of further informing the reader about the reliability of the information provided in the ''quantitative disclosures: risk assessment'' over the long run. The disclosures are requirements from year-end 2010; in the meantime, early adoption is encouraged. The phased implementation is to allow a Federal savings association sufficient time to build up a longer run of data that will make these disclosures meaningful.

[22] This regulation is not prescriptive about the period used for this assessment. Upon implementation, it might be expected that a Federal savings association would provide these disclosures for as long a run of data as possible—for example, if a savings association has 10 years of data, it might choose to disclose the average default rates for each PD grade over that 10-year period. Annual amounts need not be disclosed.

[23] A Federal savings association should provide this further decomposition where it will allow users greater insight into the reliability of the estimates provided in the ''quantitative disclosures: risk assessment.'' In particular, it should provide this information where there are material differences between its estimates of PD, LGD or EAD compared to actual outcomes over the long run. The savings association should also provide explanations for such differences.

TABLE 11.6—GENERAL DISCLOSURE FOR COUNTERPARTY CREDIT RISK OF OTC DERIVATIVE CONTRACTS, REPO-STYLE TRANSACTIONS, AND ELIGIBLE MARGIN LOANS

Qualitative Disclosures	(a) The general qualitative disclosure requirement with respect to OTC derivatives, eligible margin loans, and repo-style transactions, including: • Discussion of methodology used to assign economic capital and credit limits for counterparty credit exposures; • Discussion of policies for securing collateral, valuing and managing collateral, and establishing credit reserves; • Discussion of the primary types of collateral taken; • Discussion of policies with respect to wrong-way risk exposures; and • Discussion of the impact of the amount of collateral the Federal savings association would have to provide if the savings association were to receive a credit rating downgrade.
Quantitative Disclosures	(b) Gross positive fair value of contracts, netting benefits, netted current credit exposure, collateral held (including type, for example, cash, government securities), and net unsecured credit exposure.[24] Also report measures for EAD used for regulatory capital for these transactions, the notional value of credit derivative hedges purchased for counterparty credit risk protection, and, for Federal savings associations not using the internal models methodology in section 32(d) of this appendix, the distribution of current credit exposure by types of credit exposure.[25] (c) Notional amount of purchased and sold credit derivatives, segregated between use for the Federal savings association's own credit portfolio and for its intermediation activities, including the distribution of the credit derivative products used, broken down further by protection bought and sold within each product group. (d) The estimate of alpha if the Federal savings association has received supervisory approval to estimate alpha.

TABLE 11.7—CREDIT RISK MITIGATION [26] [27] [28]

Qualitative Disclosures	(a) The general qualitative disclosure requirement with respect to credit risk mitigation including: • Policies and processes for, and an indication of the extent to which the Federal savings association uses, on- and off-balance sheet netting; • Policies and processes for collateral valuation and management; • A description of the main types of collateral taken by the Federal savings association; • The main types of guarantors/credit derivative counterparties and their creditworthiness; and • Information about (market or credit) risk concentrations within the mitigation taken.
Quantitative Disclosures	(b) For each separately disclosed portfolio, the total exposure (after, where applicable, on- or off-balance sheet netting) that is covered by guarantees/credit derivatives.

[24] Net unsecured credit exposure is the credit exposure after considering the benefits from legally enforceable netting agreements and collateral arrangements, without taking into account haircuts for price volatility, liquidity, etc.

[25] This may include interest rate derivative contracts, foreign exchange derivative contracts, equity derivative contracts, credit derivatives, commodity or other derivative contracts, repo-style transactions, and eligible margin loans.

[26] At a minimum, a Federal savings association must provide the disclosures in Table 11.7 in relation to credit risk mitigation that has been recognized for the purposes of reducing capital requirements under this appendix. Where relevant, Federal savings associations are encouraged to give further information about mitigants that have not been recognized for that purpose.

[27] Credit derivatives that are treated, for the purposes of this appendix, as synthetic securitization exposures should be excluded from the credit risk mitigation disclosures and included within those relating to securitization.

[28] Counterparty credit risk-related exposures disclosed pursuant to Table 11.6 should be excluded from the credit risk mitigation disclosures in Table 11.7.

TABLE 11.8—SECURITIZATION

Qualitative Disclosures	(a) The general qualitative disclosure requirement with respect to securitization (including synthetics), including a discussion of: • The Federal savings association's objectives relating to securitization activity, including the extent to which these activities transfer credit risk of the underlying exposures away from the savings association to other entities; • The roles played by the Federal savings association in the securitization process[29] and an indication of the extent of the savings association's involvement in each of them; and • The regulatory capital approaches (for example, RBA, IAA and SFA) that the Federal savings association follows for its securitization activities. (b) Summary of the Federal savings association's accounting policies for securitization activities, including: • Whether the transactions are treated as sales or financings; • Recognition of gain-on-sale; • Key assumptions for valuing retained interests, including any significant changes since the last reporting period and the impact of such changes; and • Treatment of synthetic securitizations. (c) Names of NRSROs used for securitizations and the types of securitization exposure for which each agency is used.
Quantitative Disclosures	(d) The total outstanding exposures securitized by the Federal savings association in securitizations that meet the operational criteria in section 41 of this appendix (broken down into traditional/synthetic), by underlying exposure type.[30] [31] [32] (e) For exposures securitized by the Federal savings association in securitizations that meet the operational criteria in Section 41 of this appendix: • Amount of securitized assets that are impaired/past due; and • Losses recognized by the Federal savings association during the current period[33] broken down by exposure type. (f) Aggregate amount of securitization exposures broken down by underlying exposure type. (g) Aggregate amount of securitization exposures and the associated IRB capital requirements for these exposures broken down into a meaningful number of risk weight bands. Exposures that have been deducted from capital should be disclosed separately by type of underlying asset. (h) For securitizations subject to the early amortization treatment, the following items by underlying asset type for securitized facilities: • The aggregate drawn exposures attributed to the seller's and investors' interests; and • The aggregate IRB capital charges incurred by the Federal savings association against the investors' shares of drawn balances and undrawn lines. (i) Summary of current year's securitization activity, including the amount of exposures securitized (by exposure type), and recognized gain or loss on sale by asset type.

TABLE 11.9—OPERATIONAL RISK

Qualitative Disclosures	(a) The general qualitative disclosure requirement for operational risk. (b) Description of the AMA, including a discussion of relevant internal and external factors considered in the Federal savings association's measurement approach. (c) A description of the use of insurance for the purpose of mitigating operational risk.

[29] For example: originator, investor, servicer, provider of credit enhancement, sponsor of ABCP facility, liquidity provider, or swap provider.

[30] Underlying exposure types may include, for example, one- to four-family residential loans, home equity lines, credit card receivables, and auto loans.

[31] Securitization transactions in which the originating Federal savings association does not retain any securitization exposure should be shown separately but need only be reported for the year of inception.

[32] Where relevant, a Federal savings association is encouraged to differentiate between exposures resulting from activities in which they act only as sponsors, and exposures that result from all other Federal savings association securitization activities.

[33] For example, charge-offs/allowances (if the assets remain on the savings association's balance sheet) or write-downs of I/O strips and other residual interests.

TABLE 11.10—EQUITIES NOT SUBJECT TO MARKET RISK RULE

Qualitative Disclosures	(a) The general qualitative disclosure requirement with respect to equity risk, including: • Differentiation between holdings on which capital gains are expected and those held for other objectives, including for relationship and strategic reasons; and • Discussion of important policies covering the valuation of and accounting for equity holdings in the banking book. This includes the accounting techniques and valuation methodologies used, including key assumptions and practices affecting valuation as well as significant changes in these practices.
Quantitative Disclosures	(b) Value disclosed in the balance sheet of investments, as well as the fair value of those investments; for quoted securities, a comparison to publicly quoted share values where the share price is materially different from fair value. (c) The types and nature of investments, including the amount that is: • Publicly traded; and • Non-publicly traded. (d) The cumulative realized gains (losses) arising from sales and liquidations in the reporting period. (e) • Total unrealized gains (losses) [34] • Total latent revaluation gains (losses) [35] • Any amounts of the above included in tier 1 and/or tier 2 capital. (f) Capital requirements broken down by appropriate equity groupings, consistent with the Federal savings association's methodology, as well as the aggregate amounts and the type of equity investments subject to any supervisory transition regarding regulatory capital requirements.[36]

TABLE 11.11—INTEREST RATE RISK FOR NON-TRADING ACTIVITIES

Qualitative Disclosures	(a) The general qualitative disclosure requirement, including the nature of interest rate risk for non-trading activities and key assumptions, including assumptions regarding loan prepayments and behavior of non-maturity deposits, and frequency of measurement of interest rate risk for non-trading activities.
Quantitative Disclosures	(b) The increase (decline) in earnings or economic value (or relevant measure used by management) for upward and downward rate shocks according to management's method for measuring interest rate risk for non-trading activities, broken down by currency (as appropriate).

Part IX—Transition Provisions

Section 81—Optional Transition Provisions Related to the Implementation of Consolidation Requirements Under FAS 167

(a) *Scope, applicability, and purpose.* This section 81 provides optional transition provisions for a Federal savings association that is required for financial and regulatory reporting purposes, as a result of its implementation of Statement of Financial Accounting Standards No. 167, *Amendments to FASB Interpretation No. 46(R)* (FAS 167), to consolidate certain variable interest entities (VIEs) as defined under GAAP. These transition provisions apply through the end of the fourth quarter following the date of a savings association's implementation of FAS 167 (implementation date).

(b) *Exclusion period.*

(1) *Exclusion of risk-weighted assets for the first and second quarters.* For the first two quarters after the implementation date (exclusion period), including for the two calendar quarter-end regulatory report dates within those quarters, a Federal savings association may exclude from risk-weighted assets:

(i) Subject to the limitations in paragraph (d) of section 81, assets held by a VIE, provided that the following conditions are met:

(A) The VIE existed prior to the implementation date,

(B) The savings association did not consolidate the VIE on its balance sheet for calendar quarter-end regulatory report dates prior to the implementation date,

(C) The savings association must consolidate the VIE on its balance sheet beginning as of the implementation date as a result of its implementation of FAS 167, and

(D) The savings association excludes all assets held by VIEs described in paragraphs (b)(1)(i)(A) through (C) of this section 81; and

(ii) Subject to the limitations in paragraph (d) of this section 81, assets held by a VIE that is a consolidated ABCP program, provided that the following conditions are met:

(A) The savings association is the sponsor of the ABCP program,

(B) Prior to the implementation date, the savings association consolidated the VIE onto its balance sheet under GAAP and excluded the VIE's assets from the savings association's risk-weighted assets, and

(C) The savings association chooses to exclude all assets held by ABCP program VIEs described in paragraphs (b)(1)(ii)(A) and (B) of this section 81.

(2) *Risk-weighted assets during exclusion period.* During the exclusion period, including for the two calendar quarter-end regulatory report dates within the exclusion period, a Federal savings association adopting the optional provisions in paragraph (b) of this section must calculate risk-weighted assets for its contractual exposures to the VIEs referenced in paragraph (b)(1) of this section 81 on the implementation date and include this calculated amount in risk-weighted assets. Such contractual exposures may include direct-credit substitutes, recourse obligations, residual interests, liquidity facilities, and loans.

(3) *Inclusion of ALLL in tier 2 capital for the first and second quarters.* During the exclusion period, including for the two calendar quarter-end regulatory report dates within the exclusion period, a Federal savings association that excludes VIE assets from risk-weighted assets pursuant to paragraph (b)(1) of this section 81 may include in tier 2 capital the full amount of the ALLL calculated as of the implementation date that is attributable to the assets it excludes pursuant to paragraph (b)(1) of this section 81 (inclusion amount). The amount of ALLL includable in tier 2 capital in accordance with this paragraph shall not be subject to the limitations set forth in section 13(A)(2) and 13(b) of this Appendix.

(c) *Phase-in period—*

(1) *Exclusion amount.* For purposes of this paragraph (c), exclusion amount is defined as the amount of risk-weighted assets excluded in paragraph (b)(1) of this section as of the implementation date.

(2) *Risk-weighted assets for the third and fourth quarters.* A Federal savings association

[34] Unrealized gains (losses) recognized in the balance sheet but not through earnings.

[35] Unrealized gains (losses) not recognized either in the balance sheet or through earnings.

[36] This disclosure should include a breakdown of equities that are subject to the 0 percent, 20 percent, 100 percent, 300 percent, 400 percent, and 600 percent risk weights, as applicable.

that excludes assets of consolidated VIEs from risk-weighted assets pursuant to paragraph (b)(1) of this section may, for the third and fourth quarters after the implementation date (phase-in period), including for the two calendar quarter-end regulatory report dates within those quarters, exclude from risk-weighted assets 50 percent of the exclusion amount, provided that the savings association may not include in risk-weighted assets pursuant to this paragraph an amount less than the aggregate risk-weighted assets calculated pursuant to paragraph (b)(2) of this section 81.

(3) *Inclusion of ALLL in tier 2 capital for the third and fourth quarters.* A Federal savings association that excludes assets of consolidated VIEs from risk-weighted assets pursuant to paragraph (c)(2) of this section may, for the phase-in period, include in tier 2 capital 50 percent of the inclusion amount it included in tier 2 capital, during the exclusion period, notwithstanding the limit on including ALLL in tier 2 capital in section 13(a)(2) and 13(b) of this Appendix.

(d) *Implicit recourse limitation.* Notwithstanding any other provision in this section 81, assets held by a VIE to which the savings association has provided recourse through credit enhancement beyond any contractual obligation to support assets it has sold may not be excluded from risk-weighted assets.

PART 168—SECURITY PROCEDURES

Sec.
168.1 Authority, purpose, and scope.
168.2 Designation of security officer.
168.3 Security program.
168.4 Report.
168.5 Protection of customer information.

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, 1881–1884, 5412(b)(2)(B); 15 U.S.C. 1681s and 1681w; 15 U.S.C. 6801 and 6805(b)(1).

§ 168.1 Authority, purpose, and scope.

(a) This part is issued under section 3 of the Bank Protection Act of 1968 (12 U.S.C 1882), sections 501 and 505(b)(1) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805(b)(1)), and sections 621 and 628 of the Fair Credit Reporting Act (15 U.S.C. 1681s and 1681w). This part is applicable to Federal savings associations. It requires each Federal savings association to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in the identification and prosecution of persons who commit such acts. Section 168.5 of this part is applicable to Federal savings associations and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers). Section 168.5 of this part requires covered institutions to establish and implement appropriate administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

(b) It is the responsibility of a Federal savings association's board of directors to comply with this regulation and ensure that a written security program for the association's main office and branches is developed and implemented.

§ 168.2 Designation of security officer.

Within 30 days after the effective date of insurance of accounts, the board of directors of each Federal savings association shall designate a security officer who shall have the authority, subject to the approval of the board of directors, to develop, within a reasonable time but no later than 180 days, and to administer a written security program for each of the association's offices.

§ 168.3 Security program.

(a) *Contents of security program.* The security program shall:

(1) Establish procedures for opening and closing for business and for the safekeeping of all currency, negotiable securities, and similar valuables at all times;

(2) Establish procedures that will assist in identifying persons committing crimes against the association and that will preserve evidence that may aid in their identification and prosecution. Such procedures may include, but are not limited to:

(i) Maintaining a camera that records activity in the office;

(ii) Using identification devices, such as prerecorded serial-numbered bills, or chemical and electronic devices; and

(iii) Retaining a record of any robbery, burglary, or larceny committed against the association;

(3) Provide for initial and periodic training of officers and employees in their responsibilities under the security program and in proper employee conduct during and after a burglary, robbery, or larceny; and

(4) Provide for selecting, testing, operating and maintaining appropriate security devices, as specified in paragraph (b) of this section.

(b) *Security devices.* Each savings association shall have, at a minimum, the following security devices:

(1) A means of protecting cash and other liquid assets, such as a vault, safe, or other secure space;

(2) A lighting system for illuminating, during the hours of darkness, the area around the vault, if the vault is visible from outside the office;

(3) Tamper-resistant locks on exterior doors and exterior windows that may be opened;

(4) An alarm system or other appropriate device for promptly notifying the nearest responsible law enforcement officers of an attempted or perpetrated robbery or burglary; and

(5) Such other devices as the security officer determines to be appropriate, taking into consideration:

(i) The incidence of crimes against financial institutions in the area;

(ii) The amount of currency and other valuables exposed to robbery, burglary, or larceny;

(iii) The distance of the office from the nearest responsible law enforcement officers;

(iv) The cost of the security devices;

(v) Other security measures in effect at the office; and

(vi) The physical characteristics of the structure of the office and its surroundings.

§ 168.4 Report.

The security officer for each Federal savings association shall report at least annually to the association's board of directors on the implementation, administration, and effectiveness of the security program.

§ 168.5 Protection of customer information.

Federal savings associations and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers) must comply with the Interagency Guidelines Establishing Information Security Standards set forth in appendix B to part 170 of this chapter. Supplement A to appendix B to part 170 of this chapter provides interpretive guidance.

PART 169—PROXIES

Sec.
169.1 Definitions.
169.2 Form of proxies.
169.3 Holders of proxies.
169.4 Proxy soliciting material.

Authority: Section 2, 48 Stat. 128, as amended (12 U.S.C. 1462); section 3, as added by section 301, 103 Stat. 278 (12 U.S.C. 1462a); section 4, as added by section 301, 103 Stat. 280 (12 U.S.C. 1463), 5412(b)(2)(B).

§ 169.1 Definitions.

As used in this part:

(a) *Security holder.* (1) The term *security holder* means any person having the right to vote in the affairs of a savings association by virtue of:

(i) Ownership of any security of the association or

(ii) Any indebtedness to the association.

(2) For purposes of this part, the term *security holder* shall include any account holder having the right to vote in the affairs of a mutual savings association.

(b) *Person.* The term *person* includes, in addition to natural persons, corporations, partnerships, pension funds, profit-sharing funds, trusts, and any other group of associated persons of whatever nature.

(c) *Proxy.* The term *proxy* includes every form of authorization by which a person is, or may be deemed to be, designated to act for the security holder in the exercise of his or her voting rights in the affairs of a savings association. Such an authorization may take the form of failure to dissent or object.

(d) *Solicit; solicitation.* (1) The terms *solicit* and *solicitation* refer to:

(i) Any request for a proxy whether or not accompanied by or included in a form of proxy;

(ii) Any request to execute, not execute, or revoke a proxy; or

(iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy.

(2) The terms do not apply, however, to the furnishing of a form of proxy to a security holder upon the request of such security holder or to the performance by any person of ministerial acts on behalf of a person soliciting a proxy.

§ 169.2 Form of proxies.

Every form of proxy shall conform to the following requirements:

(a) The proxy shall be revocable at will by the person giving it. The power to revoke may not be conditioned on any event or occurrence or be otherwise limited; except that, in the case of a proxy relating to capital stock if such proxy is coupled with an interest, states such fact on its face, and is valid under the laws of the state in which it is to be exercised, such proxy may be made irrevocable to the extent permitted by such state law.

(b) The proxy may not be part of any other document or instrument (such as an account card).

(c) The proxy shall be clearly labeled ''Revocable Proxy'' in boldface type (at least as large as 18 point).

§ 169.3 Holders of proxies.

No proxy of a mutual savings association with a term greater than eleven months or solicited at the expense of the association may designate as holder anyone other than the board of directors [trustees] as a whole, or a committee appointed by a majority of such board.

§ 169.4 Proxy soliciting material.

No solicitation of a proxy shall be made by means of any statement, form of proxy, notice of meeting, or other communication, written or oral, which:

(a) Solicits any undated or postdated proxy;

(b) Solicits any proxy that provides that it shall be deemed to be dated as of any date subsequent to the date on which it is signed by the security holder; or

(c)(1) Contains any statement that is false or misleading with respect to any material fact, or

(2) Omits to state any material fact:

(i) Necessary in order to make the statements therein not false or misleading or

(ii) Necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter that has subsequently become false or misleading.

PART 170—SAFETY AND SOUNDNESS GUIDELINES AND COMPLIANCE PROCEDURES

Sec.
170.1 Authority, purpose, scope and preservation of existing authority.
170.2 Determination and notification of failure to meet safety and soundness standards and request for compliance plan.
170.3 Filing of safety and soundness compliance plan.
170.4 Issuance of orders to correct deficiencies and to take or refrain from taking other actions.
170.5 Enforcement of orders.

Appendix A to Part 170—Interagency Guidelines Establishing Standards for Safety and Soundness

Appendix B to Part 170—Interagency Guidelines Establishing Information Security Standards

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, 1881–1884, 5412(b)(2)(B); 15 U.S.C. 1681s and 1681w; 15 U.S.C. 6801 and 6805(b)(1).

§ 170.1 Authority, purpose, scope and preservation of existing authority.

(a) *Authority.* This part and the Guidelines in Appendices A and B to this part are issued by the OCC under section 39 (section 39) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831p–1) as added by section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (Pub. L. 102–242, 105 Stat. 2236 (1991)), and as amended by section 956 of the Housing and Community Development Act of 1992 (Pub. L. 102–550, 106 Stat. 3895 (1992)), and as amended by section 318 of the Community Development Banking Act of 1994 (Pub. L. 103–325, 108 Stat. 2160 (1994)). Appendix B to this part is further issued under sections 501(b) and 505 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999)).

(b) *Purpose.* Section 39 of the FDI Act requires the OCC to establish safety and soundness standards. Pursuant to section 39, a Federal savings association may be required to submit a compliance plan if it is not in compliance with a safety and soundness standard established by guideline under section 39 (a) or (b). An enforceable order under section 8 of the FDI Act may be issued if, after being notified that it is in violation of a safety and soundness standard prescribed under section 39, the Federal savings association fails to submit an acceptable compliance plan or fails in any material respect to implement an accepted plan. This part establishes procedures for submission and review of safety and soundness compliance plans and for issuance and review of orders pursuant to section 39. Interagency Guidelines Establishing Standards for Safety and Soundness pursuant to section 39 of the FDI Act are set forth in Appendix A to this part. Interagency Guidelines Establishing Information Security Standards are set forth in appendix B to this part.

(c) *Scope.* This part and the Interagency Guidelines Establishing Standards for Safety and Soundness as set forth at appendix A to this part and the Interagency Guidelines Establishing Information Security Standards at appendix B to this part implement the provisions of section 39 of the FDI Act as they apply to Federal savings associations.

(d) *Preservation of existing authority.* Neither section 39 of the FDI Act nor this part in any way limits the authority of the OCC under any other provision of law to take supervisory actions to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. Action under section 39 and this part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the OCC.

§ 170.2 Determination and notification of failure to meet safety and soundness standards and request for compliance plan.

(a) *Determination.* The OCC may, based upon an examination, inspection, or any other information that becomes available to the OCC, determine that a Federal savings association has failed to satisfy the safety and soundness standards contained in the Interagency

Guidelines Establishing Standards for Safety and Soundness as set forth in appendix A to this part or the Interagency Guidelines Establishing Information Security Standards as set forth in appendix B to this part.

(b) *Request for compliance plan.* If the OCC determines that a Federal savings association has failed to meet a safety and soundness standard pursuant to paragraph (a) of this section, the OCC may request by letter or through a report of examination, the submission of a compliance plan. The savings association shall be deemed to have notice of the request three days after mailing or delivery of the letter or report of examination by the OCC.

§ 170.3 Filing of safety and soundness compliance plan.

(a) *Schedule for filing compliance plan*— (1) *In general.* A Federal savings association shall file a written safety and soundness compliance plan with the OCC within 30 days of receiving a request for a compliance plan pursuant to § 170.2(b), unless the OCC notifies the savings association in writing that the plan is to be filed within a different period.

(2) *Other plans.* If a savings association is obligated to file, or is currently operating under, a capital restoration plan submitted pursuant to section 38 of the FDI Act (12 U.S.C. 1831o), a cease-and-desist order entered into pursuant to section 8 of the FDI Act, a formal or informal agreement, or a response to a report of examination, it may, with the permission of the OCC, submit a compliance plan under this section as part of that plan, order, agreement, or response, subject to the deadline provided in paragraph (a)(1) of this section.

(b) *Contents of plan.* The compliance plan shall include a description of the steps the Federal savings association will take to correct the deficiency and the time within which those steps will be taken.

(c) *Review of safety and soundness compliance plans.* Within 30 days after receiving a safety and soundness compliance plan under this subpart, the OCC shall provide written notice to the Federal savings association of whether the plan has been approved or seek additional information from the savings association regarding the plan. The OCC may extend the time within which notice regarding approval of a plan will be provided.

(d) *Failure to submit or implement a compliance plan.* If a Federal savings association fails to submit an acceptable plan within the time specified by the OCC or fails in any material respect to implement a compliance plan, then the OCC shall, by order, require the savings association to correct the deficiency and may take further actions provided in section 39(e)(2)(B) of the FDI Act. Pursuant to section 39(e)(3), the OCC may be required to take certain actions if the savings association commenced operations or experienced a change in control within the previous 24-month period, or the savings association experienced extraordinary growth during the previous 18-month period.

(e) *Amendment of compliance plan.* A Federal savings association that has filed an approved compliance plan may, after prior written notice to and approval by the OCC, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the savings association shall implement the compliance plan as previously approved.

§ 170.4 Issuance of orders to correct deficiencies and to take or refrain from taking other actions.

(a) *Notice of intent to issue order*—(1) *In general.* The OCC shall provide a Federal savings association prior written notice of the OCC's intention to issue an order requiring the savings association to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39 of the FDI Act. The savings association shall have such time to respond to a proposed order as provided by the OCC under paragraph (c) of this section.

(2) *Immediate issuance of final order.* If the OCC finds it necessary in order to carry out the purposes of section 39 of the FDI Act, the OCC may, without providing the notice prescribed in paragraph (a)(1) of this section, issue an order requiring a savings association immediately to take actions to correct a safety and soundness deficiency or to take or refrain from taking other actions pursuant to section 39. A savings association that is subject to such an immediately effective order may submit a written appeal of the order to the OCC. Such an appeal must be received by the OCC within 14 calendar days of the issuance of the order, unless the OCC permits a longer period. The OCC shall consider any such appeal, if filed in a timely manner, within 60 days of receiving the appeal. During such period of review, the order shall remain in effect unless the OCC, in its sole discretion, stays the effectiveness of the order.

(b) *Contents of notice.* A notice of intent to issue an order shall include:

(1) A statement of the safety and soundness deficiency or deficiencies that have been identified at the Federal savings association;

(2) A description of any restrictions, prohibitions, or affirmative actions that the OCC proposes to impose or require;

(3) The proposed date when such restrictions or prohibitions would be effective or the proposed date for completion of any required action; and

(4) The date by which the savings association subject to the order may file with the OCC a written response to the notice.

(c) *Response to notice*— (1) *Time for response.* A Federal savings association may file a written response to a notice of intent to issue an order within the time period set by the OCC. Such a response must be received by the OCC within 14 calendar days from the date of the notice unless the OCC determines that a different period is appropriate in light of the safety and soundness of the savings association or other relevant circumstances.

(2) *Contents of response.* The response should include:

(i) An explanation why the action proposed by the OCC is not an appropriate exercise of discretion under section 39 of the FDI Act;

(ii) Any recommended modification of the proposed order; and

(iii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association regarding the proposed order.

(d) *The OCC's consideration of response.* After considering the response, the OCC may:

(1) Issue the order as proposed or in modified form;

(2) Determine not to issue the order and so notify the Federal savings association; or

(3) Seek additional information or clarification of the response from the savings association, or any other relevant source.

(e) *Failure to file response.* Failure by a Federal savings association to file with the OCC, within the specified time period, a written response to a proposed order shall constitute a waiver of the opportunity to respond and shall constitute consent to the issuance of the order.

(f) *Request for modification or rescission of order.* Any Federal savings association that is subject to an order under this subpart may, upon a change in circumstances, request in writing that the OCC reconsider the terms of the order, and may propose that the order be rescinded or modified. Unless otherwise ordered by the OCC, the order

shall continue in place while such request is pending before the OCC.

§ 170.5 Enforcement of orders.

(a) *Judicial remedies.* Whenever a Federal savings association fails to comply with an order issued under section 39 of the FDI Act, the OCC may seek enforcement of the order in the appropriate United States district court pursuant to section 8(i)(1) of the FDI Act.

(b) *Administrative remedies.* Pursuant to section 8(i)(2)(A) of the FDI Act, the OCC may assess a civil money penalty against any Federal savings association that violates or otherwise fails to comply with any final order issued under section 39 and against any savings association-affiliated party who participates in such violation or noncompliance.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the OCC may seek enforcement of the provisions of section 39 of the FDI Act or this part through any other judicial or administrative proceeding authorized by law.

Appendix A to Part 170—Interagency Guidelines Establishing Standards for Safety and Soundness

I. Introduction
A. Preservation of existing authority.
B. Definitions.
II. Operational and Managerial Standards
A. Internal controls and information systems.
B. Internal audit system.
C. Loan documentation.
D. Credit underwriting.
E. Interest rate exposure.
F. Asset growth.
G. Asset quality.
H. Earnings.
I. Compensation, fees and benefits.
III. Prohibition on Compensation That Constitutes an Unsafe and Unsound Practice
A. Excessive compensation.
B. Compensation leading to material financial loss.

I. Introduction

i. Section 39 of the Federal Deposit Insurance Act [1] (FDI Act) requires each Federal banking agency (collectively, the agencies) to establish certain safety and soundness standards by regulation or by guideline for all insured depository institutions. Under section 39, the agencies must establish three types of standards: (1) Operational and managerial standards; (2) compensation standards; and (3) such standards relating to asset quality, earnings, and stock valuation as they determine to be appropriate.

ii. Section 39(a) requires the agencies to establish operational and managerial standards relating to: (1) Internal controls, information systems and internal audit systems, in accordance with section 36 of the FDI Act (12 U.S.C. 1831m); (2) loan documentation; (3) credit underwriting; (4) interest rate exposure; (5) asset growth; and (6) compensation, fees, and benefits, in accordance with subsection (c) of section 39. Section 39(b) requires the agencies to establish standards relating to asset quality, earnings, and stock valuation that the agencies determine to be appropriate.

iii. Section 39(c) requires the agencies to establish standards prohibiting as an unsafe and unsound practice any compensatory arrangement that would provide any executive officer, employee, director, or principal shareholder of the institution with excessive compensation, fees or benefits and any compensatory arrangement that could lead to material financial loss to an institution. Section 39(c) also requires that the agencies establish standards that specify when compensation is excessive.

iv. If an agency determines that an institution fails to meet any standard established by guideline under subsection (a) or (b) of section 39, the agency may require the institution to submit to the agency an acceptable plan to achieve compliance with the standard. In the event that an institution fails to submit an acceptable plan within the time allowed by the agency or fails in any material respect to implement an accepted plan, the agency must, by order, require the institution to correct the deficiency. The agency may, and in some cases must, take other supervisory actions until the deficiency has been corrected.

v. The agencies have adopted amendments to their rules and regulations to establish deadlines for submission and review of compliance plans.[2]

vi. The following Guidelines set out the safety and soundness standards that the agencies use to identify and address problems at insured depository institutions before capital becomes impaired. The agencies believe that the standards adopted in these Guidelines serve this end without dictating how institutions must be managed and operated. These standards are designed to identify potential safety and soundness concerns and ensure that action is taken to address those concerns before they pose a risk to the Deposit Insurance Fund.

A. Preservation of Existing Authority

Neither section 39 nor these Guidelines in any way limits the authority of the agencies to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. Action under section 39 and these Guidelines may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the agencies. Nothing in these Guidelines limits the authority of the FDIC pursuant to section 38(i)(2)(F) of the FDI Act (12 U.S.C. 1831(o)) and part 325 of Title 12 of the Code of Federal Regulations.

B. Definitions

1. *In general.* For purposes of these Guidelines, except as modified in the Guidelines or unless the context otherwise requires, the terms used have the same meanings as set forth in sections 3 and 39 of the FDI Act (12 U.S.C. 1813 and 1831p–1).

2. *Board of directors,* in the case of a state-licensed insured branch of a foreign bank and in the case of a Federal branch of a foreign bank, means the managing official in charge of the insured foreign branch.

3. *Compensation* means all direct and indirect payments or benefits, both cash and non-cash, granted to or for the benefit of any executive officer, employee, director, or principal shareholder, including but not limited to payments or benefits derived from an employment contract, compensation or benefit agreement, fee arrangement, perquisite, stock option plan, postemployment benefit, or other compensatory arrangement.

4. *Director* shall have the meaning described in 12 CFR 215.2(c).[3]

5. *Executive officer* shall have the meaning described in 12 CFR 215.2(d).[4]

6. *Principal shareholder* shall have the meaning described in 12 CFR 215.2 (*l*).[5]

II. Operational and Managerial Standards

A. *Internal controls and information systems.* An institution should have internal controls and information systems that are appropriate to the size of the institution and the nature, scope and risk of its activities and that provide for:

1. An organizational structure that establishes clear lines of authority and responsibility for monitoring adherence to established policies;

2. Effective risk assessment;

3. Timely and accurate financial, operational and regulatory reports;

4. Adequate procedures to safeguard and manage assets; and

5. Compliance with applicable laws and regulations.

B. *Internal audit system.* An institution should have an internal audit system that is appropriate to the size of the institution and the nature and scope of its activities and that provides for:

[1] Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) was added by section 132 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Public Law 102–242, 105 Stat. 2236 (1991), and amended by section 956 of the Housing and Community Development Act of 1992, Public Law 102–550, 106 Stat. 3895 (1992) and section 318 of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325, 108 Stat. 2160 (1994).

[2] For the Office of the Comptroller of the Currency, these regulations appear at 12 CFR part 30 for national banks and part 170 for Federal savings associations; for the Board of Governors of the Federal Reserve System, these regulations appear at 12 CFR part 263; and for the Federal Deposit Insurance Corporation, these regulations appear at 12 CFR part 308 subpart R for state nonmember banks and part 390, subpart B for state savings associations.

[3] In applying these definitions for Federal savings associations, pursuant to 12 U.S.C. 1464, Federal savings associations shall use the terms ''Federal savings association'' and ''insured Federal savings association'' in place of the terms ''member bank'' and ''insured bank''.

[4] See footnote 3 in section I.B.4. of this appendix.

[5] See footnote 3 in section I.B.4. of this appendix.

1. Adequate monitoring of the system of internal controls through an internal audit function. For an institution whose size, complexity or scope of operations does not warrant a full scale internal audit function, a system of independent reviews of key internal controls may be used;

2. Independence and objectivity;

3. Qualified persons;

4. Adequate testing and review of information systems;

5. Adequate documentation of tests and findings and any corrective actions;

6. Verification and review of management actions to address material weaknesses; and

7. Review by the institution's audit committee or board of directors of the effectiveness of the internal audit systems.

C. *Loan documentation.* An institution should establish and maintain loan documentation practices that:

1. Enable the institution to make an informed lending decision and to assess risk, as necessary, on an ongoing basis;

2. Identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner;

3. Ensure that any claim against a borrower is legally enforceable;

4. Demonstrate appropriate administration and monitoring of a loan; and

5. Take account of the size and complexity of a loan.

D. *Credit underwriting.* An institution should establish and maintain prudent credit underwriting practices that:

1. Are commensurate with the types of loans the institution will make and consider the terms and conditions under which they will be made;

2. Consider the nature of the markets in which loans will be made;

3. Provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed;

4. Establish a system of independent, ongoing credit review and appropriate communication to management and to the board of directors;

5. Take adequate account of concentration of credit risk; and

6. Are appropriate to the size of the institution and the nature and scope of its activities.

E. *Interest rate exposure.* An institution should:

1. Manage interest rate risk in a manner that is appropriate to the size of the institution and the complexity of its assets and liabilities; and

2. Provide for periodic reporting to management and the board of directors regarding interest rate risk with adequate information for management and the board of directors to assess the level of risk.

F. *Asset growth.* An institution's asset growth should be prudent and consider:

1. The source, volatility and use of the funds that support asset growth;

2. Any increase in credit risk or interest rate risk as a result of growth; and

3. The effect of growth on the institution's capital.

G. *Asset quality.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to identify problem assets and prevent deterioration in those assets. The institution should:

1. Conduct periodic asset quality reviews to identify problem assets;

2. Estimate the inherent losses in those assets and establish reserves that are sufficient to absorb estimated losses;

3. Compare problem asset totals to capital;

4. Take appropriate corrective action to resolve problem assets;

5. Consider the size and potential risks of material asset concentrations; and

6. Provide periodic asset reports with adequate information for management and the board of directors to assess the level of asset risk.

H. *Earnings.* An insured depository institution should establish and maintain a system that is commensurate with the institution's size and the nature and scope of its operations to evaluate and monitor earnings and ensure that earnings are sufficient to maintain adequate capital and reserves. The institution should:

1. Compare recent earnings trends relative to equity, assets, or other commonly used benchmarks to the institution's historical results and those of its peers;

2. Evaluate the adequacy of earnings given the size, complexity, and risk profile of the institution's assets and operations;

3. Assess the source, volatility, and sustainability of earnings, including the effect of nonrecurring or extraordinary income or expense;

4. Take steps to ensure that earnings are sufficient to maintain adequate capital and reserves after considering the institution's asset quality and growth rate; and

5. Provide periodic earnings reports with adequate information for management and the board of directors to assess earnings performance.

I. *Compensation, fees and benefits.* An institution should maintain safeguards to prevent the payment of compensation, fees, and benefits that are excessive or that could lead to material financial loss to the institution.

III. Prohibition on Compensation That Constitutes an Unsafe and Unsound Practice

A. Excessive Compensation

Excessive compensation is prohibited as an unsafe and unsound practice. Compensation shall be considered excessive when amounts paid are unreasonable or disproportionate to the services performed by an executive officer, employee, director, or principal shareholder, considering the following:

1. The combined value of all cash and non-cash benefits provided to the individual;

2. The compensation history of the individual and other individuals with comparable expertise at the institution;

3. The financial condition of the institution;

4. Comparable compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the loan portfolio or other assets;

5. For postemployment benefits, the projected total cost and benefit to the institution;

6. Any connection between the individual and any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the institution; and

7. Any other factors the agencies determines to be relevant.

B. Compensation Leading to Material Financial Loss

Compensation that could lead to material financial loss to an institution is prohibited as an unsafe and unsound practice.

Appendix B to Part 170—Interagency Guidelines Establishing Information Security Standards

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I. Introduction

The Interagency Guidelines Establishing Information Security Standards (Guidelines) set forth standards pursuant to section 39(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1), and sections 501 and 505(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805(b)). These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information. These Guidelines also address standards with respect to the proper disposal of consumer information, pursuant to sections 621 and 628 of the Fair Credit Reporting Act (15 U.S.C. 1681s and 1681w).

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of entities over which the OCC has authority. For purposes of this appendix, these entities are Federal savings associations whose deposits are FDIC-insured and any subsidiaries of such savings associations, except brokers, dealers, persons providing insurance, investment companies, and investment advisers. This appendix refers to such entities as ''you'. These Guidelines also apply to the proper disposal of consumer information by or on behalf of such entities.

B. *Preservation of Existing Authority.* Neither section 39 nor these Guidelines in any way limit the OCC's authority to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other

practices. The OCC may take action under section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to the OCC.

C. *Definitions.* 1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Consumer information* means any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report and that is maintained or otherwise possessed by you or on your behalf for a business purpose. Consumer information also means a compilation of such records. The term does not include any record that does not identify an individual.

i. *Examples.* (1) *Consumer information* includes:

(A) A consumer report that a Federal savings association obtains;

(B) Information from a consumer report that you obtain from your affiliate after the consumer has been given a notice and has elected not to opt out of that sharing;

(C) Information from a consumer report that you obtain about an individual who applies for but does not receive a loan, including any loan sought by an individual for a business purpose;

(D) Information from a consumer report that you obtain about an individual who guarantees a loan (including a loan to a business entity); or

(E) Information from a consumer report that you obtain about an employee or prospective employee.

(2) *Consumer information* does not include:

(A) Aggregate information, such as the mean credit score, derived from a group of consumer reports; or

(B) Blind data, such as payment history on accounts that are not personally identifiable, that may be used for developing credit scoring models or for other purposes.

b. *Consumer report* has the same meaning as set forth in the Fair Credit Reporting Act, 15 U.S.C. 1681a(d).

c. *Customer* means any of your customers as defined in § 573.3(h) or any superseding regulation issued by the Consumer Financial Protection Bureau.

d. *Customer information* means any record containing nonpublic personal information, as defined in § 573.3(n) or any superseding regulation issued by the Consumer Financial Protection Bureau, about a customer, whether in paper, electronic, or other form, that you maintain or that is maintained on your behalf.

e. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

f. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information or consumer information, through its provision of services directly to you.

II. Standards for Information Security

A. *Information Security Program.* You shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to your size and complexity and the nature and scope of your activities. While all parts of your organization are not required to implement a uniform set of policies, all elements of your information security program must be coordinated.

B. *Objectives.* Your information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information;

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer; and

4. Ensure the proper disposal of customer information and consumer information.

III. Development and Implementation of Information Security Program

A. *Involve the Board of Directors.* Your board of directors or an appropriate committee of the board shall:

1. Approve your written information security program; and

2. Oversee the development, implementation, and maintenance of your information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.* You shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* You shall:

1. Design your information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of your activities. You must consider whether the following security measures are appropriate for you and, if so, adopt those measures you conclude are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with your information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions for you to take when you suspect or detect that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement your information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by your risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

4. Develop, implement, and maintain, as part of your information security program, appropriate measures to properly dispose of customer information and consumer information in accordance with each of the requirements in this paragraph III.

D. *Oversee Service Provider Arrangements.* You shall:

1. Exercise appropriate due diligence in selecting your service providers;

2. Require your service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by your risk assessment, monitor your service providers to confirm that they have satisfied their obligations as required by paragraph D.2. As part of this monitoring, you should review audits, summaries of test results, or other equivalent evaluations of your service providers.

E. *Adjust the Program.* You shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of your customer information, internal or external threats to information, and your own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* You shall report to your board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and your compliance with these Guidelines. The reports should discuss material matters related to your program, addressing issues

such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.* 1. *Effective date.* You must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that you have entered into with a service provider to perform services for you or functions on your behalf satisfies the provisions of paragraph III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information, as long as you entered into the contract on or before March 5, 2001.

3. *Effective date for measures relating to the disposal of consumer information.* You must satisfy these Guidelines with respect to the proper disposal of consumer information by July 1, 2005.

4. *Exception for existing agreements with service providers relating to the disposal of consumer information.* Notwithstanding the requirement in paragraph III.G.3., your contracts with service providers that have access to consumer information and that may dispose of consumer information, entered into before July 1, 2005, must comply with the provisions of the Guidelines relating to the proper disposal of consumer information by July 1, 2006.

Supplement A to Appendix B to Part 170—Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice

I. Background

This Guidance [1] interprets section 501(b) of the Gramm-Leach-Bliley Act (''GLBA'') and the Interagency Guidelines Establishing Information Security Standards (the ''Security Guidelines'') [2] and describes response programs, including customer notification procedures, that a financial institution should develop and implement to address unauthorized access to or use of customer information that could result in substantial harm or inconvenience to a customer. The scope of, and definitions of terms used in, this Guidance are identical to those of the Security Guidelines. For example, the term ''customer information'' is the same term used in the Security Guidelines, and means any record containing nonpublic personal information about a customer, whether in paper, electronic, or other form, maintained by or on behalf of the institution.

A. Interagency Security Guidelines

Section 501(b) of the GLBA required the Agencies to establish appropriate standards for financial institutions subject to their jurisdiction that include administrative, technical, and physical safeguards, to protect the security and confidentiality of customer information. Accordingly, the Agencies issued Security Guidelines requiring every financial institution to have an information security program designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

B. Risk Assessment and Controls

1. The Security Guidelines direct every financial institution to assess the following risks, among others, when developing its information security program:

a. Reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems;

b. The likelihood and potential damage of threats, taking into consideration the sensitivity of customer information; and

c. The sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.[3]

2. Following the assessment of these risks, the Security Guidelines require a financial institution to design a program to address the identified risks. The particular security measures an institution should adopt will depend upon the risks presented by the complexity and scope of its business. At a minimum, the financial institution is required to consider the specific security measures enumerated in the Security Guidelines,[4] and adopt those that are appropriate for the institution, including:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means;

b. Background checks for employees with responsibilities for access to customer information; and

c. Response programs that specify actions to be taken when the financial institution suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies.[5]

C. Service Providers

The Security Guidelines direct every financial institution to require its service providers by contract to implement appropriate measures designed to protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer.[6]

II. Response Program

Millions of Americans, throughout the country, have been victims of identity theft.[7] Identity thieves misuse personal information they obtain from a number of sources, including financial institutions, to perpetrate identity theft. Therefore, financial institutions should take preventative measures to safeguard customer information against attempts to gain unauthorized access to the information. For example, financial institutions should place access controls on customer information systems and conduct background checks for employees who are authorized to access customer information.[8] However, every financial institution should also develop and implement a risk-based response program to address incidents of unauthorized access to customer information in customer information systems [9] that occur nonetheless. A response program should be a key part of an institution's information security program.[10] The program should be appropriate to the size and complexity of the institution and the nature and scope of its activities.

In addition, each institution should be able to address incidents of unauthorized access to customer information in customer information systems maintained by its domestic and foreign service providers.

[1] This Guidance was originally jointly issued by the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS).

[2] 12 CFR part 30, app. B and 12 CFR part 170, app. B (OCC); 12 CFR part 208, app. D–2 and part 225, app. F (Board); and 12 CFR part 364, app. B (FDIC). The ''Interagency Guidelines Establishing Information Security Standards'' were formerly known as ''The Interagency Guidelines Establishing Standards for Safeguarding Customer Information.''

[3] *See* Security Guidelines, III.B.

[4] *See* Security Guidelines, III.C.

[5] *See* Security Guidelines, III.C.

[6] *See* Security Guidelines, III.B. and III.D. Further, the Agencies note that, in addition to contractual obligations to a financial institution, a service provider may be required to implement its own comprehensive information security program in accordance with the Safeguards Rule promulgated by the Federal Trade Commission (''FTC''), 16 CFR part 314.

[7] The FTC estimates that nearly 10 million Americans discovered they were victims of some form of identity theft in 2002. *See* The Federal Trade Commission, *Identity Theft Survey Report,* (September 2003), available at *http://www.ftc.gov/os/2003/09/synovatereport.pdf.*

[8] Institutions should also conduct background checks of employees to ensure that the institution does not violate 12 U.S.C. 1829, which prohibits an institution from hiring an individual convicted of certain criminal offenses or who is subject to a prohibition order under 12 U.S.C. 1818(e)(6).

[9] Under the Guidelines, an institution's *customer information systems* consist of all of the methods used to access, collect, store, use, transmit, protect, or dispose of customer information, including the systems maintained by its service providers. *See* Security Guidelines, I.C.2.d.

[10] *See* FFIEC Information Technology Examination Handbook, Information Security Booklet, Dec. 2002 available at *http://www.ffiec.gov/ffiecinfobase/html_pages/infosec_book_frame.htm.* Federal Reserve SR 97–32, Sound Practice Guidance for Information Security for Networks, Dec. 4, 1997; OCC Bulletin 2000–14, ''Infrastructure Threats—Intrusion Risks'' (May 15, 2000), for additional guidance on preventing, detecting, and responding to intrusions into financial institution computer systems.

Therefore, consistent with the obligations in the Guidelines that relate to these arrangements, and with existing guidance on this topic issued by the Agencies,[11] an institution's contract with its service provider should require the service provider to take appropriate actions to address incidents of unauthorized access to the financial institution's customer information, including notification to the institution as soon as possible of any such incident, to enable the institution to expeditiously implement its response program.

A. Components of a Response Program

1. At a minimum, an institution's response program should contain procedures for the following:

a. Assessing the nature and scope of an incident, and identifying what customer information systems and types of customer information have been accessed or misused;

b. Notifying its primary Federal regulator as soon as possible when the institution becomes aware of an incident involving unauthorized access to or use of *sensitive* customer information, as defined below;

c. Consistent with the Agencies' Suspicious Activity Report (''SAR'') regulations,[12] notifying appropriate law enforcement authorities, in addition to filing a timely SAR in situations involving Federal criminal violations requiring immediate attention, such as when a reportable violation is ongoing;

d. Taking appropriate steps to contain and control the incident to prevent further unauthorized access to or use of customer information, for example, by monitoring, freezing, or closing affected accounts, while preserving records and other evidence;[13] and

e. Notifying customers when warranted.

2. Where an incident of unauthorized access to customer information involves customer information systems maintained by an institution's service providers, it is the responsibility of the financial institution to notify the institution's customers and regulator. However, an institution may authorize or contract with its service provider to notify the institution's customers or regulator on its behalf.

III. Customer Notice

Financial institutions have an affirmative duty to protect their customers' information against unauthorized access or use. Notifying customers of a security incident involving the unauthorized access or use of the customer's information in accordance with the standard set forth below is a key part of that duty. Timely notification of customers is important to manage an institution's reputation risk. Effective notice also may reduce an institution's legal risk, assist in maintaining good customer relations, and enable the institution's customers to take steps to protect themselves against the consequences of identity theft. When customer notification is warranted, an institution may not forgo notifying its customers of an incident because the institution believes that it may be potentially embarrassed or inconvenienced by doing so.

A. Standard for Providing Notice

When a financial institution becomes aware of an incident of unauthorized access to sensitive customer information, the institution should conduct a reasonable investigation to promptly determine the likelihood that the information has been or will be misused. If the institution determines that misuse of its information about a customer has occurred or is reasonably possible, it should notify the affected customer as soon as possible. Customer notice may be delayed if an appropriate law enforcement agency determines that notification will interfere with a criminal investigation and provides the institution with a written request for the delay. However, the institution should notify its customers as soon as notification will no longer interfere with the investigation.

1. Sensitive Customer Information

Under the Guidelines, an institution must protect against unauthorized access to or use of customer information that could result in substantial harm or inconvenience to any customer. Substantial harm or inconvenience is most likely to result from improper access to *sensitive customer information* because this type of information is most likely to be misused, as in the commission of identity theft. For purposes of this Guidance, *sensitive customer information* means a customer's name, address, or telephone number, in conjunction with the customer's social security number, driver's license number, account number, credit or debit card number, or a personal identification number or password that would permit access to the customer's account. *Sensitive customer information* also includes any combination of components of customer information that would allow someone to log onto or access the customer's account, such as user name and password or password and account number.

2. Affected Customers

If a financial institution, based upon its investigation, can determine from its logs or other data precisely which customers' information has been improperly accessed, it may limit notification to those customers with regard to whom the institution determines that misuse of their information has occurred or is reasonably possible. However, there may be situations where the institution determines that a group of files has been accessed improperly, but is unable to identify which specific customers' information has been accessed. If the circumstances of the unauthorized access lead the institution to determine that misuse of the information is reasonably possible, it should notify all customers in the group.

B. Content of Customer Notice

1. Customer notice should be given in a clear and conspicuous manner. The notice should describe the incident in general terms and the type of customer information that was the subject of unauthorized access or use. It also should generally describe what the institution has done to protect the customers' information from further unauthorized access. In addition, it should include a telephone number that customers can call for further information and assistance.[14] The notice also should remind customers of the need to remain vigilant over the next twelve to twenty-four months, and to promptly report incidents of suspected identity theft to the institution. The notice should include the following additional items, when appropriate:

a. A recommendation that the customer review account statements and immediately report any suspicious activity to the institution;

b. A description of fraud alerts and an explanation of how the customer may place a fraud alert in the customer's consumer reports to put the customer's creditors on notice that the customer may be a victim of fraud;

c. A recommendation that the customer periodically obtain credit reports from each nationwide credit reporting agency and have information relating to fraudulent transactions deleted;

d. An explanation of how the customer may obtain a credit report free of charge; and

e. Information about the availability of the FTC's online guidance regarding steps a consumer can take to protect against identity theft. The notice should encourage the customer to report any incidents of identity theft to the FTC, and should provide the

[11] *See* Federal Reserve SR Ltr. 00–04, Outsourcing of Information and Transaction Processing, Feb. 9, 2000; OCC Bulletin 2001–47, ''Third-Party Relationships Risk Management Principles,'' Nov. 1, 2001; FDIC FIL 68–99, Risk Assessment Tools and Practices for Information System Security, July 7, 1999; OTS Thrift Bulletin 82a, Third Party Arrangements, Sept. 1, 2004.

[12] An institution's obligation to file a SAR is set out in the Agencies' SAR regulations and Agency guidance. *See* 12 CFR 21.11 (national banks, Federal branches and agencies); 12 CFR 208.62 (state member banks); 12 CFR 211.5(k) (Edge and agreement corporations); 12 CFR 211.24(f) (uninsured state branches and agencies of foreign banks); 12 CFR 225.4(f) (bank holding companies and their nonbank subsidiaries); 12 CFR part 353 (state non-member banks); and 12 CFR 163.180 (Federal savings associations). National banks must file SARs in connection with computer intrusions and other computer crimes. *See* OCC Bulletin 2000–14, ''Infrastructure Threats—Intrusion Risks'' (May 15, 2000); Advisory Letter 97–9, ''Reporting Computer Related Crimes'' (November 19, 1997) (general guidance still applicable though instructions for new SAR form published in 65 FR 1229, 1230 (January 7, 2000)). *See also* Federal Reserve SR 01–11, Identity Theft and Pretext Calling, Apr. 26, 2001; SR 97–28, Guidance Concerning Reporting of Computer Related Crimes by Financial Institutions, Nov. 6, 1997; FDIC FIL 48–2000, Suspicious Activity Reports, July 14, 2000; FIL 47–97, Preparation of Suspicious Activity Reports, May 6, 1997; OTS CEO Memorandum 139, Identity Theft and Pretext Calling, May 4, 2001; CEO Memorandum 126, New Suspicious Activity Report Form, July 5, 2000.

[13] *See* FFIEC Information Technology Examination Handbook, Information Security Booklet, Dec. 2002, pp. 68–74.

[14] The institution should, therefore, ensure that it has reasonable policies and procedures in place, including trained personnel, to respond appropriately to customer inquiries and requests for assistance.

FTC's Web site address and toll-free telephone number that customers may use to obtain the identity theft guidance and report suspected incidents of identity theft.[15]

2. The Agencies encourage financial institutions to notify the nationwide consumer reporting agencies prior to sending notices to a large number of customers that include contact information for the reporting agencies.

C. Delivery of Customer Notice

Customer notice should be delivered in any manner designed to ensure that a customer can reasonably be expected to receive it. For example, the institution may choose to contact all customers affected by telephone or by mail, or by electronic mail for those customers for whom it has a valid e-mail address and who have agreed to receive communications electronically.

PART 171—FAIR CREDIT REPORTING

Sec.

Subparts A–H [Reserved]

Subpart I—Duties of Users of Consumer Reports Regarding Records Disposal

171.80–170.82 [Reserved]
171.83 Disposal of consumer information.

Subpart J—Identity Theft Red Flags

171.90 Duties regarding the detection, prevention, and mitigation of identity theft.
171.91 Duties of card issuers regarding changes of address.
171.92 Examples.
Appendices A–I to Part 171 [Reserved]
Appendix J to Part 171—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467a, 1828, 1831p–1, 1881–1884, and 5412(b)(2)(B); 15 U.S.C. 1681b, 1681m, 1681s, 1681s–2, 1681s–3, 1681t, and 1681w; 15 U.S.C. 6801 and 6805; Section 214 Pub. L. 108–159, 117 Stat. 1952.

Subparts A–H [Reserved]

Subpart I—Duties of Users of Consumer Reports Regarding Records Disposal

§§ 171.80–170.82 [Reserved]

§ 171.83 Disposal of consumer information.

(a) *Scope.* This section applies to Federal savings associations whose deposits are insured by the Federal Deposit Insurance Corporation and Federal savings association operating subsidiaries in accordance with § 159.3(h)(1) of this chapter (defined as ''you'').

(b) *In general.* You must properly dispose of any consumer information that you maintain or otherwise possess in accordance with the Interagency Guidelines Establishing Information Security Standards, as set forth in appendix B to part 170, to the extent that you are covered by the scope of the Guidelines.

(c) *Rule of construction.* Nothing in this section shall be construed to:

(1) Require you to maintain or destroy any record pertaining to a consumer that is not imposed under any other law; or

(2) Alter or affect any requirement imposed under any other provision of law to maintain or destroy such a record.

Subpart J—Identity Theft Red Flags

§ 171.90 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope.* This section applies to a financial institution or creditor that is a Federal savings association whose deposits are insured by the Federal Deposit Insurance Corporation or, in accordance with § 159.3(h)(1) of this chapter, a Federal savings association operating subsidiary that is not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

(b) *Definitions.* For purposes of this section and appendix J, the following definitions apply:

(1) *Account* means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes:

(i) An extension of credit, such as the purchase of property or services involving a deferred payment; and

(ii) A deposit account.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5), and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t).

(8) *Identity theft* has the same meaning as in 16 CFR 603.2(a).

(9) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(10) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic Identification of Covered Accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program*—(1) *Program requirement.* Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Program.* The Program must include reasonable policies and procedures to:

[15] Currently, the FTC Web site for the ID Theft brochure and the FTC Hotline phone number are *http://www.consumer.gov/idtheft* and 1–877–IDTHEFT. The institution may also refer customers to any materials developed pursuant to section 151(b) of the FACT Act (educational materials developed by the FTC to teach the public how to prevent identity theft).

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;

(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Program.* Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement a Program must consider the guidelines in appendix J of this part and include in its Program those guidelines that are appropriate.

§ 171.91 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to an issuer of a debit or credit card (card issuer) that is a Federal savings association whose deposits are insured by the Federal Deposit Insurance Corporation or, in accordance with § 159.3(h)(1) of this chapter, a Federal savings association operating subsidiary that is not functionally regulated within the meaning of section 5(c)(5) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(c)(5)).

(b) *Definitions.* For purposes of this section:

(1) *Cardholder* means a consumer who has been issued a credit or debit card.

(2) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 171.90 of this part.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

§ 171.92 Examples.

The examples in Appendix J and Supplement A to Appendix J are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this subpart. Examples in a paragraph illustrate only the issue described in the paragraph and do not illustrate any other issue that may arise in this subpart.

Appendices A–I to Part 171 [Reserved]

Appendix J to Part 171—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 171.90 of this part requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in § 171.90(b)(3) of this part, to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of § 171.90 of this part.

I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) *Risk Factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable supervisory guidance.

(c) *Categories of Red Flags.* The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix J.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person

opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(l) (31 CFR 1020.220); and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent website. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

V. Updating the Program

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Program

(a) *Oversight of Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:

(1) Assigning specific responsibility for the Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 171.90 of this part; and

(3) Approving material changes to the Program as necessary to address changing identity theft risks.

(b) *Reports.* (1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with § 171.90 of this part.

(2) *Contents of report.* The report should address material matters related to the Program and evaluate issues such as: the effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c–1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s–2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix J

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in Appendix J of this part, each financial institution or creditor may consider incorporating into its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings from a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as defined in § 171.82(b) of this part.

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement card or a cell phone, or for the addition of authorized users on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (e.g., electronics equipment or jewelry); or

b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns;

d. A material change in electronic fund transfer patterns in connection with a deposit account; or

e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice From Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

PART 172—LOANS IN AREAS HAVING SPECIAL FLOOD HAZARDS

Sec.
172.1 Authority, purpose, and scope.
172.2 Definitions.
172.3 Requirement to purchase flood insurance where available.
172.4 Exemptions.
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172.6 Required use of standard flood hazard determination form.
172.7 Forced placement of flood insurance.
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172.9 Notice of special flood hazards and availability of Federal disaster relief assistance.
172.10 Notice of servicer's identity.

Appendix A to Part 172—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

Authority: 12 U.S.C. 1462a, 1463, 1464; 42 U.S.C. 4012a, 4104a, 4104b, 4106, 4128, and 5412(b)(2)(B).

§ 172.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued pursuant to 12 U.S.C. 1462, 1462a, 1463, 1464 and 42 U.S.C. 4012a, 4104a, 4104b, 4106, 4128.

(b) *Purpose.* The purpose of this part is to implement the requirements of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129).

(c) *Scope.* This part, except for §§ 172.6 and 172.8, applies to loans secured by buildings or mobile homes located or to be located in areas determined by the Director of the Federal Emergency Management Agency to have special flood hazards. Sections 172.6 and 172.8 of this part apply to loans secured by buildings or mobile homes, regardless of location.

§ 172.2 Definitions.

(a) *Act* means the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001–4129).

(b) *Federal savings association* means, for purposes of this part, a Federal savings association as that term is defined in 12 U.S.C. 1813(b)(2) and any subsidiaries or service corporations thereof.

(c) *Building* means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, and a walled and roofed structure while in the course of construction, alteration, or repair.

(d) *Community* means a state or a political subdivision of a state that has zoning and building code jurisdiction over a particular area having special flood hazards.

(e) *Designated loan* means a loan secured by a building or mobile home that is located or to be located in a special flood hazard area in which flood insurance is available under the Act.

(f) *Director of FEMA* means the Director of the Federal Emergency Management Agency.

(g) *Mobile home* means a structure, transportable in one or more sections, that is built on a permanent chassis and designed for use with or without a permanent foundation when attached to the required utilities. The term *mobile home* does not include a recreational vehicle. For purposes of this part, the term *mobile home* means a mobile home on a permanent foundation. The term *mobile home* includes a manufactured home as that term is used in the NFIP.

(h) *NFIP* means the National Flood Insurance Program authorized under the Act.

(i) *Residential improved real estate* means real estate upon which a home or other residential building is located or to be located.

(j) *Servicer* means the person responsible for:

(1) Receiving any scheduled, periodic payments from a borrower under the terms of a loan, including amounts for taxes, insurance premiums, and other charges with respect to the property securing the loan; and

(2) Making payments of principal and interest and any other payments from the amounts received from the borrower as may be required under the terms of the loan.

(k) *Special flood hazard area* means the land in the flood plain within a community having at least a one percent chance of flooding in any given year, as designated by the Director of FEMA.

(l) *Table funding* means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

§ 172.3 Requirement to purchase flood insurance where available.

(a) *In general.* A Federal savings association shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan. The amount of insurance must be at least equal to the lesser of the outstanding principal balance of the designated loan or the maximum limit of coverage available for the particular type of property under the Act. Flood insurance coverage under the Act is limited to the overall value of the property securing the designated loan minus the value of the land on which the property is located.

(b) *Table funded loans.* A Federal savings association that acquires a loan from a mortgage broker or other entity through table funding shall be considered to be making a loan for the purposes of this part.

§ 172.4 Exemptions.

The flood insurance requirement prescribed by § 172.3 does not apply with respect to:

(a) Any state-owned property covered under a policy of self-insurance satisfactory to the Director of FEMA, who publishes and periodically revises the list of states falling within this exemption; or

(b) Property securing any loan with an original principal balance of $5,000 or less and a repayment term of one year or less.

§ 172.5 Escrow requirement.

If a Federal savings association requires the escrow of taxes, insurance premiums, fees, or any other charges for a loan secured by *residential* improved real estate or a mobile home that is made, increased, extended, or renewed on or after October 1, 1996, the savings association shall also require the escrow of all premiums and fees for any flood insurance required under § 172.3. The savings association, or a servicer acting on behalf of the savings association, shall deposit the flood insurance premiums on behalf of the borrower in an escrow account. This escrow account will be subject to escrow requirements adopted pursuant to section 10 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2609) (RESPA), which generally limits the amount that may be maintained in escrow accounts for certain types of loans and requires escrow account statements for those accounts, only if the loan is otherwise subject to RESPA. Following receipt of a notice from the Director of FEMA or other provider of flood insurance that premiums are due, the savings association, or a servicer acting on behalf of the savings association, shall pay the amount owed to the insurance provider from the escrow account by the date when such premiums are due.

§ 172.6 Required use of standard flood hazard determination form.

(a) *Use of form.* A Federal savings association shall use the standard flood hazard determination form developed by the Director of FEMA when determining whether the building or mobile home offered as collateral security for a loan is or will be located in a special flood hazard area in which flood insurance is available under the Act. The standard flood hazard determination form may be used in a printed, computerized, or electronic manner. A Federal savings association may obtain the standard flood hazard determination form from FEMA, P.O. Box 2012, Jessup, MD 20794–2012.

(b) *Retention of form.* A Federal savings association shall retain a copy of the completed standard flood hazard determination form, in either hard copy or electronic form, for the period of time the savings association owns the loan.

§ 172.7 Forced placement of flood insurance.

If a Federal savings association, or a servicer acting on behalf of the savings association, determines at any time during the term of a designated loan that the building or mobile home and any personal property securing the designated loan is not covered by flood insurance or is covered by flood insurance in an amount less than the amount required under § 172.3, then the savings association or its servicer shall notify the borrower that the borrower should obtain flood insurance, at the borrower's expense, in an amount at least equal to the amount required under § 172.3, for the remaining term of the loan. If the borrower fails to obtain flood insurance within 45 days after notification, then the savings association or its servicer shall purchase insurance on the borrower's behalf. The savings association or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance.

§ 172.8 Determination fees.

(a) *General.* Notwithstanding any Federal or state law other than the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4129), any Federal savings association, or a servicer acting on behalf of the savings association, may charge a reasonable fee for determining whether the building or mobile home securing the loan is located or will be located in a special flood hazard area. A determination fee may also include, but is not limited to, a fee for life-of-loan monitoring.

(b) *Borrower fee.* The determination fee authorized by paragraph (a) of this section may be charged to the borrower if the determination:

(1) Is made in connection with a making, increasing, extending, or renewing of the loan that is initiated by the borrower;

(2) Reflects the Director of FEMA's revision or updating of floodplain areas or flood-risk zones;

(3) Reflects the Director of FEMA's publication of a notice or compendium that:

(i) Affects the area in which the building or mobile home securing the loan is located; or

(ii) By determination of the Director of FEMA, may reasonably require a determination whether the building or mobile home securing the loan is located in a special flood hazard area; or

(4) Results in the purchase of flood insurance coverage by the lender or its servicer on behalf of the borrower under § 172.7.

(c) *Purchaser or transferee fee.* The determination fee authorized by paragraph (a) of this section may be charged to the purchaser or transferee of a loan in the case of the sale or transfer of the loan.

§ 172.9 Notice of special flood hazards and availability of Federal disaster relief assistance.

(a) *Notice requirement.* When a Federal savings association makes, increases, extends, or renews a loan secured by a building or a mobile home located or to be located in a special flood hazard area, the savings association shall mail or deliver a written notice to the borrower and to the servicer in all cases whether or not flood insurance is available under the Act for the collateral securing the loan.

(b) *Contents of notice.* The written notice must include the following information:

(1) A warning, in a form approved by the Director of FEMA, that the building or the mobile home is or will be located in a special flood hazard area;

(2) A description of the flood insurance purchase requirements set forth in section 102(b) of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a(b));

(3) A statement, where applicable, that flood insurance coverage is available under the NFIP and may also be available from private insurers; and

(4) A statement whether Federal disaster relief assistance may be available in the event of damage to the building or mobile home caused by flooding in a Federally-declared disaster.

(c) *Timing of notice.* The Federal savings association shall provide the notice required by paragraph (a) of this section to the borrower within a reasonable time before the completion of the transaction, and to the servicer as promptly as practicable after the savings association provides notice to the borrower and in any event no later than the savings association provides other similar notices to the servicer concerning hazard insurance and taxes. Notice to the servicer may be made electronically or may take the form of a copy of the notice to the borrower.

(d) *Record of receipt.* The Federal savings association shall retain a record of the receipt of the notices by the borrower and the servicer for the period of time the savings association owns the loan.

(e) *Alternate method of notice.* Instead of providing the notice to the borrower required by paragraph (a) of this section, a Federal savings association may obtain satisfactory written assurance from a seller or lessor that, within a reasonable time before the completion of the sale or lease transaction, the seller or lessor has provided such notice to the purchaser or lessee. The savings association shall retain a record of the written assurance from the seller or lessor for the period of time the savings association owns the loan.

(f) *Use of prescribed form of notice.* A Federal savings association will be considered to be in compliance with the requirement for notice to the borrower of this section by providing written notice to the borrower containing the language presented in appendix A to this part within a reasonable time before the completion of the transaction. The notice presented in appendix A to this part satisfies the borrower notice requirements of the Act.

§ 172.10 Notice of servicer's identity.

(a) *Notice requirement.* When a Federal savings association makes, increases, extends, renews, sells, or transfers a loan secured by a building or mobile home located or to be located in a special flood hazard area, the savings association shall notify the Director of FEMA (or the Director's designee) in writing of the identity of the servicer of the loan. The Director of FEMA has designated the insurance provider to receive the savings association's notice of the servicer's identity. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee.

(b) *Transfer of servicing rights.* The Federal savings association shall notify the Director of FEMA (or the Director's designee) of any change in the servicer of a loan described in paragraph (a) of this section within 60 days after the effective date of the change. This notice may be provided electronically if electronic transmission is satisfactory to the Director of FEMA's designee. Upon any change in the servicing of a loan described in paragraph (a) of this section, the duty to provide notice under this paragraph (b) shall transfer to the transferee servicer.

Appendix A to Part 172—Sample Form of Notice of Special Flood Hazards and Availability of Federal Disaster Relief Assistance

We are giving you this notice to inform you that:

The building or mobile home securing the loan for which you have applied is or will be located in an area with special flood hazards.

The area has been identified by the Director of the Federal Emergency Management Agency (FEMA) as a special flood hazard area using FEMA's *Flood Insurance Rate Map* or the *Flood Hazard Boundary Map* for the following community: _____. This area has at least a one percent (1%) chance of a flood equal to or exceeding the base flood elevation (a 100-year flood) in any given year. During the life of a 30-year mortgage loan the risk of a 100-year flood in a special flood hazard area is 26 percent (26%).

Federal law allows a lender and borrower jointly to request the Director of FEMA to review the determination of whether the property securing the loan is located in a special flood hazard area. If you would like to make such a request, please contact us for further information.

____ The community in which the property securing the loan is located participates in the National Flood Insurance Program (NFIP). Federal law will not allow us to make you the loan that you have applied for if you do not purchase flood insurance. The flood insurance must be maintained for the life of the loan. If you fail to purchase or renew flood insurance on the property, Federal law authorizes and requires us to purchase the flood insurance for you at your expense.

- Flood insurance coverage under the NFIP may be purchased through an insurance agent who will obtain the policy either directly through the NFIP or through an insurance company that participates in the NFIP. Flood insurance also may be available from private insurers that do not participate in the NFIP.
- At a minimum, flood insurance purchased must cover *the lesser of:*

(1) the outstanding principal balance of the loan; *or*

(2) the maximum amount of coverage allowed for the type of property under the NFIP.

Flood insurance coverage under the NFIP is limited to the overall value of the property securing the loan minus the value of the land on which the property is located.

- Federal disaster relief assistance (usually in the form of a low-interest loan) may be available for damages incurred in excess of your flood insurance if your community's participation in the NFIP is in accordance with NFIP requirements.

____ Flood insurance coverage under the NFIP is not available for the property securing the loan because the community in which the property is located does not participate in the NFIP. In addition, if the non-participating community has been identified for at least one year as containing a special flood hazard area, properties located in the community will not be eligible for Federal disaster relief assistance in the event of a Federally-declared flood disaster.

PART 174—ACQUISITION OF CONTROL OF FEDERAL SAVINGS ASSOCIATIONS

Sec.
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Authority: 12 U.S.C. 1817(j).

§ 174.1 Scope of part.

The purpose of this part is to implement the provisions of the Change in Bank Control Act, 12 U.S.C. 1817(j) (''Control Act'') relating to acquisitions and changes in control of Federal savings associations that are organized in stock form.

§ 174.2 Definitions.

As used in this part and in the forms under this part, the following definitions apply, unless the context otherwise requires:

(a) *Acquire* when used in connection with the acquisition of stock of a savings association means obtaining ownership, control, power to vote, or sole power of disposition of stock, directly or indirectly or through one or more transactions or subsidiaries, through purchase, assignment, transfer, exchange, succession, or other means, including:

(1) An increase in percentage ownership resulting from a redemption, repurchase, reverse stock split or a

similar transaction involving other securities of the same class, and

(2) The acquisition of stock by a group of persons and/or companies acting in concert which shall be deemed to occur upon formation of such group: *Provided,* That an investment advisor shall not be deemed to acquire the voting stock of its advisee if the advisor:

(i) Votes the stock only upon instruction from the beneficial owner, and

(ii) Does not provide the beneficial owner with advice concerning the voting of such stock.

(b) *Acquiror* means a person or company.

(c) *Acting in concert* means:

(1) Knowing participation in a joint activity or interdependent conscious parallel action towards a common goal whether or not pursuant to an express agreement, or

(2) A combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangement, whether written or otherwise.

(3) A person or company which acts in concert with another person or company (''other party'') shall also be deemed to be acting in concert with any person or company who is also acting in concert with that other party, except that any tax-qualified employee stock benefit plan as defined in § 192.25 of this chapter will not be deemed to be acting in concert with its trustee or a person who serves in a similar capacity solely for the purpose of determining whether stock held by the trustee and stock held by the plan will be aggregated.

(d) *Affiliate* means any person or company which controls, is controlled by or is under common control with a person, savings association or company.

(e) [Reserved]

(f) *Company* means any corporation, partnership, trust, association, joint venture, pool, syndicate, unincorporated organization, joint-stock company or similar organization, as defined in paragraph (r) of this section; but a company does not include:

(1) The Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Office of the Comptroller of the Currency (OCC), or any Federal Home Loan Bank;

(2) Any company the majority of shares of which is owned by:

(i) The United States or any state;

(ii) An officer of the United States or any state in his or her official capacity; or

(iii) An instrumentality of the United States or any state; or

(3) A savings and loan holding company registered under section 10(b) of the Home Owners' Loan Act (Holding Company Act).

(g) *Controlling shareholder* means any person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of his or her immediate family, owns, controls, or holds with power to vote 10 percent or more of the voting stock of a company or controls in any manner the election or appointment of a majority of the company's board of directors.

(h) *Comptroller* means the Comptroller of the Currency.

(i) [Reserved]

(j) *Immediate family* means a person's spouse, father, mother, children, brothers, sisters and grandchildren; the father, mother, brothers, and sisters of the person's spouse; and the spouse of the person's child, brother or sister.

(k) *Management official* means any president, chief executive officer, chief operating officer, vice president, director, partner, or trustee, or any other person who performs or has a representative or nominee performing similar policymaking functions, including executive officers of principal business units or divisions or subsidiaries who perform policymaking functions, for a savings association or a company, whether or not incorporated.

(l) [Reserved]

(m) *Person* means an individual or a group of individuals acting in concert who do not constitute a ''company'' as defined in paragraph (f) of this section.

(n) *Repealed Control Act* means the Change in Savings and Loan Control Act, 12 U.S.C. 1730(q), as in effect immediately prior to its repeal by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

(o) [Reserved]

(p) *Savings Association* means a Federal savings and loan association or a Federal savings bank chartered under section 5 of the Home Owners' Loan Act (HOLA), a building and loan, savings and loan or homestead association or a cooperative bank (other than a cooperative bank described in 12 U.S.C. 1813(a)(2)) the deposits of which are insured by the Federal Deposit Insurance Corporation, and any corporation (other than a bank) the deposits of which are insured by the Federal Deposit Insurance Corporation that the OCC and the Federal Deposit Insurance Corporation jointly determine to be operating in substantially the same manner as a savings association.

(q) [Reserved]

(r) *Similar organization* for purposes of paragraph (f) of this section means a combination of parties with the potential for or practical likelihood of continuing rather than temporary existence, where the parties thereto have knowingly and voluntarily associated for a common purpose pursuant to identifiable and binding relationships which govern the parties with respect to either:

(1) The transferability and voting of any stock or other indicia of participation in another entity, or

(2) Achievement of a common or shared objective, such as to collectively manage or control another entity.

(s) *Stock* means common or preferred stock, general or limited partnership shares or interests, or similar interests.

(t) *Uninsured institution* means any financial institution the deposits of which are not insured by the Federal Deposit Insurance Corporation.

(u)(1) *Voting stock* means common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interests, by statute, charter or in any manner, entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing savings association or company); or

(ii) To vote or to direct the conduct of the operations or other significant policies of the issuer:

(2) Notwithstanding anything in paragraph (u)(1) of this section, preferred stock, limited partnership shares or interests, or similar interests are not ''voting stock'' if:

(i) Voting rights associated with the stock, shares or interests are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the stock, security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the stock, security or interest, the dissolution of the issuer, or the payment of dividends by the issuer when preferred dividends are in arrears;

(ii) The stock, shares or interests represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuer; and

(iii) The stock, shares or interests do not at the time entitle the holder, by statute, charter, or otherwise, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuer;

(3) Notwithstanding anything in paragraphs (u)(1) and (u)(2) of this

section, ''voting stock'' shall be deemed to include stock and other securities that, upon transfer or otherwise, are convertible into voting stock or exercisable to acquire voting stock where the holder of the stock, convertible security or right to acquire voting stock has the preponderant economic risk in the underlying voting stock. Securities immediately convertible into voting stock at the option of the holder without payment of additional consideration shall be deemed to constitute the voting stock into which they are convertible; other convertible securities and rights to acquire voting stock shall not be deemed to vest the holder with the preponderant economic risk in the underlying voting stock if the holder has paid less than 50 percent of the consideration required to directly acquire the voting stock and has no other economic interest in the underlying voting stock. For purposes of calculating the percentage of voting stock held by a particular acquiror, stock or other securities convertible into voting stock or exercisable to acquire voting stock which are deemed voting stock under this paragraph (u)(3) shall be included in calculating the amount of voting stock held by the acquiror and the total amount of stock outstanding only to the extent of the voting stock obtainable by such acquiror by such conversion or exercise of rights.

§ 174.3 Acquisition of control of Federal savings associations.

(a) [Reserved]

(b) *Acquisition by a person or company.* Unless a transaction is exempt from prior notice under paragraph (d) of this section, no person or company (other than certain persons affiliated with a savings and loan holding company who are subject to 10(e)(4) of the HOLA), shall acquire control, as defined in § 174.4 (a) and (b) of this part, of a Federal savings association until written notice has been provided to the appropriate OCC licensing office and the OCC indicates in writing its intent not to disapprove the proposed acquisition or 60 days (or such period of time as the OCC may specify if the review period has been extended under § 174.6(c)(3) of this part) have passed since receipt of a notice deemed sufficient under § 174.6(c)(2). Notwithstanding the forgoing, acquisitions by persons or companies by means of a merger with an interim association are not subject to this part, but shall be subject to approval under § 163.22, and either § 152.13 or applicable state law.

(c) *Exempt Transactions.*

(1) [Reserved]

(2) The following transactions are exempt from the notice requirements of paragraph (b) of this section:

(i)(A) Control of a Federal savings association acquired by a bank holding company that is registered under and subject to, the Bank Holding Company Act of 1956, or any company controlled by such bank holding company;

(B) Control of a Federal savings association acquired solely as a result of a pledge or hypothecation of stock to secure a loan contracted for in good faith or the liquidation of a loan contracted for in good faith, in either case where such loan was made in the ordinary course of the business of the lender: *Provided, further,* That acquisition of control pursuant to such pledge, hypothecation or liquidation is reported to the OCC within 30 days, and *Provided, further,* That the acquiror shall not retain such control for more than one year from the date on which such control was acquired; however, the OCC may, upon application by an acquiror, extend such one-year period from year to year, for an additional period of time not exceeding three years, if the OCC finds such extension is warranted and would not be detrimental to the public interest;

(C) Control of a Federal savings association acquired through a percentage increase in stock ownership following a *pro rata* stock dividend or stock split, if the proportional interests of the recipients remain substantially the same;

(D) Acquisition of additional stock after a non-disapproval under § 174.7 of this part, or any predecessor provision, has been received: *Provided,* That such acquisition is consistent with any conditions imposed in connection with such non-disapproval and with the representations made by the acquiror in its notice; and

(E) Acquisitions of less than 25 percent (25%) of a class of stock by a tax-qualified employee stock benefit plan as defined in § 192.25.

(ii) Transactions for which approval is required under the HOLA;

(iii) Transactions for which approval is required under part 146 or § 152.13 and § 163.22 of this chapter;

(iv) Transactions for which a change of control notice must be submitted to the Board of Governors of the Federal Reserve System pursuant to the Change in Bank Control Act, 12 U.S.C. 1817(j);

(v) Acquisition of additional stock of a Federal savings association by any person who:

(A) Has held power to vote 25 percent or more of any class of voting stock in such association continuously since March 9, 1979; or

(B) Has maintained control of the savings association continuously since acquiring control in compliance with the Control Act (or the Repealed Control Act) and the OCC's regulations thereunder then in effect: *Provided,* That such acquisition is consistent with any conditions imposed in connection with such acquisition of control and with the representations made by the acquiror in its notice; and

(vi) Acquisitions of stock of a *de novo* Federal savings association in connection with the organization of such association: *Provided,* That the OCC has considered the financial and managerial resources of the acquiror in granting the association its Federal savings association charter; and additional acquisitions of stock of such association, and *further provided,* that the acquisitions are consistent with any conditions imposed in connection with the approval of the association's charter and with representations made by the acquiror in its application for a Federal savings association charter, and that the OCC has no supervisory objection to the acquiror's additional acquisitions.

(3) An acquiror that would be considered to be in control of a Federal savings association pursuant to § 174.4 of this part on December 26, 1985, shall not be subject to this § 174.3 unless the acquiror acquires additional stock of the savings association or obtains a control factor with respect to such association after December 26, 1985: *Provided,* That an acquiror shall not be deemed to have acquired control of a savings association on the basis of actions taken prior to December 26, 1985, or on the basis of actions taken after December 26, 1985, if such actions are pursuant to and consistent with a materially complete application under the Holding Company Act or notice under the Repealed Control Act filed prior to December 26, 1985, if such acquisition is made pursuant to an application approved under the Holding Company Act or a notice under the Repealed Control Act that was not disapproved.

(d) *Transactions exempt from prior notice.* (1) Subject to the conditions set forth in paragraph (d)(2) of this section, the following transactions are exempt from prior approval and prior notice under § 174.3: *Provided,* That the timing of the transaction was not within the control of the acquiror.

(i) Control of a savings association acquired through *bona fide* gift;

(ii) Control of a savings association acquired through liquidation of a loan contracted in good faith where the loan

was not made in the ordinary course of business of the lender;

(iii) Control of a savings association acquired through a percentage increase in ownership following a stock split or redemption that was not *pro rata;*

(iv) Control determined pursuant to § 174.4 (a) or (b) as a result of actions by third parties that are not within the control of the acquiror;

(v) Control of a savings association acquired through testate or intestate succession: *Provided,* That the acquiror transmits written notification of the acquisition to the OCC within 60 days of the acquisition and provides such additional information as the OCC may specifically request.

(2) The exemptions provided by paragraphs (d)(1)(i) through (d)(1)(iv) of this section are subject to the following conditions:

(i) The acquiror shall file a notice or rebuttal, as appropriate, with the OCC within 90 days of acquisition of control;

(ii) The acquiror shall not take any action to direct the management or policies of the savings association or which are designed to effect a change in the business plan of the savings association other than voting on matters that may be presented to stockholders by management of the savings association until the OCC has acted favorably upon the acquiror's notice or rebuttal, and the OCC may require that the acquiror take such steps as the OCC deems necessary to insure that control is not exercised; and

(iii) If the OCC disapproves the acquiror's notice or rebuttal, the acquiror shall divest such portion of the stock held by the acquiror so as to cause the acquiror not to be determined to be in control of the savings association under § 174.4 of this part, within one year or such shorter period of time and in the manner that the OCC may order.

§ 174.4 Control.

(a) *Conclusive control.* (1) An acquiror shall be deemed to have acquired control of a Federal savings association if the acquiror directly or indirectly, through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(i) Acquires 25 percent or more of any class of voting stock of the savings association;

(ii) Acquires irrevocable proxies representing 25 percent or more of any class of voting stock of the savings association; or

(iii) Acquires any combination of voting stock and irrevocable proxies representing 25 percent or more of any class of voting stock of a savings association.

(iv) [Reserved]

(2) [Reserved]

(3) [Reserved]

(4) A person or company shall be deemed to control a savings association if the OCC determines that such person has the power to direct the management or policies of the savings association.

(b) *Rebuttable control determinations.* (1) An acquiror shall be determined, subject to rebuttal, to have acquired control of a Federal savings association, if the acquiror directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(i) Acquires more than 10 percent of any class of voting stock of the savings association and is subject to any control factor, as defined in paragraph (c) of this section;

(ii) Acquires 25 percent or more of any class of stock of the savings association and is subject to any control factor, as defined in paragraph (c) of this section.

(2) An acquiror shall be determined, subject to rebuttal, to have acquired control of a savings association, if the acquiror directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies, holds any combination of voting stock and revocable proxies, representing 25 percent or more of any class of voting stock of a savings association, excluding such proxies held in connection with a solicitation by, or in opposition to, a solicitation on behalf of management of the savings association, but including a solicitation in connection with an election of directors, and such proxies would enable the acquiror to:

(i) Elect one-third or more of the savings association's board of directors, including nominees or representatives of the acquiror currently serving on such board;

(ii) Cause the savings association's stockholders to approve the acquisition or corporate reorganization of the savings association; or

(iii) Exert a continuing influence on a material aspect of the business operations of the savings association.

(c) *Control factors.* For purposes of paragraph (b)(1) of this section, the following constitute control factors. References to the acquiror include actions taken directly or indirectly, or through one or more subsidiaries or transactions or acting in concert with one or more persons or companies:

(1) The acquiror would be one of the two largest holders of any class of voting stock of the Federal savings association.

(2) The acquiror would hold 25 percent or more of the total stockholders' equity of the Federal savings association.

(3) The acquiror would hold more than 35 percent of the combined debt securities and stockholders' equity of the Federal savings association.

(4) The acquiror is party to any agreement:

(i) Pursuant to which the acquiror possesses a material economic stake in the Federal savings association resulting from a profit-sharing arrangement, use of common names, facilities or personnel, or the provision of essential services to the savings association; or

(ii) That enables the acquiror to influence a material aspect of the management or policies of the Federal savings association, other than agreements to which the savings association is a party where the restrictions are customary under the circumstances and in the case of an acquisition agreement, which apply only during the period when the acquiror is seeking the OCC's approval to acquire the savings association, the agreement prohibits transactions between the acquiror and the savings association and their respective affiliates without approval by the OCC during the pendency of the notice process, and the agreement contains no material forfeiture provisions applicable to the savings association in the event the acquisition is not approved or not approved by a specified date.

(5) The acquiror would have the ability, other than through the holding of revocable proxies, to direct the votes of 25 percent or more of a class of the Federal savings association's voting stock or to vote 25 percent or more of a class of the savings association's voting stock in the future upon the occurrence of a future event.

(6) The acquiror would have the power to direct the disposition of 25 percent or more of a class of the Federal savings association's voting stock in a manner other than a widely dispersed or public offering.

(7) The acquiror and/or the acquiror's representatives or nominees would constitute more than one member of the Federal savings association's board of directors.

(8) The acquiror or a nominee or management official of the acquiror would serve as the chairman of the board of directors, chairman of the executive committee, chief executive officer, chief operating officer, chief financial officer, or in any position with similar policymaking authority in the Federal savings association.

(d) *Rebuttable presumptions of concerted action.* An acquiror will be

presumed to be acting in concert with the following persons and companies:

(1) A company will be presumed to be acting in concert with a controlling shareholder, partner, trustee or management official of such company with respect to the acquisition of stock of a Federal savings association, if

(i) Both the company and the person own stock in the savings association,

(ii) The company provides credit to the person to purchase the savings association's stock, or

(iii) The company pledges its assets or otherwise is instrumental in obtaining financing for the person to acquire stock of the savings association;

(2) A person will be presumed to be acting in concert with members of the person's immediate family;

(3) Persons will be presumed to be acting in concert with each other where

(i) Both own stock in the savings association and both are also management officials, controlling shareholders, partners, or trustees of another company, or

(ii) One person provides credit to another person or is instrumental in obtaining financing for another person to purchase stock of the savings association;

(4) A company controlling or controlled by another company and companies under common control will be presumed to be acting in concert;

(5) Persons or companies will be presumed to be acting in concert where they constitute a group under the beneficial ownership reporting rules under section 13 or the proxy rules under section 14 of the Securities Exchange Act of 1934, promulgated by the Securities and Exchange Commission.

(6) A person or company will be presumed to be acting in concert with any trust for which such person or company serves as trustee, except that a tax-qualified employee stock benefit plan as defined in § 192.2(a)(39) shall not be presumed to be acting in concert with its trustee or person acting in a similar fiduciary capacity solely for the purposes of determining whether to combine the holdings of a plan and its trustee or fiduciary.

(7) Persons or companies will be presumed to be acting in concert with each other and with any other person or company with which they also are presumed to act in concert.

(e) *Procedures for rebuttal*—(1) *Rebuttal of control determination.* An acquiror attempting to rebut a determination of control that would arise under paragraph (b) of this section shall file a submission with the appropriate OCC licensing office setting forth the facts and circumstances which support the acquiror's contention that no control relationship would exist if the acquiror acquires stock or obtains a control factor with respect to a Federal savings association. The rebuttal must be filed and accepted in accordance with this section before the acquiror acquires such stock or control factor.

(i) An acquiror seeking to rebut the determination of control arising under paragraph (b)(1) of this section shall submit to the appropriate OCC licensing office an executed agreement materially conforming to the agreement set forth at Appendix A to this part. Unless agreed to by the OCC in writing, no other agreement or filing shall be deemed to rebut the determination of control arising under paragraph (b)(1) of this section. If accepted by the OCC, the acquiror shall furnish a copy of the executed agreement to the association to which the rebuttal pertains.

(ii) An acquiror seeking to rebut the determination of control with respect to holding of proxies arising under paragraph (b)(2) of this section shall be subject to the requirements of paragraph (e)(1) of this section, except that in the case of a rebuttal of the presumption of control arising under paragraph (b)(2) of this section, the OCC may require the acquiror to furnish information in response to a specific request for information and depending upon the particular facts and circumstances, to provide an executed rebuttal agreement materially conforming to the agreement set forth at Appendix A to this part, with any modifications deemed necessary by the OCC.

(2) *Presumptions of concerted action.* An acquiror attempting to rebut the presumption of concerted action arising under paragraph (d) of this section shall file a submission with the appropriate OCC licensing office setting forth facts and circumstances which clearly and convincingly demonstrate the acquiror's contention that no action in concert exists. Such a statement must be accompanied by an affidavit, in form and content satisfactory to the OCC, executed by each person or company presumed to be acting in concert, stating that such person or company does not and shall not, without having made necessary filings and obtained approval or clearance thereof under the Holding Company Act or the Control Act, as applicable, have any agreements or understandings, written or tacit, with respect to the exercise of control, directly or indirectly, over the management or policies of the savings association, including agreements relating to voting, acquisition or disposition of the Federal savings association's stock. The affidavit shall also recite that the signatory is aware that the filing of a false affidavit may subject the person or company to criminal sanctions, would constitute a violation of the OCC's regulations at 12 CFR 163.180(b), and would be considered a ''presumptive disqualifier'' under 12 CFR 174.7(g)(1)(v).

(3) *Determination.* A rebuttal filed pursuant to paragraph (e) of this section shall not be deemed sufficient unless it includes all the information, agreements, and affidavits required by the OCC and this part, as well as any additional relevant information as the OCC may require by written request to the acquiror. Within 20 calendar days after proper filing of a rebuttal submission, the OCC will provide written notification of its determination to accept or reject the submission; request additional information in connection with the submission; or return the submission to the acquiror as materially deficient. Within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the OCC, the OCC shall notify the acquiror in writing as to whether the rebuttal is thereby deemed to be sufficient. If the OCC fails to notify an acquiror within such time, the rebuttal shall be deemed to be accepted. The OCC may reject any rebuttal which is inconsistent with facts and circumstances known to it or where the rebuttal does not clearly and convincingly refute the rebuttable determination of control or presumption of action in concert, and may determine to reject a submission solely on such bases.

(f) *Safe harbor.* Notwithstanding any other provision of this section, where an acquiror has no intention to participate in or to seek to exercise control over a Federal savings association's management or policies, the acquiror may seek to qualify for a safe harbor with respect to its ownership of stock of the savings association.

(1) In order to qualify for the safe harbor, an acquiror must submit a certification to the appropriate OCC licensing office that shall be signed by the acquiror or an authorized representative thereof and shall read as follows:

The undersigned makes this submission pursuant to § 174.4(f) of the regulations of the Office of the Comptroller of the Currency (''OCC'') with respect to [name of savings association] and hereby certifies to the OCC the following:

The undersigned is not in control of [name of savings association] under § 174.4(a);

The undersigned is not subject to any control factor as enumerated in § 174.4(c) with respect to the [name of savings association];

The undersigned will not solicit proxies relating to the voting stock of [name of savings association];

Before any change in status occurs that would bring the undersigned within the scope of § 174.4(a) or (b), the undersigned will file and obtain approval of a rebuttal or non-disapproval of a notice or holding company application, as appropriate.

The undersigned has not acquired stock of [name of savings association] for the purpose or effect of changing or influencing the control of [name of savings association] or in connection with or as a participant in any transaction having such purpose or effect.

(2) An acquiror claiming safe-harbor status may vote freely and dissent with respect to its own stock. Certifications provided for in this paragraph must be filed with the appropriate OCC licensing office in accordance with §§ 116.30 and 116.40 of this chapter.

§ 174.5 Certifications of ownership.

(a) *Acquisition of stock.* (1) Upon the acquisition of beneficial ownership that exceeds, in the aggregate, 10 percent of any class of stock of a Federal savings association or additional stock above 10 percent of the stock of a savings association occurring after December 26, 1985, an acquiror shall file with the OCC a certification as described in this section.

(2) The certification filed pursuant to this section shall be signed by the acquiror or an authorized representative thereof and shall read as follows:

The undersigned is the beneficial owner of 10 percent or more of a class of stock of [name of savings association]. The undersigned is not in control of such association, as defined in 12 CFR 174.4(a), and is not subject to a rebuttable determination of control under § 174.4(b), and will take no action that would result in a determination of control or a rebuttable determination of control without first filing and obtaining approval of an application under the Savings and Loan Holding Company Act, 12 U.S.C. 1467a, or notice under the Change in Bank Control Act, 12 U.S.C. 1817(j), or filing and obtaining acceptance by the Office of the Comptroller of the Currency of a rebuttal of the rebuttable determination of control.

(3) Notwithstanding anything contained in this paragraph (a), an acquiror is not required to file a certification if:

(i) The OCC has issued a notice of non-disapproval of the acquisition of the savings association; or

(ii) The acquiror has filed a materially complete notice pursuant to § 174.3 of this part.

(b) *Privacy.* All certifications filed under this § 174.5 shall be for the information of the OCC in connection with its examination functions and shall be provided confidential treatment by the OCC.

§ 174.6 Procedural requirements.

(a) *Form of notice.* A notice required by § 174.3 of this part shall be filed on the form indicated below. An acquiror may request confidential treatment of portions of a notice only by complying with the requirements of paragraph (f) of this section.

(1) [Reserved]

(2) [Reserved]

(3) [Reserved]

(4) [Reserved]

(5) [Reserved]

(6) *Notice Form 1393, parts A and B.* This form shall be used for all notices filed under § 174.3(b) of this part regarding the acquisition of control of a Federal savings association by any person or persons not constituting a company.

(b) *Filing requirements*—(1) *Notices, and rebuttals.* (i) Complete copies including exhibits and all other pertinent documents of notices and rebuttal submissions shall be filed with the appropriate OCC licensing office. Unsigned copies shall be conformed. Each copy shall include a summary of the proposed transaction.

(ii) Any person or company may amend a notice or rebuttal submission, or file additional information, upon request of the OCC or, in the case of the party filing a notice or rebuttal, upon such party's own initiative.

(2) [Reserved]

(c) *Sufficiency and waiver.* (1) Except as provided in § 174.6(c)(5), a notice filed pursuant to § 174.3(b) shall not be deemed sufficient unless it includes all of the information required by the form prescribed by the OCC and this part, including a complete description of the acquiror's proposed plan for acquisition of control whether pursuant to one or more transactions, and any additional relevant information as the OCC may require by written request to the acquiror. Unless a notice specifically indicates otherwise, the notice shall be considered to pertain to acquisition of 100 percent of a Federal savings association's voting stock. Where a notice pertains to a lesser amount of stock, the OCC may condition its non-disapproval to apply only to such amount, in which case additional acquisitions may be made only by amendment to the acquiror's notice and the OCC's non-disapproval thereof. Failure by an acquiror to respond completely to a written request by the OCC for additional information within 30 calendar days of the date of such request may be deemed to constitute withdrawal of the notice or rebuttal filing or may be treated as grounds for an issuance of a notice of disapproval of a notice or rejection of a rebuttal.

(2) The period for the OCC's review of any proposed acquisition will commence upon receipt by the OCC of a notice deemed sufficient under paragraph (c)(1) of this section. The OCC shall notify an acquiror in writing within 30 calendar days after proper filing of a notice as to whether the notice—

(i) Is sufficient;

(ii) Is insufficient, and what additional information is requested in order to render the notice sufficient; or

(iii) Is materially deficient and will not be processed. The OCC shall also notify an acquiror in writing within 15 calendar days after proper filing of any additional information furnished in response to a specific request by the OCC as to whether the notice is thereby deemed to be sufficient. If the OCC fails to so notify an acquiror within such time, the notice shall be deemed to be sufficient as of the expiration of the applicable period.

(3) After additional information has been requested and supplied, the OCC may request additional information only with respect to matters derived from or prompted by information already furnished, or information of a material nature that was not reasonably available from the acquiror, was concealed, or pertains to developments subsequent to the time of the OCC's initial request for additional information. With regard to information of a material nature that was not reasonably available from the acquiror or was concealed at the time a notice was deemed to be sufficient or which pertains to developments subsequent to the time a notice was deemed to be sufficient, the OCC, at its option, may request such additional information as it considers necessary, or may deem the notice not to be sufficient until such additional information is furnished and cause the review period to commence again in its entirety upon receipt of such additional information.

(i) The 60-day period for the OCC's review of a notice deemed to be sufficient also may be extended by the OCC for up to an additional 30 days.

(ii) The period for the OCC's review of a notice may be further extended not

to exceed two additional times for not more than 45 days each time if—

(A) The OCC determines that any acquiring party has not furnished all the information required under this part;

(B) In the OCC's judgment, any material information submitted is substantially inaccurate;

(C) The OCC has been unable to complete an investigation of each acquiror because of any delay caused by, or the inadequate cooperation of, such acquiror; or

(D) The OCC determines that additional time is needed to investigate and determine that no acquiring party has a record of failing to comply with the requirements of subchapter II of chapter 53 of title 31 of the United States Code.

(4) [Reserved]

(5) The OCC may waive any requirements of this paragraph (c) determined to be unnecessary by the OCC, upon its own initiative, upon the written request of an acquiring person, or in a supervisory case.

(d) *Public notice*. (1) The acquiror must publish a public notice of a notice under § 174.3(b) of this chapter, in accordance with the procedures in subpart B of part 116 of this chapter. Promptly after publication, the acquiror must transmit copies of the public notice and the publisher's affidavit to the OCC.

(2) The acquiror must provide a copy of the public notice to the savings association whose stock is sought to be acquired, and may provide a copy of the public notice to any other person who may have an interest in the notice.

(3) The OCC will notify the persons whose requests for announcements, as described in 12 CFR part 195, appendix B, have been received in time for the notification. The OCC may also notify any other persons who may have an interest in the notice.

(e) *Submission of comments*. Commenters may submit comments on the notice in accordance with the procedures in subpart C of part 116 of this chapter.

(f) *Disclosure*. (1) Any notice, other filings, public comment, or portion thereof, made pursuant to this part for which confidential treatment is not requested in accordance with this paragraph (f), shall be immediately available to the public and not subject to the procedures set forth herein. Public disclosure shall be made of other portions of a notice, other filing or public comment in accordance with paragraph (f)(2) of this section, the provisions of the Freedom of Information Act (5 U.S.C. 552a) and part 4 of this chapter. Submitters should provide confidential and non-confidential versions of their filings, as described in § 174.6(f)(2) and (3) in order to facilitate this process.

(2) Any person who submits any information or causes or permits any information to be submitted to the OCC pursuant to this part may request that the OCC afford confidential treatment under the Freedom of Information Act to such information for reasons of personal privacy or business confidentiality, which shall include such information that would be deemed to result in the commencement of a tender offer under § 240.14d–2 of title 17 of the Code of Federal Regulations, or for any other reason permitted by Federal law. Such request for confidentiality must be made and justified in accordance with paragraph (f)(5) of this section at the time of filing, and must, to the extent practicable, identify with specificity the information for which confidential treatment may be available and not merely indicate portions of documents or entire documents in which such information is contained. Failure to specifically identify information for which confidential treatment is requested, failure to specifically justify the bases upon which confidentiality is claimed in accordance with paragraph (f)(5) of this section, or overbroad and indiscriminate claims for confidential treatment, may be bases for denial of the request. In addition, the filing party should take all steps reasonably necessary to ensure, as nearly as practicable, that at the time the information is first received by the OCC it is supplied segregated from information for which confidential treatment is not being requested, it is appropriately marked as confidential, and it is accompanied by a written request for confidential treatment which identifies with specificity the information as to which confidential treatment is requested. Any such request must be substantiated in accordance with paragraph (f)(5) of this section.

(3) All documents which contain information for which a request for confidential treatment is made or the appropriate segregable portions thereof shall be marked by the person submitting the records with a prominent stamp, typed legend, or other suitable form of notice on each page or segregable portion of each page, stating ''Confidential Treatment Requested by [name].'' If such marking is impracticable under the circumstances, a cover sheet prominently marked ''Confidential Treatment Requested by [name]'' should be securely attached to each group of records submitted for which confidential treatment is requested. Each of the records transmitted in this manner should be individually marked with an identifying number and code so that they are separately identifiable.

(4) A determination as to the validity of any request for confidential treatment may be made when a request for disclosure of the information under the Freedom of Information Act is received, or at any time prior thereto. If the OCC receives a request for the information under the Freedom of Information Act, the OCC will advise the filing party before it discloses material for which confidential treatment has been requested.

(5) Substantiation of a request for confidential treatment shall consist of a statement setting forth, to the extent appropriate or necessary for the determination of the request for confidential treatment, the following information regarding the request:

(i) The reasons, concisely stated and referring to specific exemptive provisions of the Freedom of Information Act, why the information should be withheld from access under the Freedom of Information Act;

(ii) The applicability of any specific statutory or regulatory provisions which govern or may govern the treatment of the information;

(iii) The existence and applicability of any prior determination by the OCC, other Federal agencies, or a court, concerning confidential treatment of the information;

(iv) The adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position;

(v) The measures taken by the business to protect the confidentiality of the commercial or financial information in question and of similar information, prior to, and after, its submission to the OCC;

(vi) The ease or difficulty of a competitor's obtaining or compiling the commercial or financial information;

(vii) Whether commercial or financial information was voluntarily submitted to the OCC, and, if so, whether and how disclosure of the information would tend to impede the availability of similar information to the OCC;

(viii) The extent, if any, to which portions of the substantiation of the request for confidential treatment should be afforded confidential treatment;

(ix) The amount of time after the consummation of the proposed acquisition for which the information should remain confidential and a justification thereof;

(x) Such additional facts and such legal and other authorities as the requesting person may consider appropriate.

(6) Any person requesting access to a notice, other filing, or public comment made pursuant to this part for purposes of commenting on a pending submission may prominently label such request: ''Request for Disclosure of Filing(s) Made Under part 174/Priority Treatment Requested.''

(g) *Supervisory cases.* The provisions of paragraphs (d), (e) and (f) of this section may be waived by the OCC in connection with a transaction approved by the OCC for supervisory reasons.

(h) [Reserved]

(i) *Additional procedures for acquisitions involving mergers.* Acquisitions of control involving mergers (including mergers with an interim association) shall also be subject to the procedures set forth in § 163.22 of this chapter to the extent applicable, except as provided in paragraph (a) of this section.

(j) *Additional procedures for acquisitions of recently converted savings associations.* Notices and rebuttals involving acquisitions of the stock of a recently converted savings association under § 192.3(i)(3) of this chapter shall also address the criteria for approval set forth at § 192.3(i)(5) of this chapter.

§ 174.7 Determination by the OCC.

(a) (1) [Reserved]

(2) [Reserved]

(3) [Reserved]

(b) [Reserved]

(c) [Reserved]

(d) *Notice criteria.* In making its determination whether to disapprove a notice, the OCC may disapprove any proposed acquisition, if the OCC determines that:

(1) The proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the banking business in any part of the United States;

(2) The effect of the proposed acquisition of control in any section of the country may be substantially to lessen competition or to tend to create a monopoly or the proposed acquisition of control would in any other manner be in restraint of trade, and the anticompetitive effects of the proposed acquisition of control are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served;

(3) The financial condition of any acquiring person or company or the future prospects of the institution is such as might jeopardize the financial stability of the association or prejudice the interests of the depositors of the association;

(4) The competence, experience, or integrity of the acquiring person or any of the proposed management personnel indicates that it would not be in the interests of the depositors of the association, the OCC, or the public to permit such person to control the association;

(5) The acquiring person fails or refuses to furnish information requested by the OCC; or

(6) The OCC determines that the proposed acquisition would have an adverse effect on the Deposit Insurance Fund.

(e) *Failure to disapprove a notice.* If, upon expiration of the 60-day review period of any notice deemed to be sufficient filed pursuant to § 174.6(c), or extension thereof, the OCC has failed to disapprove such notice, the proposed acquisition may take place: *Provided,* That it is consummated within one year and in accordance with the terms and representations in the notice and that there is no material change in circumstances prior to the acquisition.

(f) [Reserved]

(g) *Presumptive disqualifiers*—(1) *Integrity factors.* The following factors shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the integrity test of paragraph (d)(4) of this section:

(i) During the 10-year period immediately preceding filing of the notice, criminal, civil or administrative judgments, consents or orders, and any indictments, formal investigations, examinations, or civil or administrative proceedings (excluding routine or customary audits, inspections and investigations) that terminated in any agreements, undertakings, consents or orders, issued against, entered into by, or involving the acquiror or affiliates of the acquiror by any Federal or state court, any department, agency, or commission of the U.S. Government, any state or municipality, any Federal Home Loan Bank, any self-regulatory trade or professional organization, or any foreign government or governmental entity, which involve:

(A) Fraud, moral turpitude, dishonesty, breach of trust or fiduciary duties, organized crime or racketeering;

(B) Violation of securities or commodities laws or regulations;

(C) Violation of depository institution laws or regulations;

(D) Violation of housing authority laws or regulations; or

(E) Violation of the rules, regulations, codes of conduct or ethics of a self-regulatory trade or professional organization;

(ii) Denial, or withdrawal after receipt of formal or informal notice of an intent to deny, by the acquiror or affiliates of the acquiror, of

(A) Any application relating to the organization of a financial institution,

(B) An application to acquire any financial institution or holding company thereof under the Savings and Loan Holding Company Act or the Bank Holding Company Act or otherwise,

(C) A notice relating to a change in control of any of the foregoing under the Control Act or

(D) An application or notice under a state holding company or change in control statute;

(iii) The acquiror or affiliates of the acquiror were placed in receivership or conservatorship during the preceding 10 years, or any management official of the acquiror was a management official or director (other than an official or director serving at the request of the OCC, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or the former Federal Savings and Loan Insurance Corporation) or controlling shareholder of a company or savings association that was placed into receivership, conservatorship, or a management consignment program, or was liquidated during his or her tenure or control or within two years thereafter;

(iv) Felony conviction of the acquiror, an affiliate of the acquiror or a management official of the acquiror or an affiliate of the acquiror;

(v) Knowingly making any written or oral statement to the OCC or any predecessor agency (or its delegate) in connection with a notice or other filing under this part that is false or misleading with respect to a material fact or omits to state a material fact with respect to information furnished or requested in connection with such a notice or other filing;

(vi) Acquisition and retention at the time of submission of a notice, of stock in the savings association by the acquiror in violation of § 174.3 or its predecessor sections.

(2) *Financial factors.* The following shall give rise to a rebuttable presumption that an acquiror may fail to satisfy the financial condition test of paragraph (d)(3) of this section:

(i) Liability for amounts of debt which, in the opinion of the OCC, create excessive risks of default and pressure on the savings association to be acquired; or

(ii) Failure to furnish a business plan or furnishing a business plan projecting activities which are inconsistent with economical home financing.

§ 174.8 [Reserved]

Appendix A to Part 174—Rebuttal of Control Agreement

Agreement

Rebuttal of Rebuttable Determination of Control Under Part 174

I. WHEREAS

A. [ ] is the owner of [ ] shares (the ''Shares'') of the [ ] stock (the ''Stock'') of [name and address of association], which Shares represent [ ] percent of a class of ''voting stock'' of [ ] as defined under the Acquisition of Control Regulations (''Regulations'') of the Office of the Comptroller of the Currency (''OCC''), 12 CFR part 174 (''Voting Stock'');

B. [ ] is a ''savings association'' within the meaning of the Regulations;

C. [ ] seeks to acquire additional shares of stock of [ ] (''Additional Shares''), such that [ ]'s ownership thereof will exceed 10 percent of a class of Voting Stock but will be less than 25 percent of a class of Voting Stock of [ ]; [and/or] [ ] seeks to [ ], which would constitute the acquisition of a ''control factor'' as defined in the Regulations (''Control Factor'');

D. [ ] does not seek to acquire the [Additional Shares or Control Factor] for the purpose or effect of changing the control of [ ] or in connection with or as a participant in any transaction having such purpose or effect;

E. The Regulations require a company or a person who intends to hold 10 percent or more but less than 25 percent of any class of Voting Stock of a savings association or holding company thereof and that also would possess any of the Control Factors specified in the Regulations, to file and obtain clearance of a notice (''Notice'') under the Change in Control Act (''Control Act''), 12 U.S.C. 1817(j), prior to acquiring such amount of stock and a Control Factor unless the rebuttable determination of control has been rebutted.

F. Under the Regulations, [ ] would be determined to be in control, subject to rebuttal, of [ ] upon acquisition of the [Additional Shares or Control Factor];

G. [ ] has no intention to manage or control, directly or indirectly, [ ];

H. [ ] has filed on [ ], a written statement seeking to rebut the determination of control, attached hereto and incorporated by reference herein, (this submission referred to as the ''Rebuttal'');

I. In order to rebut the rebuttable determination of contro1, [ ] agrees to offer this Agreement as evidence that the acquisition of the [Additional Shares or Control Factor] as proposed would not constitute an acquisition of control under the Regulations.

II. The OCC has determined, and hereby agrees, to act favorably on the Rebuttal, and in consideration of such a determination and agreement by the OCC to act favorably on the Rebuttal, [ ] and any other existing, resulting or successor entities of [ ] agree with the OCC that:

A. Unless [ ] shall have filed a Notice under the Control Act, or an Application under the Holding Company Act, as appropriate, and shall have obtained clearance of the Notice in accordance with the Regulations, [ ] will not, except as expressly permitted otherwise herein or pursuant to an amendment to this Rebuttal Agreement:

1. Seek or accept representation of more than one member of the board of directors of [insert name of association and any holding company thereof];

2. Have or seek to have any representative serve as the chairman of the board of directors, or chairman of an executive or similar committee of [insert name of association and any holding company thereof]'s board of directors or as president or chief executive officer of [insert name of association and any holding company thereof];

3. Engage in any intercompany transaction with [ ] or [ ]'s affiliates;

4. Propose a director in opposition to nominees proposed by the management of [insert name of association and any holding company thereof] for the board of directors of [insert name of association and any holding company thereof] other than as permitted in paragraph A–1;

5. Solicit proxies or participate in any solicitation of proxies with respect to any matter presented to the stockholders [ ] other than in support of, or in opposition to, a solicitation conducted on behalf of management of [ ];

6. Do any of the following, except as necessary solely in connection with [ ]'s performance of duties as a member of [ ]'s board of directors:

(a) Influence or attempt to influence in any respect the loan and credit decisions or policies of [ ], the pricing of services, any personnel decisions, the location of any offices, branching, the hours of operation or similar activities of [ ];

(b) Influence or attempt to influence the dividend policies and practices of [ ] or any decisions or policies of [ ] as to the offering or exchange of any securities;

(c) Seek to amend, or otherwise take action to change, the bylaws, articles of incorporation, or charter of [ ];

(d) Exercise, or attempt to exercise, directly or indirectly, control or a controlling influence over the management, policies or business operations of [ ]; or

(e) Seek or accept access to any non-public information concerning [ ].

B. [ ] is not a party to any agreement with [ ].

C. [ ] shall not assist, aid or abet any of [ ]'s affiliates or associates that are not parties to this Agreement to act, or act in concert with any person or company, in a manner which is inconsistent with the terms hereof or which constitutes an attempt to evade the requirements of this Agreement.

D. Any amendment to this Agreement shall only be proposed in connection with an amended rebuttal filed by [ ] with the OCC for its determination;

E. Prior to acquisition of any shares of ''Voting Stock'' of [ ] as defined in the Regulations in excess of the Additional Shares, any required filing will be made by [ ] under the Control Act or the Holding Company Act and either approval of the acquisition under the Holding Company Act or any Notice filed under the Control Act shall be cleared in accordance with applicable regulations;

F. At any time during which 10 percent or more of any class of Voting Stock of [ ] is owned or controlled by [ ], no action which is inconsistent with the provisions of this Agreement shall be taken by [ ] until [ ] files and either obtains a favorable determination with respect to either an amended rebuttal, approval of an Application under the Holding Company Act, or clearance of a Notice under the Control Act in accordance with applicable regulations;

G. Where any amended rebuttal filed by [ ] is denied or disapproved, [ ] shall take no action which is inconsistent with the terms of this Agreement, except after either (1) reducing the amount of shares of Voting Stock of [ ] owned or controlled by [ ] to an amount under 10 percent of a class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations; or (2) filing a Notice under the Control Act or an Application under the Holding Company Act, as appropriate, and either obtaining clearance of the Notice or approval of the Application, in accordance with applicable regulations;

H. Where any Notice filed by [ ] is disapproved, [ ] shall take no action which is inconsistent with the terms of this Agreement, except after reducing the amount of shares of Voting Stock of [ ] owned or controlled by [ ] to an amount under 10 percent of any class of Voting Stock, or immediately ceasing any other actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

I. Should circumstances beyond [ ]'s control result in [ ] being placed in a position to direct the management or policies of [ ], then [ ] shall either (1) promptly file a Notice under the Control Act or an Application under the Holding Company Act, as appropriate, and take no affirmative steps to enlarge that control pending either a final determination with respect to the Notice or Application, or (2) promptly reduce the amount of shares of [ ] Voting Stock owned or controlled by [ ] to an amount under 10 percent of any class of Voting Stock or immediately cease any actions that give rise to a conclusive or rebuttable determination of control under the Regulations;

J. By entering into this Agreement and by offering it for reliance in reaching a decision on the request to rebut the presumption of control under the Regulations, as long as 10 percent or more of any class of Voting Stock

of [ ] is owned or controlled, directly or indirectly, by [ ], and [ ] possesses any Control Factor as defined in the Regulations, [ ] will submit to the jurisdiction of the Regulations, including (1) the filing of an amended rebuttal or Notice for any proposed action which is prohibited by this Agreement, and (2) the provisions relating to a penalty for any person who willfully violates or with reckless disregard for the safety or soundness of a savings association participates in a violation of the Control Act and the Regulations thereunder, and any regulation or order issued by the OCC.

K. Any violation of this Agreement shall be deemed to be a violation of the [Control Act or Holding Company Act] and the Regulations, and shall be subject to such remedies and procedures as are provided in the [Control Act or Holding Company Act], as appropriate and the Regulations for a violation thereunder and in addition shall be subject to any such additional remedies and procedures as are provided under any other applicable statutes or regulations for a violation, willful or otherwise, of any agreement entered into with the OCC.

III. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which counterparts collectively shall constitute one instrument representing the Agreement among the parties thereto. It shall not be necessary that any one counterpart be signed by all of the parties hereto as long as each of the parties has signed at least one counterpart.

IV. This Agreement shall be interpreted in a manner consistent with the provisions of the Rules and Regulations of the OCC.

V. This Agreement shall terminate upon (i) clearance by the OCC of [ ]'s Notice under the Control Act to acquire [ ], and consummation of the transaction as described in such Notice, (ii) in the disposition by [ ] of a sufficient number of shares of [ ], or (iii) the taking of such other action that thereafter [ ] is not in control and would not be determined to be in control of [ ] under the Control Act or the Regulations of the OCC as in effect at that time.

VI. IN WITNESS THEREOF, the parties thereto have executed this Agreement by their duly authorized officer.

[Acquiror]

Office of the Comptroller of the Currency

Date: _____

By: _____

PART 190—PREEMPTION OF STATE USURY LAWS

Sec.

190.1 Authority, purpose, and scope.
190.2 Definitions.
190.3 Operation.
190.4 Federally-related residential manufactured housing loans—consumer protection provisions.
190.100 Status of Interpretations issued under Public Law 96–161.
190.101 State criminal usury statutes.

Authority: 12 U.S.C. 1735f–7a, 5412(b)(2)(B).

§ 190.1 Authority, purpose, and scope.

(a) *Authority.* This part contains regulations issued under section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96–221, 94 Stat. 161.

(b) *Purpose and scope.* The purpose of this permanent preemption of state interest-rate ceilings applicable to Federally-related residential mortgage loans is to ensure that the availability of such loans is not impeded in states having restrictive interest limitations. This part applies to loans, mortgages, credit sales, and advances, secured by first liens on residential real property, stock in residential cooperative housing corporations, or residential manufactured homes as defined in § 190.2 of this part.

§ 190.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Loans* mean any loans, mortgages, credit sales, or advances.

(b) *Federally-related loans* include any loan:

(1) Made by any lender whose deposits or accounts are insured by any agency of the Federal government;

(2) Made by any lender regulated by any agency of the Federal government;

(3) Made by any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act;

(4) Made in whole or in part by the Secretary of Housing and Urban Development; insured, guaranteed, supplemented, or assisted in any way by the Secretary or any officer or agency of the Federal government, or made under or in connection with a housing or urban development program administered by the Secretary, or a housing or related program administered by any other such officer or agency;

(5) Eligible for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation, or made by any financial institution from which the loan could be purchased by the Federal Home Loan Mortgage Corporation; or

(6) Made in whole or in part by any entity which:

(i) Regularly extends, or arranges for the extension of, credit payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and

(ii) Makes or invests in residential real property loans, including loans secured by first liens on residential manufactured homes that aggregate more than $1,000,000 per year; except that the latter requirement shall not apply to such an entity selling residential manufactured homes and providing financing for such sales through loans or credit sales secured by first liens on residential manufactured homes, if the entity has an arrangement to sell such loans or credit sales in whole or in part, or where such loans or credit sales are sold in whole or in part, to a lender or other institution otherwise included in this section.

(c) *Loans which are secured by first liens on real estate* means loans on the security of any instrument (whether a mortgage, deed of trust, or land contract) which makes the interest in real estate (whether in fee, or in a leasehold or subleasehold extending, or renewable, automatically or at the option of the holder or the lender, for a period of at least 5 years beyond the maturity of the loan) specific security for the payment of the obligation secured by the instrument: *Provided,* That the instrument is of such a nature that, in the event of default, the real estate described in the instrument could be subjected to the satisfaction of the obligation with the same priority as a first mortgage of a first deed of trust in the jurisdiction where the real estate is located.

(d) *Loans secured by first liens on stock in a residential cooperative housing corporation* means loans on the security of:

(1) A first security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization; and

(2) An assignment of the borrower's interest in the proprietary lease or occupancy agreement issued by such organization.

(e) *Loans secured by first liens on residential manufactured homes* means a loan made pursuant to an agreement by which the party extending the credit acquires a security interest in the residential manufactured home which will have priority over any conflicting security interest.

(f) *Residential real property* means real estate improved or to be improved by a structure or structures designed primarily for dwelling, as opposed to commercial use.

(g) *Residential manufactured home* shall mean a manufactured home as defined in the National Manufactured Home Construction and Safety

Standards Act, 42 U.S.C. 5402(6), which is or will be used as a residence.

(h) *State* means the several states, Puerto Rico, the District of Columbia, Guam, the Trust Territories of the Pacific Islands, the Northern Mariana Islands, and the Virgin Islands, except as provided in section 501(a)(2)(B) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96–221, 94 Stat. 161.

§ 190.3 Operation.

(a) The provisions of the constitution or law of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any Federally-related loan:

(1) Made after March 31, 1980; and

(2) Secured by a first lien on:

(i) Residential real property;

(ii) Stock in a residential cooperative housing corporation when the loan is used to finance the acquisition of such stock; or

(iii) A residential manufactured home: *Provided,* That the loan so secured contains the consumer safeguards required by § 190.4 of this part;

(b) The provisions of paragraph (a) of this section shall apply to loans made in any state on or before the date (after April 1, 1980 and prior to April l, 1983) on which the state adopts a law or certifies that the voters of such state have voted in favor of any law, constitutional or otherwise, which states explicitly and by its terms that such state does not want the provisions of paragraph (a) of this section to apply with respect to loans made in such state, except that—

(1) The provisions of paragraph (a) of this section shall apply to any loan which is made after such date pursuant to a commitment therefore which was entered into during the period beginning on April 1, 1980, and ending on the date the state takes such action;

(2) The provisions of paragraph (a) of this section shall apply to any rollover of a loan which loan was made, or committed to be made, during the period beginning on April 1, 1980, and ending on the date the state takes such action, if the mortgage document or loan note provided that the interest rate to the original borrower could be changed through the use of such a rollover; and

(3) At any time after the date of adoption of these regulations, any state may adopt a provision of law placing limitations on discount points or such other charges on any loan described in this part.

(c) Nothing in this section preempts limitations in state laws on prepayment charges, attorneys' fees, late charges or other provisions designed to protect borrowers.

§ 190.4 Federally-related residential manufactured housing loans—consumer protection provisions.

(a) *Definitions.* As used in this section:

(1) *Prepayment.* A ''prepayment'' occurs upon—

(i) Refinancing or consolidation of the indebtedness;

(ii) Actual prepayment of the indebtedness by the debtor, whether voluntarily or following acceleration of the payment obligation by the creditor; or

(iii) The entry of a judgment for the indebtedness in favor of the creditor.

(2) *Actuarial method.* The term *actuarial method* means the method of allocating payments made on a debt between the outstanding balance of the obligation and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation.

(3) *Precomputed Finance Charge.* The term *precomputed finance charge* means interest or a time/price differential as computed by the add-on or discount method. Precomputed finance charges do not include loan fees, points, finder's fees, or similar charges.

(4) *Creditor.* The term *creditor* means any entity covered by this part, including those which regularly extend or arrange for the extension of credit and assignees that are creditors under section 501(a)(1)(C)(v) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

(b) *General.* (1) The provisions of the constitution or the laws of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is secured by a first lien on a residential mobile home if a creditor covered by this part complies with the consumer protection regulations of this section.

(2) *Relation to state law.* (i) In making loans or credit sales subject to this section, creditors shall comply with state and Federal law in accordance with the following:

(A) *State law regulating matters not covered by this section.* When state law regulating matters not covered by this section is otherwise applicable to a loan or credit sale subject to this section, creditors shall comply with such state law provisions.

(B) *State law regulating matters covered by this section.* Creditors need comply only with the provisions of this section, unless the OCC determines that an otherwise applicable state law regulating matters covered by this section provides greater protection to consumers. Such determinations shall be published in the **Federal Register** and shall operate prospectively.

(ii) Any interested party may petition the OCC for a determination that state law requirements are more protective of consumers than the provisions of this section. Petitions shall include:

(A) A copy of the state law to be considered;

(B) Copies of any relevant judicial, regulatory, or administrative interpretations of the state law; and

(C) An opinion or memorandum from the state Attorney General or other appropriate state official having primary enforcement responsibilities for the subject state law provision, indicating how the state law to be considered offers greater protection to consumers than the OCC's regulation.

(c) *Refund of precomputed finance charge.* In the event the entire indebtedness is prepaid, the unearned portion of the precomputed finance charge shall be refunded to the debtor. This refund shall be in an amount not less than the amount which would be refunded if the unearned precomputed finance charge were calculated in accordance with the actuarial method, except that the debtor shall not be entitled to a refund which, is less than one dollar. The unearned portion of the precomputed finance charge is, at the option of the creditor, either:

(1) That portion of the precomputed finance charge which is allocable to all unexpired payment periods as originally scheduled, or if deferred, as deferred. A payment period shall be deemed unexpired if prepayment is made within 15 days after the payment period's scheduled due date. The unearned precomputed finance charge is the total of that which would have been earned for each such period had the loan not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, an annual percentage rate based on those charges which are considered precomputed finance charges in this section, assuming that all payments were made as originally scheduled, or as deferred, if deferred. The creditor, at its option, may round this annual percentage rate to the nearest one-quarter of one percent; or

(2) The total precomputed finance charge less the earned precomputed finance charge. The earned

precomputed finance charge shall be determined by applying an annual percentage rate based on the total precomputed finance charge (as that term is defined in this section), under the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment. If a late charge or deferral fee has been collected, it shall be treated as a payment.

(d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

(e) *Balloon payments*— (1) *Federal savings associations.* Federal savings association creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes, and such loans shall be governed by the provisions of this section and 12 CFR 560.220 until superseding regulations are issued by the Consumer Financial Protection Bureau regarding the Alternative Mortgage Transactions Parity Act.

(2) *Other creditors.* All other creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes to the extent authorized by applicable Federal or state law or regulation.

(f) *Late charges.* (1) No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor.

(2) To the extent that applicable state law does not provide for a longer period of time, no late charge may be collected on an installment which is paid in full on or before the 15th day after its scheduled or deferred due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of assessing late charges, payments received are deemed to be applied first to current installments.

(3) A late charge may be imposed only once on an installment; however, no such charge may be collected for a late installment which has been deferred.

(4) To the extent that applicable state law does not provide for a lower charge or a longer grace period, a late charge on any installment not paid in full on or before the 15th day after its scheduled or deferred due date may not exceed five percent of the unpaid amount of the installment.

(5) If, at any time after imposition of a late charge, the lender provides the borrower with written notice regarding amounts claimed to be due but unpaid, the notice shall separately state the total of all late charges claimed.

(6) Interest after the final scheduled maturity date may not exceed the maximum rate otherwise allowable under state law for such contracts, and if such interest is charged, no separate late charge may be made on the final scheduled installment.

(g) *Deferral fees.* (1) With respect to mobile home credit transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and

(i) Provide, to the extent that applicable state law does not provide for a lower charge, for a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable and proportionately for a part of each month, counting each day as 1/30th of a month;

(ii) Incorporate by reference the transaction to which the deferral applied;

(iii) Disclose each installment or part thereof in the amount to be deferred, the date or dates originally payable, and the date or dates agreed to become payable: and

(iv) Set forth the fact of the deferral charge, the dollar amount of the charge for each installment to be deferred, and the total dollar amount to be paid by the debtor for the privilege of deferring payment.

(2) No term of a writing executed by the debtor shall constitute authority for a creditor unilaterally to grant a deferral with respect to which a charge is to be imposed or collected.

(3) The deferral period is that period of time in which no payment is required or made by reason of the deferral.

(4) Payments received with respect to deferred installments shall be deemed to be applied first to deferred installments.

(5) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing or consolidation agreement is concluded by the parties, or a late charge has been imposed or collected, unless such late charge is refunded to the borrower or credited to the deferral charge.

(h) *Notice before repossession, foreclosure, or acceleration.* (1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outstanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as described in this paragraph (h)(1). The debtor is not entitled to notice of default more than twice in any one-year period.

(2) The notice in the following form shall state the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

To:

Date: , 20

Notice of Default and Right To Cure Default

Name, address, and telephone number of creditor

Account number, if any

Brief identification of credit transaction

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. Your default consists of:

Describe default alleged

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

If you have any questions, write (the creditor) at the above address or call (creditor's designated employee) at (telephone number) between the hours of and on (state days of week).

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.

§ 190.100 Status of Interpretations issued under Public Law 96–161.

The OCC continues to adhere to the views expressed in the formal

Interpretations issued under the authority of section 105(c) of Public Law 96–161, 93 Stat. 1233 (1979). These interpretations, which relate to the temporary preemption of state interest ceilings contained in Public Law 96–161, may be found at 45 FR 2840 (Jan. 15, 1980); 45 FR 6165 (Jan. 25, 1980); 45 FR 8000 (Feb. 6, 1980); 45 FR 15921 (Mar. 12, 1980).

§ 190.101 State criminal usury statutes.

(a) Section 501 provides that ''the provisions of the constitution or laws of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges shall not apply to any'' Federally-related loan secured by a first lien on residential real property, a residential manufactured home, or all the stock allocated to a dwelling unit in a residential housing cooperative. 12 U.S.C. 1735f–7 note (Supp. IV 1980). The question has arisen as to whether the Federal statute preempts a state law which deems it a criminal offense to charge interest at a rate in excess of that specified in the state law.

(b) Section 501 preempts all state laws which expressly limit the rate or amount of interest chargeable on a Federally-related residential first mortgage. It does not matter whether the statute in question imposes criminal or civil sanctions; section 501, by its terms, preempts ''any'' state law which imposes a ceiling on interest rates. The wording of the Federal statute clearly expresses an intent to displace all direct state law restraints on interest. Any state law that conflicts with this Congressional purpose must yield.

PART 191—PREEMPTION OF STATE DUE-ON-SALE LAWS

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191.2 Definitions.
191.3 Loans originated by Federal savings associations.
191.4 Loans originated by lenders other than Federal savings associations.
191.5 Limitation on exercise of due-on-sale clauses.
191.6 Interpretations.

Authority: 12 U.S.C. 1464, 1701j–3, and 5412(b)(2)(B).

§ 191.1 Authority, purpose, and scope.

(a) *Authority.* This part contains regulations issued under section 5 of the Home Owners' Loan Act of 1933, as amended, and under section 341 of the Garn-St Germain Depository Institutions Act of 1982, Public Law 97–320, 96 Stat. 1469, 1505–1507.

(b) *Purpose and scope.* The purpose of this permanent preemption of state prohibitions on the exercise of due-on-sale clauses by all lenders, whether Federally- or state-chartered, is to reaffirm the authority of Federal savings associations to enforce due-on-sale clauses, and to confer on other lenders generally comparable authority with respect to the exercise of such clauses. This part applies to all real property loans, and all lenders making such loans, as those terms are defined in § 191.2 of this part.

§ 191.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Assumed* includes transfers of real property subject to a real property loan by assumptions, installment land sales contracts, wraparound loans, contracts for deed, transfers subject to the mortgage or similar lien, and other like transfers. ''Completed credit application'' has the same meaning as completed application for credit as provided in § 202.2(f) of this title.

(b) *Due-on-sale clause* means a contract provision which authorizes the lender, at its option, to declare immediately due and payable sums secured by the lender's security instrument upon a sale of transfer of all or any part of the real property securing the loan without the lender's prior written consent. For purposes of this definition, a *sale or transfer* means the conveyance of real property of any right, title or interest therein, whether legal or equitable, whether voluntary or involuntary, by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three years, lease-option contract or any other method of conveyance of real property interests.

(c) *Federal savings association* has the same meaning as provided in § 141.11 of this chapter.

(d) *Federal credit union* means a credit union chartered under the Federal Credit Union Act.

(e) *Home* has the same meaning as provided in § 141.14 of this chapter.

(f) *Savings association* has the same meaning as provided in § 161.43 of this chapter.

(g) *Lender* means a person or government agency making a real property loan, including without limitation, individuals, Federal savings associations, state-chartered savings associations, national banks, state-chartered banks and state-chartered mutual savings banks, Federal credit unions, state-chartered credit unions, mortgage banks, insurance companies and finance companies which make real property loans, manufactured-home retailers who extend credit, agencies of the Federal government, any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act, and any assignee or transferee, in whole or part, of any such persons or agencies.

(h) *Loan secured by a lien on real property* means a loan on the security of any instrument (whether a mortgage, deed or trust, or land contract) which makes the interest in real property (whether in fee, or in a leasehold or subleasehold) specific security for the payment of the obligation secured by the instrument.

(i) *Loan secured by a lien on stock in a residential cooperative housing corporation* means a loan on the security of:

(1) A security interest in stock or a membership certificate issued to a tenant stockholder or resident member by a cooperative housing organization; and

(2) An assignment of the borrower's interest in the proprietary lease or occupancy agreement issued by such organization.

(j) *Loan secured by a lien on a residential manufactured home, whether real or personal property,* means a loan made pursuant to an agreement by which the party extending the credit acquires a security interest in the residential manufactured home.

(k) *Loan originated by* a Federal savings association or other lender means any loan for which the lender makes the first advance of credit thereunder, *Provided,* That such lender then held a beneficial interest in the loan, whether as to the whole loan or a portion thereof, and whether or not the loan is later held by or transferred to another lender.

(l) *Real property loan* means any loan, mortgage, advance or credit sale secured by a lien on real property, the stock or membership certificate allocated to a dwelling unit in a cooperative housing corporation, or a residential manufactured home, whether real or personal property.

(m) *Residential manufactured home* has the same meaning as provided in § 190.2(g) of this chapter.

(n) *Reverse mortgage* means an instrument that provides for one or more payments to a homeowner based on accumulated equity. The lender may make payment directly, through the purchase of an annuity through an insurance company, or in any other manner. The loan may be due either on a specific date or when a specified event

occurs, such as the sale of the property or the death of the borrower.

(o) *State* means the several states, Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, the Virgin Islands, and American Samoa.

(p)(1) A *window-period loan* means a real property loan, not originated by a Federal savings association, which was made or assumed during a window-period created by state law and subject to that law, which loan was recorded, at the time of origination or assumption, before October 15, 1982, or within 60 days thereafter (December 14, 1982).

(2) The window-period begins on:

(i) The date a state adopted a law (by means of a constitutional provision or statute) prohibiting the unrestricted exercise of due-on-sale clauses upon outright transfers of property securing loans subject to the state law creating the window-period, or the effective date of a constitutional or statutory provision so adopted, whichever is later; or

(ii) The date on which the highest court of the state rendered a decision prohibiting such unrestricted exercise (or if the highest court has not so decided, the date on which the next highest appellate court rendered a decision resulting in a final judgment which applies statewide), and ends on the earlier of the date such state law prohibition terminated under state law or October 15, 1982.

(3) Categories of state law which create window-periods by prohibiting the unrestricted exercise of due-on-sale clauses upon outright transfers of property securing loans subject to such state law restrictions include laws or judicial decisions which permit the lender to exercise its option under a due-on-sale clause only where:

(i) The lender's security interest or the likelihood of repayment is impaired; or

(ii) The lender is required to accept an assumption of the existing loan without an interest-rate change or with an interest-rate change below the market interest rate currently being offered by the lender on similar loans secured by similar property at the time of the transfer.

§ 191.3 Loans originated by Federal savings associations.

(a) With regard to any real property loan originated or to be originated by a Federal savings association, as a matter of contract between it and the borrower, a Federal savings association continues to have the power to include a due-on-sale clause in its loan instrument.

(b) Except as otherwise provided in § 191.5 of this part with respect to any such loan made on the security of a home occupied or to be occupied by the borrower, exercise by any lender of a due-on-sale clause in a loan originated by a Federal savings association shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and borrower shall at all times be fixed and governed by that contract.

§ 191.4 Loans originated by lenders other than Federal savings associations.

(a) With regard to any real property loan originated by a lender other than a Federal savings association, as a matter of contract between it and the borrower, the lender has the power to include a due on sale clause in its loan instrument.

(b) Except as otherwise provided in paragraph (c) of this section and § 191.5 of this part, the exercise of due-on-sale clauses in loans originated by lenders other than Federal savings associations shall be governed exclusively by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by that contract.

(c)(1) In the case of a window-period loan, the provisions of paragraph (b) of this section shall apply only in the case of a sale or transfer of the property subject to the real property loan and only if such sale or transfer occurs on or after October 15, 1985: *Provided,* That:

(i) With respect to real property loans originated in a state by lenders other than national banks, Federal savings associations, and Federal credit unions, a state may otherwise regulate such contracts by state law enacted prior to October 16, 1985, in which case paragraph (b) of this section shall apply only if such state law so provides; and

(ii) With respect to real property loans originated by national banks and Federal credit unions, the OCC or the National Credit Union Administration Board, respectively, may otherwise regulate such contracts by regulations promulgated prior to October 16, 1985, in which case paragraph (b) of this section shall apply only if such regulation so provides.

(2) A lender may not exercise its options pursuant to a due-on-sale clause contained in a window-period loan in the case of a sale or transfer of property securing such loan where the sale or transfer occurred prior to October 15, 1982.

(d)(1) Prior to the sale or transfer of property securing a window-period loan subject to the provisions of paragraph (c) of this section.

(i) Any lender in the business of making real property loans may require any successor or transferee of the borrower to supply credit information customarily required by the lender in connection with credit applications, to complete its customary credit application, and to meet customary credit standards applied by such lender, at the date of sale or transfer, to the lender's similar loans secured by similar property.

(ii) Any lender not in the business of making loans may require any successor or transferee of the borrower to meet credit standards customarily applied by other similarly situated lenders or sellers in the geographic market within which the transaction occurs, for similar loans secured by similar property, prior to the lender's consent to the transfer.

(2) The lender may exercise a due-on-sale clause in a window-period loan if:

(i) The successor or transferee of the borrower fails to meet the lender's credit standards as set forth in paragraphs (b)(1)(i) and (b)(1)(ii) of this section; or

(ii) Upon transfer of the security property and not later than fifteen days after written request by the lender, the successor or transferee of the borrower fails to provide information requested by the lender pursuant to paragraph (d)(1)(i) or (d)(1)(ii) of this section, to determine whether such successor or transferee of the borrower meets the lender's customary credit standards.

(3) The lender shall, within thirty days of receipt of a completed credit application and any other related information provided by the successor or transferee of the borrower, determine whether such successor or transferee meets the customary credit standards of the lender and provide written notice to the successor or transferee of its decision, and the reasons in the event of a disapproval. Failure of the lender to provide such notice shall preclude the lender from exercise of its due-on-sale clause upon the sale or transfer of the property securing the loan.

(4) The lender's right to exercise a due-on-sale clause pursuant to this paragraph (d)(4) is in addition to any other rights afforded the lender by state law regulating window-period loans with regard to the exercise of due-on-sale clauses and loan assumptions.

§ 191.5 Limitation on exercise of due-on-sale clauses.

(a) *General.* Except as provided in § 191.4(c) and (d)(4) of this part, due-on-sale practices of Federal savings associations and other lenders shall be governed exclusively by the OCC's regulations, in preemption of and without regard to any limitations

imposed by state law on either their inclusion or exercise including, without limitation, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and state law dealing with equitable transfers.

(b) *Specific limitations.* With respect to any loan on the security of a home occupied or to be occupied by the borrower,

(1) A lender shall not (except with regard to a reverse mortgage) exercise its option pursuant to a due-on-sale clause upon:

(i) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property: *Provided,* That such lien or encumbrance is not created pursuant to a contract for deed;

(ii) The creation of a purchase-money security interest for household appliances;

(iii) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(iv) The granting of a leasehold interest which has a term of three years or less and which does not contain an option to purchase (that is, either a lease of more than three years or a lease with an option to purchase will allow the exercise of a due-on-sale clause);

(v) A transfer, in which the transferee is a person who occupies or will occupy the property, which is:

(A) A transfer to a relative resulting from the death of the borrower;

(B) A transfer where the spouse or child(ren) becomes an owner of the property; or

(C) A transfer resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse becomes an owner of the property; or

(vi) A transfer into an inter vivos trust in which the borrower is and remains the beneficiary and occupant of the property, unless, as a condition precedent to such transfer, the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy.

(2) A lender shall not impose a prepayment penalty or equivalent fee when the lender or party acting on behalf of the lender.

(i) Declares by written notice that the loan is due pursuant to a due-on-sale clause or

(ii) Commences a judicial or nonjudicial foreclosure proceeding to enforce a due-on-sale clause or to seek payment in full as a result of invoking such clause.

(3) A lender shall not impose a prepayment penalty or equivalent fee when the lender or party acting on behalf of the lender fails to approve within 30 days the completed credit application of a qualified transferee of the security property to assume the loan in accordance with the terms of the loan, and thereafter the borrower transfers the security property to such transferee and prepays the loan in full within 120 days after receipt by the lender of the completed credit application. For purposes of this paragraph (b)(3), a *qualified transferee* is a person who qualifies for the loan under the lender's applicable underwriting standards and who occupies or will occupy the security property.

(4) A lender waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the lender and the existing borrower's prospective successor in interest agree in writing that the successor in interest will be obligated under the terms of the loan and that interest on sums secured by the lender's security interest will be payable at a rate the lender shall request. Upon such agreement and resultant waiver, a lender shall release the existing borrower from all obligations under the loan instruments, and the lender is deemed to have made a new loan to the existing borrower's successor in interest. The waiver and release apply to all loans secured by homes occupied by borrowers made by a Federal savings association after July 31, 1976, and to all loans secured by homes occupied by borrowers made by other lenders after the effective date of this regulation.

(5) Nothing in paragraph (b)(1) of this section shall be construed to restrict a lender's right to enforce a due-on-sale clause upon the subsequent occurrence of any event which disqualifies a transfer for a previously-applicable exception under that paragraph (b)(1).

(c) *Policy considerations.* Paragraph (b) of this section does not prohibit a lender from requiring, as a condition to an assumption, continued maintenance of mortgage insurance by the existing borrower's successor in interest, whether by endorsement of the existing policy or by entrance into a new contract of insurance.

§ 191.6 Interpretations.

The OCC periodically will publish Interpretations under section 341 of the Garn-St Germain Depository Institutions Act of 1982, Public Law 97–320, 96 Stat. 1469, 1505–1507, in the Federal Register in response to written requests sent to the OCC.

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Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901, 5412(b)(2)(B); 15 U.S.C. 78c, 78*l,* 78m, 78n, 78w.

§ 192.5 What does this part do?

(a) *General.* This part governs how a savings association (''you'') may convert from the mutual to the stock form of ownership. Subpart A of this part governs standard mutual-to-stock conversions. Subpart B of this part governs voluntary supervisory mutual-to-stock conversions. This part supersedes all inconsistent charter and bylaw provisions of Federal savings associations converting to stock form.

(b) *Prescribed forms.* You must use the forms prescribed under this part and provide such information as the appropriate Federal banking agency may require under the forms by regulation or otherwise. The forms required under this part include: Form AC (Application for Conversion); Form PS (Proxy Statement); Form OC (Offering Circular); and Form OF (Order Form). Forms are available on the OCC's web site at *http://www.occ.gov.*

(c) *Waivers.* The appropriate Federal banking agency may waive any requirement of this part or a provision in any prescribed form. To obtain a waiver, you must file a written request with the appropriate Federal banking agency that:

(1) Specifies the requirement(s) or provision(s) you want the appropriate Federal banking agency to waive;

(2) Demonstrates that the waiver is equitable; is not detrimental to you, your account holders, or other savings associations; and is not contrary to the public interest; and

(3) Includes an opinion of counsel demonstrating that applicable law does not conflict with the requirement or provision.

§ 192.10 May I form a holding company as part of my conversion.

You may convert to the stock form of ownership as part of a transaction where you organize a holding company to acquire all of your shares upon their issuance. In such a transaction, your holding company will offer rights to purchase its shares instead of your shares. Regulations of the Board of Governors of the Federal Reserve System address holding company application requirements.

§ 192.15 May I form a charitable organization as part of my conversion?

When you convert to the stock form, you may form a charitable organization. Your contributions to the charitable organization are governed by the requirements of §§ 192.550 through 192.575.

§ 192.20 May I acquire another insured stock depository institution as part of my conversion?

When you convert to stock form, you may acquire for cash or stock another insured depository institution that is already in the stock form of ownership.

§ 192.25 What definitions apply to this part?.

The following definitions apply to this part and the forms prescribed under this part:

Acting in concert has the same meaning as in § 174.2(c) of this chapter. The rebuttable presumptions of § 174.4(d) of this chapter, other than §§ 174.4(d)(1) and (d)(2) of this chapter, apply to the share purchase limitations at §§ 192.355 through 192.395.

Affiliate of, or a person *affiliated with,* a specified person is a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the specified person.

Associate of a person is:

(1) A corporation or organization (other than you or your majority-owned subsidiaries), if the person is a senior officer or partner, or beneficially owns, directly or indirectly, 10 percent or more of any class of equity securities of the corporation or organization.

(2) A trust or other estate, if the person has a substantial beneficial interest in the trust or estate or is a trustee or fiduciary of the trust or estate. For purposes of §§ 192.370, 192.380, 192.385, 192.390, 192.395 and 192.505, a person who has a substantial beneficial interest in your tax-qualified or non-tax-qualified employee stock benefit plan, or who is a trustee or a fiduciary of the plan, is not an associate of the plan. For the purposes of § 192.370, your tax-qualified employee stock benefit plan is not an associate of a person.

(3) Any person who is related by blood or marriage to such person and:

(i) Who lives in the same home as the person; or

(ii) Who is your director or senior officer, or a director or senior officer of your holding company or your subsidiary.

Association members or *members* are persons who, under applicable law, are eligible to vote at the meeting on conversion.

Control (including *controlling, controlled by,* and *under common control with*) means the direct or indirect power to direct or exercise a controlling influence over the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise as described in part 174 of this chapter.

Eligibility record date is the date for determining eligible account holders. The eligibility record date must be at least one year before the date your board of directors adopts the plan of conversion.

Eligible account holders are any persons holding qualifying deposits on the eligibility record date.

IRS is the Internal Revenue Service.

Local community includes:

(1) Every county, parish, or similar governmental subdivision in which you have a home or branch office;

(2) Each county's, parish's, or subdivision's metropolitan statistical area;

(3) All zip code areas in your Community Reinvestment Act assessment area; and

(4) Any other area or category you set out in your plan of conversion, as approved by the appropriate Federal banking agency.

Offer, offer to sell, or *offer for sale* is an attempt or offer to dispose of, or a solicitation of an offer to buy, a security or interest in a security for value. Preliminary negotiations or agreements with an underwriter, or among underwriters who are or will be in privity of contract with you, are not offers, offers to sell, or offers for sale.

Person is an individual, a corporation, a partnership, an association, a joint-stock company, a limited liability company, a trust, an unincorporated organization, or a government or political subdivision of a government.

Proxy soliciting material includes a proxy statement, form of proxy, or other written or oral communication regarding the conversion.

Purchase or *buy* includes every contract to acquire a security or interest in a security for value.

Qualifying deposit is the total balance in an account holder's savings accounts at the close of business on the eligibility or supplemental eligibility record date. Your plan of conversion may provide that only savings accounts with total deposit balances of $50 or more will qualify.

Sale or *sell* includes every contract to dispose of a security or interest in a security for value. An exchange of securities in a merger or acquisition approved by the appropriate Federal banking agency is not a sale.

Savings account is any withdrawable account as defined in § 161.42 of this chapter, including a demand account as defined in § 161.16 of this chapter.

Solicitation and *solicit* is a request for a proxy, whether or not accompanied by or included in a form of proxy; a request to execute, not execute, or revoke a proxy; or the furnishing of a form of proxy or other communication reasonably calculated to cause your members to procure, withhold, or revoke a proxy. Solicitation or solicit does not include providing a form of proxy at the unsolicited request of a member, the acts required to mail communications for members, or ministerial acts performed on behalf of a person soliciting a proxy.

Subscription offering is the offering of shares through nontransferable subscription rights to:

(1) Eligible account holders under § 192.355;

(2) Tax-qualified employee stock ownership plans under § 192.380;

(3) Supplemental eligible account holders under § 192.355; and

(4) Other voting members under § 192.365.

Supplemental eligibility record date is the date for determining supplemental eligible account holders. The supplemental eligibility record date is the last day of the calendar quarter before the appropriate Federal banking agency approves your conversion and will only occur if such agency has not approved your conversion within 15 months after the eligibility record date.

Supplemental eligible account holders are any persons, except your officers, directors, and their associates,

holding qualifying deposits on the supplemental eligibility record date.

Tax-qualified employee stock benefit plan is any defined benefit plan or defined contribution plan, such as an employee stock ownership plan, stock bonus plan, profit-sharing plan, or other plan, and a related trust, that is qualified under section 401 of the Internal Revenue Code (26 U.S.C. 401).

Underwriter is any person who purchases any securities from you with a view to distributing the securities, offers or sells securities for you in connection with the securities' distribution, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking. Underwriter does not include a person whose interest is limited to a usual and customary distributor's or seller's commission from an underwriter or dealer.

Subpart A—Standard Conversions

Prior to Conversion

§ 192.100 What must I do before a conversion?

(a) Your board, or a subcommittee of your board, must meet with the appropriate Federal banking agency before you pass your plan of conversion. The meeting may occur at the appropriate Federal banking agency or your offices at your option. At that meeting you must provide the appropriate Federal banking agency with a written strategic plan that outlines the objectives of the proposed conversion and the intended use of the conversion proceeds.

(b) You should also consult with the appropriate Federal banking agency before you file your application for conversion. The appropriate Federal banking agency will discuss the information that you must include in the application for conversion, general issues that you may confront in the conversion process, and any other pertinent issues.

§ 192.105 What information must I include in my business plan?

(a) Prior to filing an application for conversion, you must adopt a business plan reflecting your intended plans for deployment of the proposed conversion proceeds. Your business plan is required, under § 192.150, to be included in your conversion application. At a minimum, your business plan must address:

(1) Your projected operations and activities for three years following the conversion. You must describe how you will deploy the conversion proceeds at the converted savings association (and holding company, if applicable), what opportunities are available to reasonably achieve your planned deployment of conversion proceeds in your proposed market areas, and how your deployment will provide a reasonable return on investment commensurate with investment risk, investor expectations, and industry norms, by the final year of the business plan. You must include three years of projected financial statements. The business plan must provide that the converted savings association must retain at least 50 percent of the net conversion proceeds. The appropriate Federal banking agency may require that a larger percentage of proceeds remain in the institution.

(2) Your plan for deploying conversion proceeds to meet credit and lending needs in your proposed market areas. The appropriate Federal banking agencies strongly discourage business plans that provide for a substantial investment in mortgage securities or other securities, except as an interim measure to facilitate orderly, prudent deployment of proceeds during the three years following the conversion, or as part of a properly managed leverage strategy.

(3) The risks associated with your plan for deployment of conversion proceeds, and the effect of this plan on management resources, staffing, and facilities.

(4) The expertise of your management and board of directors, or that you have planned for adequate staffing and controls to prudently manage the growth, expansion, new investment, and other operations and activities proposed in your business plan.

(b) You may not project returns of capital or special dividends in any part of the business plan. A newly converted company may not plan on stock repurchases in the first year of the business plan.

§ 192.110 Who must review my business plan?

(a) Your chief executive officer and members of the board of directors must review, and at least two-thirds of your board of directors must approve, the business plan.

(b) Your chief executive officer and at least two-thirds of the board of directors must certify that the business plan accurately reflects the intended plans for deployment of conversion proceeds, and that any new initiatives reflected in the business plan are reasonably achievable. You must submit these certifications with your business plan, as part of your conversion application under § 192.150.

§ 192.115 How will the appropriate Federal banking agency review my business plan?

(a) The appropriate Federal banking agency will review your business plan to determine that it demonstrates a safe and sound deployment of conversion proceeds, as part of its review of your conversion application. In making its determination, the appropriate Federal banking agency will consider how you have addressed the applicable factors of § 192.105. No single factor will be determinative.

(b) If you are a Federal savings association, you must file your business plan with the appropriate OCC licensing office. If you are a state savings association, you must file your business plan with the appropriate FDIC region. The appropriate Federal banking agency may request additional information, if necessary, to support its determination under paragraph (a) of this section. You must file your business plan as a confidential exhibit to the Form AC.

(c) If the appropriate Federal banking agency approves your application for conversion and you complete your conversion, you must operate within the parameters of your business plan. You must obtain the prior written approval of the appropriate Federal banking agency for any material deviations from your business plan.

§ 192.120 May I discuss my plans to convert with others?

(a) You may discuss information about your conversion with individuals that you authorize to prepare documents for your conversion.

(b) Except as permitted under paragraph (a) of this section, you must keep all information about your conversion confidential until your board of directors adopts your plan of conversion.

(c) If you violate this section, the appropriate Federal banking agency may require you to take remedial action. For example, the appropriate Federal banking agency may require you to take any or all of the following actions:

(1) Publicly announce that you are considering a conversion;

(2) Set an eligibility record date acceptable to the appropriate Federal banking agency;

(3) Limit the subscription rights of any person who violates or aids a violation of this section; or

(4) Take any other action to assure that your conversion is fair and equitable.

Plan of Conversion

§ 192.125 Must my board of directors adopt a plan of conversion?

Prior to filing an application for conversion, your board of directors must adopt a plan of conversion that conforms to §§ 192.320 through 192.485 and 192.505. Your board of directors must adopt the plan by at least a two-thirds vote. Your plan of conversion is required, under § 192.150, to be included in your conversion application.

§ 192.130 What must I include in my plan of conversion?

You must include the information included in §§ 192.320 through 192.485 and 192.505 in your plan of conversion. The appropriate Federal banking agency may require you to delete or revise any provision in your plan of conversion if it determines the provision is inequitable; is detrimental to you, your account holders, or other savings associations; or is contrary to public interest.

§ 192.135 How do I notify my members that my board of directors approved a plan of conversion?

(a) *Notice.* You must promptly notify your members that your board of directors adopted a plan of conversion and that a copy of the plan is available for the members' inspection in your home office and in your branch offices. You must mail a letter to each member or publish a notice in the local newspaper in every local community where you have an office. You may also issue a press release. The appropriate Federal banking agency may require broader publication, if necessary, to ensure adequate notice to your members.

(b) *Contents of notice.* You may include any of the following statements and descriptions in your letter, notice, or press release.

(1) Your board of directors adopted a proposed plan to convert from a mutual to a stock savings institution.

(2) You will send your members a proxy statement with detailed information on the proposed conversion before you convene a members' meeting to vote on the conversion.

(3) Your members will have an opportunity to approve or disapprove the proposed conversion at a meeting. At least a majority of the eligible votes must approve the conversion.

(4) You will not vote existing proxies to approve or disapprove the conversion. You will solicit new proxies for voting on the proposed conversion.

(5) The appropriate Federal banking agency, and in the case of a state-chartered savings association, the appropriate state regulator, must approve the conversion before the conversion will be effective. Your members will have an opportunity to file written comments, including objections and materials supporting the objections, with the appropriate Federal banking agency.

(6) The IRS must issue a favorable tax ruling, or a tax expert must issue an appropriate tax opinion, on the tax consequences of your conversion before the appropriate Federal banking agency will approve the conversion. The ruling or opinion must indicate the conversion will be a tax-free reorganization.

(7) The appropriate Federal banking agency, and in the case of a state-chartered savings association, the appropriate state regulator, might not approve the conversion, and the IRS or a tax expert might not issue a favorable tax ruling or tax opinion.

(8) Savings account holders will continue to hold accounts in the converted savings association with the same dollar amounts, rates of return, and general terms as existing deposits. FDIC will continue to insure the accounts.

(9) Your conversion will not affect borrowers' loans, including the amount, rate, maturity, security, and other contractual terms.

(10) Your business of accepting deposits and making loans will continue without interruption.

(11) Your current management and staff will continue to conduct current services for depositors and borrowers under current policies and in existing offices.

(12) You may continue to be a member of the Federal Home Loan Bank System.

(13) You may substantively amend your proposed plan of conversion before the members' meeting.

(14) You may terminate the proposed conversion.

(15) After the appropriate Federal banking agency, and in the case of a state-chartered savings association, the appropriate state regulator, approves the proposed conversion, you will send proxy materials providing additional information. After you send proxy materials, members may telephone or write to you with additional questions.

(16) The proposed record date for determining the eligible account holders who are entitled to receive subscription rights to purchase your shares.

(17) A brief description of the circumstances under which supplemental eligible account holders will receive subscription rights to purchase your shares.

(18) A brief description of how voting members may participate in the conversion.

(19) A brief description of how directors, officers, and employees will participate in the conversion.

(20) A brief description of the proposed plan of conversion.

(21) The par value (if any) and approximate number of shares you will issue and sell in the conversion.

(c) *Other requirements.* (1) You may not solicit proxies, provide financial statements, describe the benefits of conversion, or estimate the value of your shares upon conversion in the letter, notice, or press release.

(2) If you respond to inquiries about the conversion, you may address only the matters listed in paragraph (b) of this section.

§ 192.140 May I amend my plan of conversion?

You may amend your plan of conversion before you solicit proxies. After you solicit proxies, you may amend your plan of conversion only if the appropriate Federal banking agency concurs.

Filing Requirements

§ 192.150 What must I include in my application for conversion?

(a) Your application for conversion must include all of the following information.

(1) Your plan of conversion.

(2) Pricing materials meeting the requirements of § 192.200(b).

(3) Proxy soliciting materials under § 192.270, including:

(i) A preliminary proxy statement with signed financial statements;

(ii) A form of proxy meeting the requirements of § 192.255; and

(iii) Any additional proxy soliciting materials, including press releases, personal solicitation instructions, radio or television scripts that you plan to use or furnish to your members, and a legal opinion indicating that any marketing materials comply with all applicable securities laws.

(4) An offering circular described in § 192.300.

(5) The documents and information required by Form AC. You may obtain Form AC from the appropriate Federal banking agency.

(6) Where indicated, written consents, signed and dated, of any accountant, attorney, investment banker, appraiser, or other professional who prepared, reviewed, passed upon, or certified any statement, report, or valuation for use. *See* Form AC, instruction B(7).

(7) Your business plan, submitted as a separately bound, confidential exhibit. *See* § 192.160.

(8) Any additional information that the appropriate Federal banking agency requests.

(b) The appropriate Federal banking agency will not accept for filing, and will return, any application for conversion that is improperly executed, materially deficient, substantially incomplete, or that provides for unreasonable conversion expenses.

§ 192.155 How do I file my application for conversion?

If you are a Federal savings association, you must file an original and at least one conformed copy of Form AC with the appropriate OCC licensing office. If you are a state savings association, you must file all copies of your application with the appropriate FDIC region.

§ 192.160 May I keep portions of my application for conversion confidential?

(a) The appropriate Federal banking agency makes all filings under this part available to the public, but may keep portions of your application for conversion confidential under paragraph (b) of this section.

(b) You may request that the appropriate Federal banking agency keep portions of your application confidential. To do so, you must separately bind and clearly designate as ''confidential'' any portion of your application for conversion that you deem confidential. You must provide a written statement specifying the grounds supporting your request for confidentiality. The appropriate Federal banking agency will not treat as confidential the portion of your application describing how you plan to meet your Community Reinvestment Act (CRA) objectives. The CRA portion of your application may not incorporate by reference information contained in the confidential portion of your application.

(c) The appropriate Federal banking agency will determine whether confidential information must be made available to the public under 5 U.S.C. 552 and part 4 of this chapter or 12 CFR 309. The appropriate Federal banking agency will advise you before it makes information you designated as ''confidential'' available to the public.

§ 192.165 How do I amend my application for conversion?

To amend your application for conversion, you must:

(a) File an amendment with an appropriate facing sheet;

(b) Number each amendment consecutively;

(c) Respond to all issues raised by the appropriate Federal banking agency; and

(d) Demonstrate that the amendment conforms to all applicable regulations.

Notice of Filing of Application and Comment Process

§ 192.180 How do I notify the public that I filed an application for conversion?

(a) You must publish a public notice of the application in accordance with the procedures in subpart B of part 116 of this chapter. You must simultaneously prominently post the notice in your home office and all branch offices.

(b) Promptly after publication, you must file any public notice and an affidavit of publication from each publisher. If you are a Federal savings association, you must file the affidavit and two copies of any public notice with the appropriate OCC licensing office. If you are a state savings association, you must file all copies with the appropriate FDIC region.

(c) If the appropriate Federal banking agency does not accept your application for conversion under § 192.200 and requires you to file a new application, you must publish and post a new notice and allow an additional 30 days for comment.

§ 192.185 How may a person comment on my application for conversion?

Commenters may submit comments on your application in accordance with the procedures in subpart C of part 116 of this chapter. A commenter must file the original and one copy of any comments with the appropriate OCC licensing office for Federal savings association applications and with the appropriate FDIC region for state savings association applications.

Agency Review of the Application for Conversion

§ 192.200 What actions may the appropriate Federal banking agency take on my application?

(a) The appropriate Federal banking agency may approve your application for conversion only if:

(1) Your conversion complies with this part;

(2) You will meet your regulatory capital requirements under part 167 of this chapter after the conversion; and

(3) Your conversion will not result in a taxable reorganization under the Internal Revenue Code of 1986, as amended.

(b) The appropriate Federal banking agency will review the appraisal required by § 192.150(a)(2) in determining whether to approve your application. The appropriate Federal banking agency will review the appraisal under the following requirements.

(1) Independent persons experienced and expert in corporate appraisal, and acceptable to the appropriate Federal banking agency, must prepare the appraisal report.

(2) An affiliate of the appraiser may serve as an underwriter or selling agent, if you ensure that the appraiser is separate from the underwriter or selling agent affiliate and the underwriter or selling agent affiliate does not make recommendations or affect the appraisal.

(3) The appraiser may not receive any fee in connection with the conversion other than for appraisal services.

(4) The appraisal report must include a complete and detailed description of the elements of the appraisal, a justification for the appraisal methodology, and sufficient support for the conclusions.

(5) If the appraisal is based on a capitalization of your pro forma income, it must indicate the basis for determining the income to be derived from the sale of shares, and demonstrate that the earnings multiple used is appropriate, including future earnings growth assumptions.

(6) If the appraisal is based on a comparison of your shares with outstanding shares of existing stock associations, the existing stock associations must be reasonably comparable in size, market area, competitive conditions, risk profile, profit history, and expected future earnings.

(7) The appropriate Federal banking agency may decline to process the application for conversion and deem it materially deficient or substantially incomplete if the initial appraisal report is materially deficient or substantially incomplete.

(8) You may not represent or imply that the appropriate Federal banking agency approved the appraisal.

(c) The appropriate Federal banking agency will review your compliance record under part 195 of this chapter and your business plan to determine how you will serve the convenience and needs of your communities after the conversion.

(1) Based on this review, the appropriate Federal banking agency may approve your application, deny your application, or approve your application on the condition that you will improve your CRA performance or that you will address the particular credit or lending needs of the communities that you will serve.

(2) The appropriate Federal banking agency may deny your application if your business plan does not demonstrate that your proposed use of conversion proceeds will help you to meet the credit and lending needs of the communities that you will serve.

(d) The appropriate Federal banking agency may request that you amend your application if further explanation is necessary, material is missing, or material must be corrected.

(e) The appropriate Federal banking agency will deny your application if the application does not meet the requirements of this subpart, unless The appropriate Federal banking agency waives the requirement under § 192.5(c).

§ 192.205 May a court review the appropriate Federal banking agency's final action on my conversion?

(a) Any person aggrieved by the appropriate Federal banking agency's final action on your application for conversion may ask the court of appeals of the United States for the circuit in which the principal office or residence of such person is located, or the U.S. Court of Appeals for the District of Columbia Circuit, to review the action under 12 U.S.C. 1464(i)(2)(B).

(b) To obtain court review of the action, this statute requires the aggrieved person to file a written petition requesting that the court modify, terminate, or set aside the final appropriate Federal banking agency action. The aggrieved person must file the petition with the court within the later of 30 days after the appropriate Federal agency publishes notice of its final action in the Federal Register or 30 days after you mail the proxy statement to your members under § 192.235.

Vote by Members

§ 192.225 Must I submit the plan of conversion to my members for approval?

(a) After the appropriate Federal banking agency approves your plan of conversion, you must submit your plan of conversion to your members for approval. You must obtain this approval at a meeting of your members, which may be a special or annual meeting, unless you are a state-chartered savings association and state law requires you to obtain approval at an annual meeting.

(b) Your members must approve your plan of conversion by a majority of the total outstanding votes, unless you are a state-chartered savings association and state law prescribes a higher percentage.

(c) Your members may vote in person or by proxy.

(d) You may notify eligible account holders or supplemental eligible account holders who are not voting members of your proposed conversion. You may include only the information in § 192.135 in your notice.

§ 192.230 Who is eligible to vote?

You determine members' eligibility to vote by setting a voting record date. You must set a voting record date that is not more than 60 days nor less than 20 days before your meeting, unless you are a state-chartered savings association and state law requires a different voting record date.

§ 192.235 How must I notify my members of the meeting?

(a) You must notify your members of the meeting to consider your conversion by sending the members a proxy statement cleared by the appropriate Federal banking agency.

(b) You must notify your members 20 to 45 days before your meeting, unless you are a state-chartered savings association and state law requires a different notice period.

(c) You must also notify each beneficial holder of an account held in a fiduciary capacity:

(1) If you are a Federal savings association, and the name of the beneficial holder is disclosed on your records; or

(2) If you are a state-chartered association and the beneficial holder possesses voting rights under state law.

§ 192.240 What must I submit after the members' meeting?

(a) Promptly after the members' meeting, you must file all of the following information with the appropriate OCC licensing office if you are a Federal savings association, and with the appropriate FDIC region if you are a state savings association.

(1) A certified copy of each adopted resolution on the conversion.

(2) The total votes eligible to be cast.

(3) The total votes represented in person or by proxy.

(4) The total votes cast in favor of and against each matter.

(5) The percentage of votes necessary to approve each matter.

(6) An opinion of counsel that you conducted the members' meeting in compliance with all applicable state or Federal laws and regulations.

(b) Promptly after completion of the conversion, you must submit an opinion of counsel that you complied with all laws applicable to the conversion.

Proxy Solicitation

§ 192.250 Who must comply with these proxy solicitation provisions?

(a) You must comply with these proxy solicitation provisions when you provide proxy solicitation material to members for the meeting to vote on your plan of conversion.

(b) Your members must comply with these proxy solicitation provisions when they provide proxy solicitation materials to members for the meeting to vote on your conversion, pursuant to § 192.280, except where:

(1) The member solicits 50 people or fewer and does not solicit proxies on your behalf; or

(2) The member solicits proxies through newspaper advertisements after your board of directors adopts the plan of conversion. Any newspaper advertisements may include only the following information:

(i) Your name;

(ii) The reason for the advertisement;

(iii) The proposal or proposals to be voted upon;

(iv) Where a member may obtain a copy of the proxy solicitation material; and

(v) A request for your members to vote at the meeting.

§ 192.255 What must the form of proxy include?

The form of proxy must include all of the following:

(a) A statement in bold face type stating that management is soliciting the proxy.

(b) Blank spaces where the member must date and sign the proxy.

(c) Clear and impartial identification of each matter or group of related matters that members will vote upon. You must include any proposed charitable contribution as an item to be voted on separately.

(d) The phrase ''Revocable Proxy'' in bold face type (at least 18 point).

(e) A description of any charter or state law requirement that restricts or conditions votes by proxy.

(f) An acknowledgment that the member received a proxy statement before he or she signed the form of proxy.

(g) The date, time, and the place of the meeting, when available.

(h) A way for the member to specify by ballot whether he or she approves or disapproves of each matter that members will vote upon.

(i) A statement that management will vote the proxy in accordance with the member's specifications.

(j) A statement in bold face type indicating how management will vote the proxy if the member does not specify a choice for a matter.

§ 192.260 May I use previously executed proxies?

You may not use previously executed proxies for the plan of conversion vote.

If members consider your plan of conversion at an annual meeting, you may vote proxies obtained through other proxy solicitations only on matters not related to your plan of conversion.

§ 192.265 How may I use proxies executed under this part?

You may vote a proxy obtained under this part on matters that are incidental to the conduct of the meeting. You may not vote a proxy obtained under this subpart at any meeting other than the meeting (or any adjournment of the meeting) to vote on your plan of conversion.

§ 192.270 What must I include in my proxy statement?

(a) *Content requirements.* You must prepare your proxy statement in compliance with this part and Form PS.

(b) *Other requirements.* (1) The appropriate Federal banking agency will review your proxy solicitation material when it reviews the application for conversion and will clear the proxy solicitation material.

(2) You must provide a cleared written proxy statement to your members before or at the same time you provide any other soliciting material. You must mail cleared proxy solicitation material to your members within ten days after the appropriate Federal banking agency clears the solicitation.

§ 192.275 How do I file revised proxy materials?

(a) You must file revised proxy materials as an amendment to your application for conversion. *See* § 192.155 for where to file.

(b) To revise your proxy solicitation materials, you must file:

(1) Seven copies of your revised proxy materials as required by Form PS;

(2) Seven copies of your revised form of proxy, if applicable; and

(3) Seven copies of any additional proxy solicitation material subject to § 192.270.

(c) You must mark four of the seven required copies to clearly indicate changes from the prior filing.

(d) You must file seven definitive copies of all proxy solicitation material, in the form in which you furnish the material to your members. You must file no later than the date that you send or give the proxy solicitation material to your members. You must indicate the date that you will release the materials.

(e) Unless the appropriate Federal banking agency requests you to do so, you do not have to file copies of replies to inquiries from your members or copies of communications that merely request members to sign and return proxy forms.

§ 192.280 Must I mail a member's proxy solicitation material?

(a) You must mail the member's cleared proxy solicitation material if:

(1) Your board of directors adopted a plan of conversion;

(2) A member requests in writing that you mail the proxy solicitation material;

(3) The appropriate Federal banking agency has cleared the member's proxy solicitation; and

(4) The member agrees to defray your reasonable expenses.

(b) As soon as practicable after you receive a request under paragraph (a) of this section, you must mail or otherwise furnish the following information to the member:

(1) The approximate number of members that you solicited or will solicit, or the approximate number of members of any group of account holders that the member designates; and

(2) The estimated cost of mailing the proxy solicitation material for the member.

(c) You must mail cleared proxy solicitation material to the designated members promptly after the member furnishes the materials, envelopes (or other containers), and postage (or payment for postage) to you.

(d) You are not responsible for the content of a member's proxy solicitation material.

(e) A member may furnish other members its own proxy solicitation material, cleared by the appropriate Federal banking agency, subject to the rules in this section.

§ 192.285 What solicitations. are prohibited?

(a) *False or misleading statements.* (1) No one may use proxy solicitation material for the members' meeting if the material contains any statement which, considering the time and the circumstances of the statement:

(i) Is false or misleading with respect to any material fact;

(ii) Omits any material fact that is necessary to make the statements not false or misleading; or

(iii) Omits any material fact that is necessary to correct a statement in an earlier communication that has become false or misleading.

(2) No one may represent or imply that the appropriate Federal banking agency determined that the proxy solicitation material is accurate, complete, not false or not misleading, or passed upon the merits of or approved any proposal.

(b) *Other prohibited solicitations.* No person may solicit:

(1) An undated or post-dated proxy;

(2) A proxy that states it will be dated after the date it is signed by a member;

(3) A proxy that is not revocable at will by the member; or

(4) A proxy that is part of another document or instrument.

§ 192.290 What will the appropriate Federal banking agency do if a solicitation violates these prohibitions?

(a) If a solicitation violates § 192.285, the appropriate Federal banking agency may require remedial measures, including:

(1) Correction of the violation by a retraction and a new solicitation;

(2) Rescheduling the members' meeting; or

(3) Any other actions necessary to ensure a fair vote.

(b) The appropriate Federal banking agency may also bring an enforcement action against the violator.

§ 192.295 Will the appropriate Federal banking agency require me to re-solicit proxies?

If you amend your application for conversion, the appropriate Federal banking agency may require you to re-solicit proxies for your members' meeting as a condition of approval of the amendment.

Offering Circular

§ 192.300 What must happen before the appropriate Federal banking agency declares my offering circular effective?

(a) You must prepare and file your offering circular with the Securities and Corporate Practices Division of the OCC if you are a Federal savings association and with the appropriate FDIC region if you are a state savings association, in compliance with this part and Form OC and, where applicable, part 197 of this chapter. File your offering circular in accordance with the procedures in section 192.155.

(b) You must condition your stock offering upon member approval of your plan of conversion.

(c) The appropriate Federal banking agency will review the Form OC and may comment on the included disclosures and financial statements.

(d) You must file any revised offering circular, final offering circular, and any post-effective amendment to the final offering circular in accordance with the procedures in section 192.155.

(e) The appropriate Federal banking agency will not approve the adequacy or accuracy of the offering circular or the disclosures.

(f) After you satisfactorily address the appropriate Federal banking agency's concerns, you must request the

appropriate Federal banking agency to declare your Form OC effective for a time period. The time period may not exceed the maximum time period for the completion of the sale of all of your shares under § 192.400.

§ 192.305 When may I distribute the offering circular?

(a) You may distribute a preliminary offering circular at the same time as or after you mail the proxy statement to your members.

(b) You may not distribute an offering circular until the appropriate Federal banking agency declares it effective. You must distribute the offering circular in accordance with this part.

(c) You must distribute your offering circular to persons listed in your plan of conversion within 10 days after the appropriate Federal banking agency declares it effective.

§ 192.310 When must I file a post-effective amendment to the offering circular?

(a) You must file a post-effective amendment to the offering circular with the appropriate Federal banking agency when a material event or change of circumstance occurs.

(b) After the appropriate Federal banking agency declares the post-effective amendment effective, you must immediately deliver the amendment to each person who subscribed for or ordered shares in the offering.

(c) Your post-effective amendment must indicate that each person may increase, decrease, or rescind their subscription or order.

(d) The post-effective offering period must remain open no less than 10 days nor more than 20 days, unless the appropriate Federal banking agency approves a longer rescission period.

Offers and Sales of Stock

§ 192.320 Who has priority to purchase my conversion shares?

You must offer to sell your shares in the following order:

(a) Eligible account holders.

(b) Tax-qualified employee stock ownership plans.

(c) Supplemental eligible account holders.

(d) Other voting members who have subscription rights.

(e) Your community, your community and the general public, or the general public.

§ 192.325 When may I offer to sell my conversion shares?

(a) You may offer to sell your conversion shares after the appropriate Federal banking agency approves your conversion, clears your proxy statement, and declares your offering circular effective.

(b) The offer may commence at the same time you start the proxy solicitation of your members.

§ 192.330 How do I price my conversion shares?

(a) You must sell your conversion shares at a uniform price per share and at a total price that is equal to the estimated pro forma market value of your shares after you convert.

(b) The maximum price must be no more than 15 percent above the midpoint of the estimated price range in your offering circular.

(c) The minimum price must be no more than 15 percent below the midpoint of the estimated price range in your offering circular.

(d) If the appropriate Federal banking agency permits, you may increase the maximum price of conversion shares sold. The maximum price, as adjusted, must be no more than 15 percent above the maximum price computed under paragraph (b) of this section.

(e) The maximum price must be between $5 and $50 per share.

(f) You must include the estimated price in any preliminary offering circular.

§ 192.335 How do I sell my conversion shares?

(a) You must distribute order forms to all eligible account holders, supplemental eligible account holders, and other voting members to enable them to subscribe for the conversion shares they are permitted under the plan of conversion. You may either send the order forms with your offering circular or after you distribute your offering circular.

(b) You may sell your conversion shares in a community offering, a public offering, or both. You may begin the community offering, the public offering, or both at any time during the subscription offering or upon conclusion of the subscription offering.

(c) You may pay underwriting commissions (including underwriting discounts). The appropriate Federal banking agency may object to the payment of unreasonable commissions. You may reimburse an underwriter for accountable expenses in a subscription offering if the public offering is limited. If no public offering occurs, you may pay an underwriter a consulting fee. The appropriate Federal banking agency may object to the payment of unreasonable consulting fees.

(d) If you conduct the community offering, the public offering, or both at the same time as the subscription offering, you must fill all subscription orders first.

(e) You must prepare your order form in compliance with this part and Form OF.

§ 192.340 What sales practices are prohibited?

(a) In connection with offers, sales, or purchases of conversion shares under this part, you and your directors, officers, agents, or employees may not:

(1) Employ any device, scheme, or artifice to defraud;

(2) Obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary to make the statements, in light of the circumstances under which they were made, not misleading; or

(3) Engage in any act, transaction, practice, or course of business that operates or would operate as a fraud or deceit upon a purchaser or seller.

(b) During your conversion, no person may:

(1) Transfer, or enter into any agreement or understanding to transfer, the legal or beneficial ownership of subscription rights for your conversion shares or the underlying securities to the account of another;

(2) Make any offer, or any announcement of an offer, to purchase any of your conversion shares from anyone but you; or

(3) Knowingly acquire more than the maximum purchase allowable under your plan of conversion.

(c) The restrictions in paragraphs (b)(1) and (b)(2) of this section do not apply to offers for more than 10 percent of any class of conversion shares by:

(1) An underwriter or a selling group, acting on your behalf, that makes the offer with a view toward public resale; or

(2) One or more of your tax-qualified employee stock ownership plans so long as the plan or plans do not beneficially own more than 25 percent of any class of your equity securities in the aggregate.

(d) If any person is found to have violated the restrictions in paragraphs (b)(1) and (b)(2) of this section, they may face prosecution or other legal action.

§ 192.345 How may a subscriber pay for my conversion shares?

(a) A subscriber may purchase conversion shares with cash, by a withdrawal from a savings account, or a withdrawal from a certificate of deposit. If a subscriber purchases shares by a withdrawal from a certificate of deposit, you may not assess a penalty for the withdrawal.

(b) You may not extend credit to any person to purchase your conversion shares.

§ 192.350 Must I pay interest on payments for conversion shares?

(a) You must pay interest from the date you receive a payment for conversion shares until the date you complete or terminate the conversion. You must pay interest at no less than your passbook rate for amounts paid in cash, check, or money order.

(b) If a subscriber withdraws money from a savings account to purchase conversion shares, you must pay interest on the payment until you complete or terminate the conversion as if the withdrawn amount remained in the account.

(c) If a depositor fails to maintain the applicable minimum balance requirement because he or she withdraws money from a certificate of deposit to purchase conversion shares, you may cancel the certificate and pay interest at no less than your passbook rate on any remaining balance.

§ 192.355 What subscription rights must I give to each eligible account holder and each supplemental eligible account holder?

(a) You must give each eligible account holder subscription rights to purchase conversion shares in an amount equal to the greater of:

(1) The maximum purchase limitation established for the community offering or the public offering under § 192.395;

(2) One-tenth of one percent of the total stock offering; or

(3) Fifteen times the following number: The total number of conversion shares that you will issue, multiplied by the following fraction. The numerator is the total qualifying deposit of the eligible account holder. The denominator is the total qualifying deposits of all eligible account holders. You must round down the product of this multiplied fraction to the next whole number.

(b) You must give subscription rights to purchase shares to each supplemental eligible account holder in the same amount as described in paragraph (a) of this section, except that you must compute the fraction described in paragraph (a)(3) of this section as follows: The numerator is the total qualifying deposit of the supplemental eligible account holder. The denominator is the total qualifying deposits of all supplemental eligible account holders.

§ 192.360 Are my officers, directors, and their associates eligible account holders?

Your officers, directors, and their associates may be eligible account holders. However, if an officer, director, or his or her associate receives subscription rights based on increased deposits in the year before the eligibility record date, you must subordinate subscription rights for these deposits to subscription rights exercised by other eligible account holders.

§ 192.365 May other voting members purchase conversion shares in the conversion?

(a) You must give rights to purchase your conversion shares in the conversion to voting members who are neither eligible account holders nor supplemental eligible account holders. You must allocate rights to each voting member that are equal to the greater of:

(1) The maximum purchase limitation established for the community offering and the public offering under § 192.395; or

(2) One-tenth of one percent of the total stock offering.

(b) You must subordinate the voting members' rights to the rights of eligible account holders, tax-qualified employee stock ownership plans, and supplemental eligible account holders.

§ 192.370 Does the appropriate Federal banking agency limit the aggregate purchases by officers, directors, and their associates?

(a) When you convert, your officers, directors, and their associates may not purchase, in the aggregate, more than the following percentage of your total stock offering:

Institution size	Officer and director purchases (percent)
$50,000,000 or less	35
$50,000,001–100,000,000	34
$100,000,001–150,000,000	33
$150,000,001–200,000,000	32
$200,000,001–250,000,000	31
$250,000,001–300,000,000	30
$300,000,001–350,000,000	29
$350,000,001–400,000,000	28
$400,000,001–450,000,000	27
$450,000,001–500,000,000	26
Over $500,000,000	25

(b) The purchase limitations in this section do not apply to shares held in tax-qualified employee stock benefit plans that are attributable to your officers, directors, and their associates.

§ 192.375 How do I allocate my conversion shares if my shares are oversubscribed?

(a) If your conversion shares are oversubscribed by your eligible account holders, you must allocate shares among the eligible account holders so that each, to the extent possible, may purchase 100 shares.

(b) If your conversion shares are oversubscribed by your supplemental eligible account holders, you must allocate shares among the supplemental eligible account holders so that each, to the extent possible, may purchase 100 shares.

(c) If a person is an eligible account holder and a supplemental eligible account holder, you must include the eligible account holder's allocation in determining the number of conversion shares that you may allocate to the person as a supplemental eligible account holder.

(d) For conversion shares that you do not allocate under paragraphs (a) and (b) of this section, you must allocate the shares among the eligible or supplemental eligible account holders equitably, based on the amounts of qualifying deposits. You must describe this method of allocation in your plan of conversion.

(e) If shares remain after you have allocated shares as provided in paragraphs (a) and (b) of this section, and if your voting members oversubscribe, you must allocate your conversion shares among those members equitably. You must describe

the method of allocation in your plan of conversion.

§ 192.380 May my employee stock ownership plan purchase conversion shares?

(a) Your tax-qualified employee stock ownership plan may purchase up to 10 percent of the total offering of your conversion shares.

(b) If the appropriate Federal banking agency approves a revised stock valuation range as described in § 192.330(e), and the final conversion stock valuation range exceeds the former maximum stock offering range, you may allocate conversion shares to your tax-qualified employee stock ownership plan, up to the 10 percent limit in paragraph (a) of this section.

(c) If your tax-qualified employee stock ownership plan is not able to or chooses not to purchase stock in the offering, it may, with prior appropriate Federal banking agency approval and appropriate disclosure in your offering circular, purchase stock in the open market, or purchase authorized but unissued conversion shares.

(d) You may include stock contributed to a charitable organization in the conversion in the calculation of the total offering of conversion shares under paragraphs (a) and (b) of this section, unless the appropriate Federal banking agency objects on supervisory grounds.

§ 192.385 May I impose any purchase limitations?

(a) You may limit the number of shares that any person, group of associated persons, or persons otherwise acting in concert, may subscribe to up to five percent of the total stock sold.

(b) If you set a limit of five percent under paragraph (a) of this section, you may modify that limit with appropriate Federal banking agency approval to provide that any person, group of associated persons, or persons otherwise acting in concert subscribing for five percent, may purchase between five and ten percent as long as the aggregate amount that the subscribers purchase does not exceed 10 percent of the total stock offering.

(c) You may require persons exercising subscription rights to purchase a minimum number of conversion shares. The minimum number of shares must equal the lesser of the number of shares obtained by a $500 subscription or 25 shares.

(d) In setting purchase limitations under this section, you may not aggregate conversion shares attributed to a person in your tax-qualified employee stock ownership plan with shares purchased directly by, or otherwise attributable to, that person.

§ 192.390 Must I provide a purchase preference to persons in my local community?

(a) In your subscription offering, you may give a purchase preference to eligible account holders, supplemental eligible account holders, and voting members residing in your local community.

(b) In your community offering, you must give a purchase preference to natural persons residing in your local community.

§ 192.395 What other conditions apply when I offer conversion shares in a community offering, a public offering, or both?

(a) You must offer and sell your stock to achieve a widespread distribution of the stock.

(b) If you offer shares in a community offering, a public offering, or both, you must first fill orders for your stock up to a maximum of two percent of the conversion stock on a basis that will promote a widespread distribution of stock. You must allocate any remaining shares on an equal number of shares per order basis until you fill all orders.

Completion of the Offering

§ 192.400 When must I complete the sale of my stock?

You must complete all sales of your stock within 45 calendar days after the last day of the subscription period, unless the offering is extended under § 192.405.

§ 192.405 How do I extend the offering period?

(a) You must request, in writing, an extension of any offering period.

(b) The appropriate Federal banking agency may grant extensions of time to sell your shares. The appropriate Federal banking agency will not grant any single extension of more than 90 days.

(c) If the appropriate Federal banking agency grants your request for an extension of time, you must provide a post-effective amendment to the offering circular under § 192.310 to each person who subscribed for or ordered stock. Your amendment must indicate that the appropriate Federal banking agency extended the offering period and that each person who subscribed for or ordered stock may increase, decrease, or rescind their subscription or order within the time remaining in the extension period.

Completion of the Conversion

§ 192.420 When must I complete my conversion?

(a) In your plan of conversion, you must set a date by which the conversion must be completed. This date must not be more than 24 months from the date that your members approve the plan of conversion. The date, once set, may not be extended by you or by the appropriate Federal banking agency. You must terminate the conversion if it is not completed by that date.

(b) Your conversion is complete on the date that you accept the offers for your stock.

§ 192.425 Who may terminate the conversion?

(a) Your members may terminate the conversion by failing to approve the conversion at your members' meeting.

(b) You may terminate the conversion before your members' meeting.

(c) You may terminate the conversion after the members' meeting only if the appropriate Federal banking agency concurs.

§ 192.430 What happens to my old charter?

(a) If you are a Federally chartered mutual savings association or savings bank, and you convert to a Federally chartered stock savings association or savings bank, you must apply to the OCC to amend your charter and bylaws consistent with part 152 of this chapter, as part of your application for conversion. You may only include OCC pre-approved anti-takeover provisions in your amended charter and bylaws. *See* 12 CFR 152.4(b)(8).

(b) If you are a Federally chartered mutual savings association or savings bank and you convert to a state-chartered stock savings association under this part, you must surrender your charter to the OCC for cancellation promptly after the state issues your charter. You must promptly file a copy of your new state stock charter with the FDIC.

(c) If you are a state-chartered mutual savings association or savings bank, and you convert to a Federally chartered stock savings association or savings bank, you must apply to the OCC for a new charter and bylaws consistent with part 152 of this chapter. You may only include OCC pre-approved anti-takeover provisions in your charter and bylaws. *See* 12 CFR 152.4(b)(8).

(d) Your new or amended charter must require you to establish and maintain a liquidation account for eligible and supplemental eligible account holders under § 192.450.

§ 192.435 What happens to my corporate existence after conversion?

Your corporate existence will continue following your conversion, unless you convert to a state-chartered stock savings association and state law prescribes otherwise.

§ 192.440 What voting rights must I provide to stockholders after the conversion?

You must provide your stockholders with exclusive voting rights, except as provided in § 192.445(c).

§ 192.445 What must I provide my savings account holders?

(a) You must provide each savings account holder, without payment, a withdrawable savings account or accounts in the same amount and under the same terms and conditions as their accounts before your conversion.

(b) You must provide a liquidation account for each eligible and supplemental eligible account holder under § 192.450.

(c) If you are a state-chartered savings association and state law requires you to provide voting rights to savings account holders or borrowers, your charter must:

(1) Limit these voting rights to the minimum required by state law; and

(2) Require you to solicit proxies from the savings account holders and borrowers in the same manner that you solicit proxies from your stockholders.

Liquidation Account

§ 192.450 What is a liquidation account?

(a) A liquidation account represents the potential interest of eligible account holders and supplemental eligible account holders in your net worth at the time of conversion. You must maintain a sub-account to reflect the interest of each account holder.

(b) Before you may provide a liquidation distribution to common stockholders, you must give a liquidation distribution to those eligible account holders and supplemental eligible account holders who hold savings accounts from the time of conversion until liquidation.

(c) You may not record the liquidation account in your financial statements. You must disclose the liquidation account in the footnotes to your financial statements.

§ 192.455 What is the initial balance of the liquidation account?

The initial balance of the liquidation account is your net worth in the statement of financial condition included in the final offering circular.

§ 192.460 How do I determine the initial balances of liquidation sub-accounts?

(a)(1) You determine the initial sub-account balance for a savings account held by an eligible account holder by multiplying the initial balance of the liquidation account by the following fraction: The numerator is the qualifying deposit in the savings account expressed in dollars on the eligibility record date. The denominator is total qualifying deposits of all eligible account holders on that date.

(2) You determine the initial sub-account balance for a savings account held by a supplemental eligible account holder by multiplying the initial balance of the liquidation account by the following fraction: The numerator is the qualifying deposit in the savings account expressed in dollars on the supplemental eligibility record date. The denominator is total qualifying deposits of all supplemental eligible account holders on that date.

(3) If an account holder holds a savings account on the eligibility record date and a separate savings account on the supplemental eligibility record date, you must compute separate sub-accounts for the qualifying deposits in the savings account on each record date.

(b) You may not increase the initial sub-account balances. You must decrease the initial balance under § 192.470 as depositors reduce or close their accounts.

§ 192.465 Do account holders retain any voting rights based on their liquidation sub-accounts?

Eligible account holders or supplemental eligible account holders do not retain any voting rights based on their liquidation sub-accounts.

§ 192.470 Must I adjust liquidation sub-accounts?

(a)(1) You must reduce the balance of an eligible account holder's or supplemental eligible account holder's sub-account if the deposit balance in the account holder's savings account at the close of business on any annual closing date, which for purposes of this section is your fiscal year end, after the relevant eligibility record dates is less than:

(i) The deposit balance in the account holder's savings account at the close of business on any other annual closing date after the relevant eligibility record date; or

(ii) The qualifying deposits in the account holder's savings account on the relevant eligibility record date.

(2) The reduction must be proportionate to the reduction in the deposit balance.

(b) If you reduce the balance of a liquidation sub-account, you may not subsequently increase it if the deposit balance increases.

(c) You are not required to adjust the liquidation account and sub-account balances at each annual closing date if you maintain sufficient records to make the computations if a liquidation subsequently occurs.

(d) You must maintain the liquidation sub-account for each account holder as long as the account holder maintains an account with the same social security number.

(e) If there is a complete liquidation, you must provide each account holder with a liquidation distribution in the amount of the sub-account balance.

§ 192.475 What is a liquidation?

(a) A liquidation is a sale of your assets and settlement of your liabilities with the intent to cease operations and close. Upon liquidation, you must return your charter to the governmental agency that issued it. The government agency must cancel your charter.

(b) A merger, consolidation, or similar combination or transaction with another depository institution, is not a liquidation. If you are involved in such a transaction, the surviving institution must assume the liquidation account.

§ 192.480 Does the liquidation account affect my net worth?

The liquidation account does not affect your net worth.

§ 192.485 What provision must I include in my new Federal charter?

If you convert to Federal stock form, you must include the following provision in your new charter: ''Liquidation Account. Under appropriate Federal banking agency regulations, the association must establish and maintain a liquidation account for the benefit of its savings account holders as of _____. If the association undergoes a complete liquidation, it must comply with appropriate Federal banking agency regulations with respect to the amount and priorities on liquidation of each of the savings account holder's interests in the liquidation account. A savings account holder's interest in the liquidation account does not entitle the savings account holder to any voting rights.''

Post-Conversion

§ 192.500. What management stock benefit plans may I implement?

(a) During the 12 months after your conversion, you may implement a stock option plan (Option Plan), an employee stock ownership plan or other tax-qualified employee stock benefit plan

(collectively, ESOP), and a management recognition plan (MRP), provided you meet all of the following requirements.

(1) You disclose the plans in your proxy statement and offering circular and indicate in your offering circular that there will be a separate shareholder vote on the Option Plan and the MRP at least six months after the conversion. No shareholder vote is required to implement the ESOP. Your ESOP must be tax-qualified.

(2) Your Option Plan does not encompass more than ten percent of the number of shares that you issued in the conversion.

(3)(i) Your ESOP and MRP do not encompass, in the aggregate, more than ten percent of the number of shares that you issued in the conversion. If you have tangible capital of ten percent or more following the conversion, the appropriate Federal banking agency may permit your ESOP and MRP to encompass, in the aggregate, up to 12 percent of the number of shares issued in the conversion; and

(ii) Your MRP does not encompass more than three percent of the number of shares that you issued in the conversion. If you have tangible capital of ten percent or more after the conversion, the appropriate Federal banking agency may permit your MRP to encompass up to four percent of the number of shares that you issued in the conversion.

(4) No individual receives more than 25 percent of the shares under any plan.

(5) Your directors who are not your officers do not receive more than five percent of the shares of your MRP or Option Plan individually, or 30 percent of any such plan in the aggregate.

(6) Your shareholders approve each of the Option Plan and the MRP by a majority of the total votes eligible to be cast at a duly called meeting before you establish or implement the plan. You may not hold this meeting until six months after your conversion.

(7) When you distribute proxies or related material to shareholders in connection with the vote on a plan, you state that the plan complies with the appropriate Federal banking agency's regulations and that the appropriate Federal banking agency does not endorse or approve the plan in any way. You may not make any written or oral representations to the contrary.

(8) You do not grant stock options at less than the market price at the time of grant.

(9) You do not fund the Option Plan or the MRP at the time of the conversion.

(10) Your plan does not begin to vest earlier than one year after shareholders approve the plan, and does not vest at a rate exceeding 20 percent per year.

(11) Your plan permits accelerated vesting only for disability or death, or if you undergo a change of control.

(12) Your plan provides that your executive officers or directors must exercise or forfeit their options in the event the institution becomes critically undercapitalized (as defined in § 165.4 of this chapter), is subject to appropriate Federal banking agency enforcement action, or receives a capital directive under § 165.7 of this chapter.

(13) You file a copy of the proposed Option Plan or MRP with the appropriate Federal banking agency and certify to such agency that the plan approved by the shareholders is the same plan that you filed with, and disclosed in, the proxy materials distributed to shareholders in connection with the vote on the plan.

(14) You file the plan and the certification with the appropriate Federal banking agency within five calendar days after your shareholders approve the plan.

(b) You may provide dividend equivalent rights or dividend adjustment rights to allow for stock splits or other adjustments to your stock in your ESOP, MRP, and Option Plan.

(c) The restrictions in paragraph (a) of this section do not apply to plans implemented more than 12 months after the conversion, provided that materials pertaining to any shareholder vote regarding such plans are not distributed within the 12 months after the conversion. If a plan adopted in conformity with paragraph (a) of this section is amended more than 12 months following your conversion, your shareholders must ratify any material deviations to the requirements in paragraph (a).

§ 192.505 May my directors, officers, and their associates freely trade shares?

(a) Directors and officers who purchase conversion shares may not sell the shares for one year after the date of purchase, except that in the event of the death of the officer or director, the successor in interest may sell the shares.

(b) You must include notice of the restriction described in paragraph (a) of this section on each certificate of stock that a director or officer purchases during the conversion or receives in connection with a stock dividend, stock split, or otherwise with respect to such restricted shares.

(c) You must instruct your stock transfer agent about the transfer restrictions in this section.

(d) For three years after you convert, your officers, directors, and their associates may purchase your stock only from a broker or dealer registered with the Securities and Exchange Commission. However, your officers, directors, and their associates may engage in a negotiated transaction involving more than one percent of your outstanding stock, and may purchase stock through any of your management or employee stock benefit plans.

§ 192.510 May I repurchase shares after conversion?

(a) You may not repurchase your shares in the first year after the conversion except:

(1) In extraordinary circumstances, you may make open market repurchases of up to five percent of your outstanding stock in the first year after the conversion if you file a notice under § 192.515(a) and the appropriate Federal banking agency does not disapprove your repurchase. The appropriate Federal banking agency will not approve such repurchases unless the repurchase meets the standards in § 192.515(c), and the repurchase is consistent with paragraph (c) of this section.

(2) You may repurchase qualifying shares of a director or conduct an appropriate Federal banking agency-approved repurchase pursuant to an offer made to all shareholders of your association.

(3) Repurchases to fund management recognition plans that have been ratified by shareholders do not count toward the repurchase limitations in this section. Repurchases in the first year to fund such plans require prior written notification to the appropriate Federal banking agency.

(4) Purchases to fund tax qualified employee stock benefit plans do not count toward the repurchase limitations in this section.

(b) After the first year, you may repurchase your shares, subject to all other applicable regulatory and supervisory restrictions and paragraph (c) of this section.

(c) All stock repurchases are subject to the following restrictions.

(1) You may not repurchase your shares if the repurchase will reduce your regulatory capital below the amount required for your liquidation account under § 192.450. You must comply with the capital distribution requirements at part 163, subpart E of this chapter.

(2) The restrictions on share repurchases apply to a charitable organization under § 192.550. You must aggregate purchases of shares by the charitable organization with your repurchases.

§ 192.515 What information must I provide to the appropriate Federal banking agency before I repurchase my shares?

(a) To repurchase stock in the first year following conversion, other than repurchases under § 192.510(a)(3) or (a)(4), you must file a written notice with the appropriate OCC licensing office if you are a Federal savings association and with the appropriate FDIC region if you are a state savings association. You must provide the following information:

(1) Your proposed repurchase program;

(2) The effect of the repurchases on your regulatory capital; and

(3) The purpose of the repurchases and, if applicable, an explanation of the extraordinary circumstances necessitating the repurchases.

(b) You must file your notice with the appropriate OCC licensing office if you are a Federal savings association and with the appropriate regional director of the FDIC if you are a state savings association at least ten days before you begin your repurchase program.

(c) You may not repurchase your shares if the appropriate Federal banking agency objects to your repurchase program. The appropriate Federal banking agency will not object to your repurchase program if:

(1) Your repurchase program will not adversely affect your financial condition;

(2) You submit sufficient information to evaluate your proposed repurchases;

(3) You demonstrate extraordinary circumstances and a compelling and valid business purpose for the share repurchases; and

(4) Your repurchase program would not be contrary to other applicable regulations.

§ 192.520 May I declare or pay dividends after I convert?

You may declare or pay a dividend on your shares after you convert if:

(a) The dividend will not reduce your regulatory capital below the amount required for your liquidation account under § 192.450;

(b) You comply with all capital requirements under part 167 of this chapter after you declare or pay dividends;

(c) You comply with the capital distribution requirements under part 163, subpart E, of this chapter; and

(d) You do not return any capital, other than ordinary dividends, to purchasers during the term of the business plan submitted with the conversion.

§ 192.525 Who may acquire my shares after I convert?

(a) For three years after you convert, no person may, directly or indirectly, acquire or offer to acquire the beneficial ownership of more than ten percent of any class of your equity securities without the appropriate Federal banking agency's prior written approval. If a person violates this prohibition, you may not permit the person to vote shares in excess of ten percent, and may not count the shares in excess of ten percent in any shareholder vote.

(b) A person acquires beneficial ownership of more than ten percent of a class of shares when he or she holds any combination of your stock or revocable or irrevocable proxies under circumstances that give rise to a conclusive control determination or rebuttable control determination under §§ 174.4(a) and (b) of this chapter. The appropriate Federal banking agency will presume that a person has acquired shares if the acquiror entered into a binding written agreement for the transfer of shares. For purposes of this section, an offer is made when it is communicated. An offer does not include non-binding expressions of understanding or letters of intent regarding the terms of a potential acquisition.

(c) Notwithstanding the restrictions in this section:

(1) Paragraphs (a) and (b) of this section do not apply to any offer with a view toward public resale made exclusively to you, to the underwriters, or to a selling group acting on your behalf.

(2) Unless the appropriate Federal banking agency objects in writing, any person may offer or announce an offer to acquire up to one percent of any class of shares. In computing the one percent limit, the person must include all of his or her acquisitions of the same class of shares during the prior 12 months.

(3) A corporation whose ownership is, or will be, substantially the same as your ownership may acquire or offer to acquire more than ten percent of your common stock, if it makes the offer or acquisition more than one year after you convert.

(4) One or more of your tax-qualified employee stock benefit plans may acquire your shares, if the plan or plans do not beneficially own more than 25 percent of any class of your shares in the aggregate.

(5) An acquiror does not have to file a separate application to obtain the appropriate Federal banking agency's approval under paragraph (a) of this section, if the acquiror files an application under part 174 of this chapter that specifically addresses the criteria listed under paragraph (d) of this section and you do not oppose the proposed acquisition.

(d) The appropriate Federal banking agency may deny an application under paragraph (a) of this section if the proposed acquisition:

(1) Is contrary to the purposes of this part;

(2) Is manipulative or deceptive;

(3) Subverts the fairness of the conversion;

(4) Is likely to injure you;

(5) Is inconsistent with your plan to meet the credit and lending needs of your proposed market area;

(6) Otherwise violates laws or regulations; or

(7) Does not prudently deploy your conversion proceeds.

§ 192.530 What other requirements apply after I convert?

After you convert, you must:

(a) Promptly register your shares under the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj, as amended). You may not deregister the shares for three years.

(b) Encourage and assist a market maker to establish and to maintain a market for your shares. A market maker for a security is a dealer who:

(1) Regularly publishes bona fide competitive bid and offer quotations for the security in a recognized inter-dealer quotation system;

(2) Furnishes bona fide competitive bid and offer quotations for the security on request; or

(3) May effect transactions for the security in reasonable quantities at quoted prices with other brokers or dealers.

(c) Use your best efforts to list your shares on a national or regional securities exchange or on the National Association of Securities Dealers Automated Quotation system.

(d) File all post-conversion reports that the appropriate Federal banking agency requires.

Contributions to Charitable Organizations

§ 192.550 May I donate conversion shares or conversion proceeds to a charitable organization?

You may contribute some of your conversion shares or proceeds to a charitable organization if:

(a) Your plan of conversion provides for the proposed contribution;

(b) Your members approve the proposed contribution; and

(c) The IRS either has approved, or approves within two years after formation, the charitable organization as

a tax-exempt charitable organization under the Internal Revenue Code.

§ 192.555 How do my members approve a charitable contribution?

At the meeting to consider your conversion, your members must separately approve by at least a majority of the total eligible votes, a contribution of conversion shares or proceeds. If you are in mutual holding company form and adding a charitable contribution as part of a second step stock conversion, you must also have your minority shareholders separately approve the charitable contribution by a majority of their total eligible votes.

§ 192.560 How much may I contribute to a charitable organization?

You may contribute a reasonable amount of conversion shares or proceeds to a charitable organization, if your contribution will not exceed limits for charitable deductions under the Internal Revenue Code and the appropriate Federal banking agency does not object on supervisory grounds. If you are a well-capitalized savings association, the appropriate Federal banking agency generally will not object if you contribute an aggregate amount of eight percent or less of the conversion shares or proceeds.

§ 192.565 What must the charitable organization include in its organizational documents?

The charitable organization's charter (or trust agreement) and gift instrument must provide that:

(a) The charitable organization's primary purpose is to serve and make grants in your local community;

(b) As long as the charitable organization controls shares, it must vote those shares in the same ratio as all other shares voted on each proposal considered by your shareholders;

(c) For at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for an independent director (or trustee) from your local community. This director may not be your officer, director, or employee, or your affiliate's officer, director, or employee, and should have experience with local community charitable organizations and grant making; and

(d) For at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for a director from your board of directors or the board of directors of an acquiror or resulting institution in the event of a merger or acquisition of your organization.

§ 192.570 How do I address conflicts of interest involving my directors?

(a) A person who is your director, officer, or employee, or a person who has the power to direct your management or policies, or otherwise owes a fiduciary duty to you (for example, holding company directors) and who will serve as an officer, director, or employee of the charitable organization, is subject to § 163.200 of this chapter. *See* Form AC (Exhibit 9) for further information on operating plans and conflict of interest plans.

(b) Before your board of directors may adopt a plan of conversion that includes a charitable organization, you must identify your directors that will serve on the charitable organization's board. These directors may not participate in your board's discussions concerning contributions to the charitable organization, and may not vote on the matter.

§ 192.575 What other requirements apply to charitable organizations?

(a) The charitable organization's charter (or trust agreement) and the gift instrument for the contribution must provide that:

(1) The appropriate Federal banking agency may examine the charitable organization at the charitable organization's expense;

(2) The charitable organization must comply with all supervisory directives that the appropriate Federal banking agency imposes;

(3) The charitable organization must annually provide the appropriate Federal banking agency with a copy of the annual report that the charitable organization submitted to the IRS;

(4) The charitable organization must operate according to written policies adopted by its board of directors (or board of trustees), including a conflict of interest policy; and

(5) The charitable organization may not engage in self-dealing, and must comply with all laws necessary to maintain its tax-exempt status under the Internal Revenue Code.

(b) You must include the following legend in the stock certificates of shares that you contribute to the charitable organization or that the charitable organization otherwise acquires: ''The board of directors must consider the shares that this stock certificate represents as voted in the same ratio as all other shares voted on each proposal considered by the shareholders, as long as the shares are controlled by the charitable organization.''

(c) As long as the charitable organization controls shares, you must consider those shares as voted in the same ratio as all of the shares voted on each proposal considered by your shareholders.

(d) After you complete your stock offering, you must submit copies of the following documents to the appropriate OCC licensing office in accordance with part 192.155, or if you are a state savings association, with the appropriate FDIC region: the charitable organization's charter and bylaws (or trust agreement), operating plan (within six months after your stock offering), conflict of interest policy, and the gift instrument for your contributions of either stock or cash to the charitable organization.

Subpart B—Voluntary Supervisory Conversions

§ 192.600 What does this subpart do?

(a) You must comply with this subpart to engage in a voluntary supervisory conversion. This subpart applies to all voluntary supervisory conversions under sections 5(i)(1), (i)(2), and (p) of the Home Owners' Loan Act (HOLA), 12 U.S.C. 1464(i)(1), (i)(2), and (p).

(b) Subpart A of this part also applies to a voluntary supervisory conversion, unless a requirement is clearly inapplicable.

§ 192.605 How may I conduct a voluntary supervisory conversion?

(a) You may sell your shares or the shares of a holding company to the public under the requirements of subpart A of this part.

(b) You may convert to stock form by merging into an interim Federal-or state-chartered stock association.

(c) You may sell your shares directly to an acquiror, who may be a person, company, depository institution, or depository institution holding company.

(d) You may merge or consolidate with an existing or newly created depository institution. The merger or consolidation must be authorized by, and is subject to, other applicable laws and regulations.

§ 192.610 Do my members have rights in a voluntary supervisory conversion?

Your members do not have the right to approve or participate in a voluntary supervisory conversion, and will not have any legal or beneficial ownership interests in the converted association, unless the appropriate Federal banking agency provides otherwise. Your members may have interests in a liquidation account, if one is established.

Eligibility

§ 192.625 When is a savings association eligible for a voluntary supervisory conversion?

(a) If you are an insured savings association, you may be eligible to convert under this subpart if:

(1) You are significantly undercapitalized (or you are undercapitalized and a standard conversion that would make you adequately capitalized is not feasible) and you will be a viable entity following the conversion;

(2) Severe financial conditions threaten your stability and a conversion is likely to improve your financial condition;

(3) FDIC will assist you under section 13 of the Federal Deposit Insurance Act, 12 U.S.C. 1823; or

(4) You are in receivership and a conversion will assist you.

(b) You will be a viable entity following the conversion if you satisfy all of the following:

(1) You will be adequately capitalized as a result of the conversion;

(2) You, your proposed conversion, and your acquiror(s) comply with applicable supervisory policies;

(3) The transaction is in your best interest, and the best interest of the Deposit Insurance Fund and the public; and

(4) The transaction will not injure or be detrimental to you, the Deposit Insurance Fund, or the public interest.

§ 192.630 When is a state-chartered savings bank eligible for a voluntary supervisory conversion.

If you are a state-chartered savings bank you may be eligible to convert to a Federal stock savings bank under this subpart if:

(a) FDIC certifies under section 5(o)(2)(C) of the HOLA that severe financial conditions threaten your stability and that the voluntary supervisory conversion is likely to improve your financial condition; or

(b) You meet the following conditions:

(1) Your liabilities exceed your assets, as calculated under generally accepted accounting principles, assuming you are a going concern; and

(2) You will issue a sufficient amount of permanent capital stock to meet your applicable FDIC capital requirement immediately upon completion of the conversion, or FDIC determines that you will achieve an acceptable capital level within an acceptable time period.

Plan of Supervisory Conversion

§ 192.650 What must I include in my plan of voluntary supervisory conversion?

A majority of your board of directors must adopt a plan of voluntary supervisory conversion. You must include all of the following information in your plan of voluntary supervisory conversion.

(a) Your name and address.

(b) The name, address, date and place of birth, and social security number of each proposed purchaser of conversion shares and a description of that purchaser's relationship to you.

(c) The title, per-unit par value, number, and per-unit and aggregate offering price of shares that you will issue.

(d) The number and percentage of shares that each investor will purchase.

(e) The aggregate number and percentage of shares that each director, officer, and any affiliates or associates of the director or officer will purchase.

(f) A description of any liquidation account.

(g) Certified copies of all resolutions of your board of directors relating to the conversion.

Voluntary Supervisory Conversion Application

§ 192.660 What must I include in my voluntary supervisory conversion application?

You must include all of the following information and documents in a voluntary supervisory conversion application to the appropriate OCC licensing office if you are a Federal savings association and to the appropriate FDIC region if you are a state savings association under this subpart:

(a) *Eligibility.* (1) Evidence establishing that you meet the eligibility requirements under §§ 192.625 or 192.630.

(2) An opinion of qualified, independent counsel or an independent, certified public accountant regarding the tax consequences of the conversion, or an IRS ruling indicating that the transaction qualifies as a tax-free reorganization.

(3) An opinion of independent counsel indicating that applicable state law authorizes the voluntary supervisory conversion, if you are a state-chartered savings association converting to state stock form.

(b) *Plan of conversion.* A plan of voluntary supervisory conversion that complies with § 192.650.

(c) *Business plan.* A business plan that complies with § 192.105, when required by the appropriate Federal banking agency.

(d) *Financial data.* (1) Your most recent audited financial statements and Consolidated Reports of Condition and Income or Thrift Financial Report, as appropriate. You must explain how your current capital levels make you eligible to engage in a voluntary supervisory conversion under §§ 192.625 or 192.630.

(2) A description of your estimated conversion expenses.

(3) Evidence supporting the value of any non-cash asset contributions. Appraisals must be acceptable to the appropriate Federal banking agency and the non-cash asset must meet all other appropriate Federal banking agency policy guidelines.

(4) Pro forma financial statements that reflect the effects of the transaction. You must identify your tangible, core, and risk-based capital levels and show the adjustments necessary to compute the capital levels. You must prepare your pro forma statements in conformance with the appropriate Federal banking agency regulations and policy.

(e) *Proposed documents.* (1) Your proposed charter and bylaws.

(2) Your proposed stock certificate form.

(f) *Agreements.* (1) A copy of any agreements between you and proposed purchasers.

(2) A copy and description of all existing and proposed employment contracts. You must describe the term, salary, and severance provisions of the contract, the identity and background of the officer or employee to be employed, and the amount of any conversion shares to be purchased by the officer or employee or his or her affiliates or associates.

(g) *Related applications.* (1) All filings required under the securities offering rules of parts 192 and 197 of this chapter.

(2) Any required Control Act notice, rebuttal submission under part 174 of this chapter, or copies of any Holding Company Act Applications, including prior-conduct certifications under Regulatory Bulletin 20.

(3) A subordinated debt application, if applicable.

(4) Applications for permission to organize a stock association and for approval of a merger, if applicable, and a copy of any application for Federal Home Loan Bank membership or FDIC insurance of accounts, if applicable.

(5) A statement describing any other applications required under Federal or state banking laws for all transactions related to your conversion, copies of all dispositive documents issued by regulatory authorities relating to the applications, and, if requested by the

appropriate Federal banking agency, copies of the applications and related documents.

(h) *Waiver request.* A description of any of the features of your application that do not conform to the requirements of this subpart, including any request for waiver of these requirements.

Appropriate Federal Banking Agency Review of the Voluntary Supervisory Conversion Application

§ 192.670 Will the appropriate Federal banking agency approve my voluntary supervisory conversion application?

The appropriate Federal banking agency will generally approve your application to engage in a voluntary supervisory conversion unless it determines:

(a) You do not meet the eligibility requirements for a voluntary supervisory conversion under §§ 192.625 or 192.630 or because the proceeds from the sale of your conversion stock, less the expenses of the conversion, would be insufficient to satisfy any applicable viability requirement;

(b) The transaction is detrimental to or would cause potential injury to you or the Deposit Insurance Fund or is contrary to the public interest;

(c) You or your acquiror, or the controlling parties or directors and officers of you or your acquiror, have engaged in unsafe or unsound practices in connection with the voluntary supervisory conversion; or

(d) You fail to justify an employment contract incidental to the conversion, or the employment contract will be an unsafe or unsound practice or represent a sale of control. In a voluntary supervisory conversion, the appropriate Federal banking agency generally will not approve employment contracts of more than one year for your existing management.

§ 192.675 What conditions will the appropriate Federal banking agency impose on an approval?

(a) The appropriate Federal banking agency will condition approval of a voluntary supervisory conversion application on all of the following.

(1) You must complete the conversion stock sale within three months after the appropriate Federal banking agency approves your application. The appropriate Federal banking agency may grant an extension for good cause.

(2) You must comply with all filing requirements of parts 192 and 197 of this chapter.

(3) You must submit an opinion of independent legal counsel indicating that the sale of your shares complies with all applicable state securities law requirements.

(4) You must comply with all applicable laws, rules, and regulations.

(5) You must satisfy any other requirements or conditions the appropriate Federal banking agency may impose.

(b) The appropriate Federal banking agency may condition approval of a voluntary supervisory conversion application on either of the following:

(1) You must satisfy any conditions and restrictions the appropriate Federal banking agency imposes to prevent unsafe or unsound practices, to protect the Deposit Insurance Fund and the public interest, and to prevent potential injury or detriment to you before and after the conversion. The appropriate Federal banking agency may impose these conditions and restrictions on you (before and after the conversion) or, as appropriate, your acquiror, controlling parties, or your directors and officers; or

(2) You must infuse a larger amount of capital, if necessary, for safety and soundness reasons.

Offers and Sales of Stock

§ 192.680 How do I sell my shares?

If you convert under this subpart, you must offer and sell your shares under part 197 of this chapter.

Post-Conversion

§ 192.690 Who may not acquire additional shares after the voluntary supervisory conversion?

For three years after the completion of a voluntary supervisory conversion, neither you nor your controlling shareholder(s) may acquire shares from minority shareholders without the appropriate Federal banking agency's prior approval.

PART 193—ACCOUNTING REQUIREMENTS

Subpart A—Form and Content of Financial Statements

Sec.
193.1 Form and content of financial statements.
193.2 Definitions.
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Subpart B [Reserved]

Subpart C—Financial Statement Presentation

193.101 Application of this subpart.
193.102 Financial statement presentation.
Appendix A to Part 193—Financial Statement Line Items

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B); 15 U.S.C. 78c(b), 78m, 78n, 78w.

Subpart A—Form and Content of Financial Statements

§ 193.1 Form and content of financial statements.

(a) This subpart A states the requirements as to form and content of financial statements included by a Federal savings association in the following documents. However, the OCC's regulations governing the applicable documents specify the actual financial statements that are to be included in that document.

(1) Any proxy statement or offering circular required to be used in connection with a conversion under part 192 of this chapter.

(2) Any offering circular or nonpublic offering materials required to be used in connection with an offer or sale of securities under part 197 of this chapter.

(3) Any filing under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* made pursuant to the requirements of part 194 of this chapter.

(b) Except as otherwise provided by the OCC by rule, regulation or order made specifically applicable to financial statements governed by this section, financial statements shall:

(1) Be prepared and presented in accordance with generally accepted accounting principles;

(2) Comply with subpart C of this part;

(3) Consistent with the provisions of this subpart, comply with articles 1, 2, 3, 4, 10, and 11 of Regulation S–X adopted by the Securities and Exchange Commission (17 CFR 210.1–210.4, 210.10, and 210.11).

(4) Be audited, when required, by an independent auditor in accordance with the standards imposed by the American Institute of Certified Public Accountants.

(c) The term ''financial statements'' includes all notes to the statements and related schedules.

§ 193.2 Definitions.

(a) *Registrant.* The term ''registrant'' means an applicant, a savings association, or any other person required to prepare financial statements in accordance with this subpart.

(b) *Significant subsidiary.* The term ''significant subsidiary'' means a subsidiary, including its subsidiaries, which meets any of the following conditions:

(1) The association's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the

association and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for purposes of determining whether financial statements of a business acquired or to be acquired in a business combination accounted for as a pooling of interests are required pursuant to 17 CFR 210.3–05, this condition is also met when the number of common shares exchanged by the association exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The association's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the association and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The association's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the association and its subsidiaries consolidated for the most recently completed fiscal year.

Note to paragraph (b): For purposes of making the prescribed income test the following guidance should be applied:

1. When a loss has been incurred by either the parent or its consolidated subsidiaries or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary should be excluded from the income of the association and its subsidiaries consolidated for purposes of the computation.

2. If income of the association and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income.

Note to § 193.2: *See also* 17 CFR 210.1–02.

§ 193.3 Qualification of public accountant.

The term ''qualified public accountant'' means a certified public accountant or licensed public accountant certified or licensed by a regulatory authority of a state or other political subdivision of the United States who is in good standing as such under the laws of the jurisdiction where the home office of the registrant to be audited is located. Any person or firm who is suspended from practice before the Securities and Exchange Commission or other governmental agency is not a ''qualified public accountant'' for purposes of this section.

Note to § 193.3: *See also* 17 CFR 210.2–01.

§ 193.4 Condensed financial information [Parent only].

(a) The information prescribed by Schedule III pursuant to section IV of Appendix A to this part shall be presented in a note to the financial statements when the restricted net assets (17 CFR 210.4–08(e)(3)) of consolidated subsidiaries exceed 25 percent of consolidated net assets as of the end of the most recently completed fiscal year. The investment in and indebtedness of and to association subsidiaries shall be stated separately in the condensed balance sheet from amounts for other subsidiaries; and the amount of cash dividends paid to the parent association for each of the last three years by association subsidiaries shall be stated separately in the condensed income statement from amounts for other subsidiaries.

(b) For purposes of the above test, restricted net assets of consolidated subsidiaries shall mean that amount of the association's proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent year may not be transferred to the parent company by subsidiaries in the form of loans, advances, or cash dividends without the consent of a third party (*i.e.,* lender, regulatory agency, foreign government, etc.).

(c) Where restrictions on the amount of funds which may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary shall be used. Redeemable preferred stocks (*See* item I (22) in Appendix A to this part) and minority interest (*See* item I (21) in Appendix A to this part) shall be deducted in computing net assets for purposes of this test.

Subpart B [Reserved]

Subpart C—Financial Statement Presentation

§ 193.101 Application of this subpart.

This subpart contains rules pertaining to the form and content of financial statements included as part of:

(a) A conversion application under part 192, including financial statements in proxy statements and offering circulars,

(b) A filing under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* and

(c) Any offering circular required to be used in connection with the issuance of mutual capital certificates under § 163.74 and debt securities under § 163.80 and § 163.81 of this chapter.

§ 193.102 Financial statement presentation.

Federal savings associations shall comply with Appendix A to this part, which specifies the various line items that should appear on the face of the financial statements governed by this subpart C and additional disclosures that should be included with the financial statements in related notes.

Appendix A to Part 193—Financial Statement Line Items

I. Balance Sheet

Assets

1. *Cash and amounts due from depository institutions.* (a) The amounts in this caption should include noninterest-bearing deposits with depository institutions.

(b) State in a note the amount and terms of any deposits in depository institutions held as compensating balances against long- or short-term borrowing arrangements. This disclosure should include the provisions of any restrictions as to withdrawal or usage. Restrictions may include legally restricted deposits held as compensating balances against short-term borrowing arrangements, contracts entered into with others, or company statements of intention with regard to particular deposits; however, time deposits and short-term certificates of deposits are not generally included in legally restricted deposits. In cases where compensating balance arrangements exist but are not agreements which legally restrict the use of cash amounts shown on the balance sheet, describe in the notes to the financial statements these arrangements and the amount involved, if determinable, for the most recent audited balance sheet required and for any subsequent unaudited balance sheet required. Compensating balances that are maintained under an agreement to ensure future credit availability shall be disclosed in the notes to the financial statements along with the amount and terms of the agreement.

(c) Checks outstanding in excess of an applicant's book balance in a demand deposit account shall be shown as a liability.

2. *Interest-bearing deposits in other banks.*

3. *Federal funds sold and securities purchased under resale agreements or similar arrangements.* These amounts should be presented, *i.e.,* gross and not netted against Federal funds purchased and securities sold under agreement to repurchase, as reported in caption 15.

4. *Trading account assets.* Include securities considered to be held for trading purposes.

5. *Other short-term investments.*

6. *Investment securities.* (a) Include securities considered to be held for investment purposes. Disclose the aggregate book value of investment securities as the line item on the balance sheet; and also show on the face of the balance sheet the aggregate market value at the balance sheet date. The aggregate amounts should include securities pledged, loaned, or sold under repurchase agreements and similar arrangements. Borrowed securities and securities purchased under resale agreements or similar arrangements should be excluded.

(b) Disclose in a note the carrying value and market value of securities of (i) the U.S. Treasury and other U.S. Government agencies and corporations; (ii) states of the U.S. and political subdivisions thereof; and (iii) other securities.

7. *Assets held for sale.* Investments in assets considered to be held for sale purposes should be reported separately in the statement of financial condition.

8. *Loans.* (a) Disclose separately: (i) Total loans (including financing type leases), (ii) allowance for loan losses, (iii) unearned income on installment loans, (iv) discount on loans purchased, and (v) loans in process.

(b) State on the balance sheet or in a note the amount of loans in each of the following categories: (i) Real estate mortgage; (ii) real estate construction; (iii) installment; and (iv) commercial, financial, and agricultural.

(c)(i) Include under the real estate mortgage category loans payable in monthly, quarterly, or other periodic installments and secured by developed income property and/or personal residences.

(ii) Include under the real estate construction category loans secured by real estate which are made for the purpose of financing construction of real estate and land development projects.

(iii) Include under the installment category loans to individuals generally repayable in monthly installments. This category shall include, but not be limited to, credit card and related activities, individual automobile loans, other installment loans, mobile home loans, and residential repair and modernization loans.

(iv) Include under the commercial, financial, and agricultural category all loans not included in another category. This category shall include, but not be limited to, loans to real estate investment trusts, mortgage companies, banks, and other financial institutions; loans for carrying securities; and loans for agricultural purposes. Do not include loans secured primarily by developed real estate.

(d) State separately any other loan category regardless of relative size if necessary to reflect any unusual risk concentration.

(e) Unearned income on installment loans shall be shown and deducted separately from total loans.

(f) Unamortized discounts on purchased loans shall be deducted separately from total loans.

(g) Loans in process shall be deducted separately from total loans.

(h) A series of categories other than those specified in item (b) of paragraph 8. may be used to present details of loans if considered a more appropriate presentation. The categories specified in item (b) of paragraph 8. should be considered the minimum categories that may be presented.

(i) For each period for which an income statement is presented, disclose in a note the total dollar amount of loans being serviced by the association for the benefit of others.

(j)(i)(A) As of each balance sheet date, disclose in a note the aggregate dollar amount of loans (exclusive of loans to any such persons which in the aggregate do not exceed $60,000 during the last year) made by the association or any of its subsidiaries to directors, executive officers, or principal holders of equity securities (17 CFR 210.1–02) of the association or any of its significant subsidiaries (17 CFR 210.1–02) or to any associate of such persons. For the latest fiscal year, an analysis of activity with respect to such aggregate loans to related parties should be provided. The analysis should include at the beginning of the period new loans, repayments, and other changes. (Other changes, if significant, should be explained.)

(B) This disclosure need not be furnished when the aggregate amount of such loans at the balance sheet date (or with respect to the latest fiscal year, the maximum amount outstanding during the period) does not exceed 5 percent of stockholders' equity at the balance sheet date.

(ii) If a significant portion of the aggregate amount of loans outstanding at the end of the fiscal year disclosed pursuant to item (i)(A) of this paragraph (j) relates to nonaccrual, past due, restructured, and potential problem loans (*see* Securities and Exchange Commission's Securities Act Industry Guide 3, section III.C.), so state and disclose the aggregate amount of such loans along with such other information necessary to an understanding of the effects of the transactions on the financial statements.

(iii) Notwithstanding the aggregate disclosure called for by paragraph (j)(i) of this balance sheet caption 8, if any loans were not made in the ordinary course of business during any period for which an income statement is required to be filed, provide an appropriate description of each such loan (*see* 17 CFR 210.9–03.7(e)(3)).

(iv) For purposes only of Balance Sheet item 8(j), the following definitions shall apply:

(A) *Associate* used to indicate a relationship with any person means (1) any corporation, venture, or organization of which such person is a general partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities; (2) any trust or other estate in which such person has a substantial beneficial interest or for which such person serves as trustee or in a similar capacity; and (3) any member of the immediate family of any of the foregoing persons.

(B) *Executive officer* means the president, any vice president in charge of a principal business unit, division, or function (such as loans, investments, operations, administration, or finance), and any other officer or person who performs similar policy-making functions.

(C) *Immediate family* with regard to a person means such person's spouse, parents, children, siblings, mother- and father-in-law, sons- and daughters-in-law, and brothers- and sisters-in-law.

(D) *Ordinary course of business* with regard to loans means those loans which were made on substantially the same terms, including interest rate and collateral, as those prevailing at the same time for comparable transactions with unrelated persons and did not involve more than the normal risk of collectability or present other unfavorable features.

(k) For each period for which an income statement is presented, furnish in a note a statement of changes in the allowance for loan losses, showing balances at beginning and end of the period, provision charged to income, recoveries of amounts previously charged off, and losses charged to the allowance.

9. *Premises and equipment.*

10. *Real estate owned.* State, parenthetically or otherwise:

(a) The amount of real estate owned by class as described in item (b) of paragraph 10. and the basis for determining that amount; and

(b) A description of each class of real estate owned (i) acquired by foreclosure or by deed in lieu of foreclosure, (ii) in judgment and subject to redemption, or (iii) acquired for development or resale. Show separately any accumulated depreciation or valuation allowances. Disclose the policies regarding, and amounts of, capitalized costs, including interest.

11. *Investment in joint ventures.* In a note, present summarized aggregate financial statements for investments in real estate or other joint ventures which individually (a) are 20 percent or more owned by the association or any of its subsidiaries, or (b) have liabilities (including contingent liabilities) to the parent exceeding 10 percent of the parent's regulatory capital. If an allowance for real estate losses subsequent to acquisition is maintained, the amount shall be disclosed, deducted from the other real estate owned, and a statement of changes in the allowance showing balances at beginning and end of period should be included. Provision charged to income and losses charged to the allowance account shall be furnished for each period for which an income statement is filed.

12. *Other assets.* (a) Disclose separately on the balance sheet or in a note thereto any of the following assets or any other asset the amount of which exceeds 30 percent of stockholders' equity. The remaining assets may be shown as one amount.

(i) *Accrued interest receivable.* State separately those amounts relating to loans and those amounts relating to investments.

(ii) Excess of cost over assets acquired (net of amortization).

(b) State in a note (i) amounts representing investments in affiliates and investments in other persons which are accounted for by the equity method, and (ii) indebtedness of affiliates and other persons, the investments in which are accounted for by the equity method. State the basis of determining the amounts reported under paragraph (b)(i).

13. *Total assets.*

Liabilities, and Stockholders' Equity

14. *Deposits.* (a) Disclose separately on the balance sheet or in a note the amounts in the following categories of interest-bearing and noninterest-bearing deposits: (i) NOW account and MMDA deposits, (ii) savings deposits, and (iii) time deposits.

(b) Include under the savings-deposits category interest-bearing deposits without specified maturity or contractual provisions requiring advance notice of intention to withdraw funds. Include deposits for which an association may require at its option written notice of intended withdrawal not less than 14 days in advance.

(c) Include under the time-deposits category deposits subject to provisions specifying maturity or other withdrawal conditions such as time certificates of deposits, open account time deposits, and deposits accumulated for the payment of personal loans.

(d) Include accrued interest or dividends, if appropriate.

15. *Short-term borrowings.* (a) State separately, here or in a note, the amounts payable for (i) Federal funds purchased and securities sold under agreements to repurchase, (ii) commercial paper, and (iii) other short-term borrowings.

(b) Federal funds purchased and sales of securities under repurchase agreements shall be reported gross and not netted against sales of Federal funds and purchase of securities under resale agreements.

(c) Include as securities sold under agreements to repurchase all transactions of this type regardless of (i) whether they are called simultaneous purchases and sales, buy-backs, turnarounds, overnight transactions, delayed deliveries, or other terms signifying the same substantive transaction, and (ii) whether the transactions are with the same or different institutions, if the purpose of the transactions is to repurchase identical or similar securities.

(d) The amount and terms (including commitment fees and the conditions under which lines may be withdrawn) of unused lines of credit for short-term financing shall be disclosed, if significant, in the notes to the financial statements. The amount of these lines of credit which support a commercial paper borrowing arrangement or similar arrangements shall be separately identified.

16. *Advance payments by borrowers for taxes and insurance.*

17. *Other liabilities.* Disclose separately on the balance sheet or in a note any of the following liabilities or any other items which are individually in excess of 30 percent of stockholders' equity (except that amounts in excess of 5 percent of stockholders' equity should be disclosed with respect to item (d)). The remaining items may be shown as one amount.

(a) Income taxes payable.

(b) Deferred income taxes.

(c) Indebtedness to affiliate and other persons the investment in which is accounted for by the equity method.

(d) Indebtedness to directors, executive officers, and principal holders of equity securities of the registrant or any of its significant subsidiaries. (The guidance in balance sheet caption ''8(j)'' shall be used to identify related parties for purposes of this disclosure.)

18. *Bonds, mortgages, and similar debt.* (a) Include bonds, Federal Home Loan Bank advances, capital notes, debentures, mortgages, and similar debt.

(b) For each issue or type of obligation state in a note:

(i) The general character of each type of debt, including: (A) The rate of interest, (B) the date of maturity, or, if maturing serially, a brief indication of the serial maturities, such as ''maturing serially from 1980 to 1990,'' (C) if the payment of principal or interest is contingent, an appropriate indication of such contingency, (D) a brief indication of priority, and (E) if convertible, the basis. For amounts owed to related parties *see* 17 CFR 210.4–08(k).

(ii) The amount and terms (including commitment fees and the conditions under which commitments may be withdrawn) of unused commitments for long-term financing arrangements that, if used, would be disclosed under this caption shall be disclosed in the notes to the financial statements, if significant.

(c) State in the notes with appropriate explanations (i) the title and amount of each issue of debt of a subsidiary included in item (a) of paragraph 18 which has not been assumed or guaranteed by the association, and (ii) any liens on premises of a subsidiary or its consolidated subsidiaries which have not been assumed by the subsidiary or its consolidated subsidiaries.

19. *Deferred credits.* State separately those items which exceed 30 percent of stockholders' equity.

20. *Commitments and contingent liabilities.* Total commitments to fund loans should be disclosed. The dollar amounts and terms of other than floating market-rate commitments should also be disclosed.

21. *Minority interest in consolidated subsidiaries.*

22. *Preferred stock subject to mandatory redemption requirements or the redemption of which is outside the control of the issuer.* (a) Include under this caption amounts applicable to any class of stock which has any of the following characteristics: (i) It is redeemable at a fixed or determinable price on a fixed or determinable date or dates, whether by operation of a sinking fund or otherwise; (ii) it is redeemable at the option of the holder; or (iii) it has conditions for redemption which are not solely within the control of the issuer, such as stock which must be redeemed out of future earnings. Amounts attributable to preferred stock which is not redeemable or is redeemable solely at the option of the issuer shall be included under caption 23 unless it meets one or more of the above criteria.

(b) State on the face of the balance sheet the title, carrying amount, and redemption amount of each issue. (If there is more than one issue, these amounts may be aggregated on the face of the balance sheet and details concerning each issue may be presented in the note required by item (c) of paragraph 22.) Show also the dollar amount of any shares subscribed for but unissued, and show the deduction of subscriptions receivable therefrom. If the carrying value is different from the redemption amount, describe the accounting treatment for such difference in the note required by item (c) of paragraph 22. Also state in this note or on the face of the balance sheet, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate. (*See* 17 CFR 210.4–07.)

(c) State in a separate note captioned ''Redeemable Preferred Stock'' (i) a general description of each issue, including its redemption features (*e.g.,* sinking fund, at option of holders, out of future earnings) and the rights, if any, of holders in the event of default, including the effect, if any, on junior securities in the event a required dividend, sinking fund, or other redemption payment(s) is not made, (ii) the combined aggregate amount of redemption requirements for all issues each year for the five years following the date of the latest balance sheet, and (iii) the changes in each issue for each period for which an income statement is required to be presented. (*See also* 17 CFR 210.4–08(d)).

(d) Securities reported under this caption are not to be included under a general heading ''stockholders' equity'' or combined in a total with items described in captions 23, 24 or 25, which follow.

23. *Preferred stock which is not redeemable or is redeemed solely at the option of the issuer.* State on the face of the balance sheet, or, if more than one issue is outstanding, state in a note, the title of each issue and the dollar amount thereof. Show also the dollar amount of any shares subscribed for but unissued, and show the deduction of subscriptions receivable. State on the face of the balance sheet or in a note, for each issue, the number of shares authorized and the number of shares issued or outstanding, as appropriate. (*See* 17 CFR 210.4–07.) Show in a note or separate statement the changes in each class of preferred shares reported under this caption for each period for which an income statement is required to be presented. (*See also* 17 CFR 210.4–08(d)).

24. *Common stock.* For each class of common shares state, on the face of the balance sheet, the number of shares issued or outstanding, as appropriate (*see* 17 CFR 210.4–07), and the dollar amount thereof. If convertible, this fact should be indicated on the face of the balance sheet. For each class of common stock state, on the face of the balance sheet or in a note, the title of the issue, the number of shares authorized, and, if convertible, the basis for conversion (*see also* 17 CFR 210.4–08(d)). Show also the dollar amount of any common stock subscribed for but unissued, and show the deduction of subscriptions receivable. Show in a note or statement the changes in each class of common stock for each period for which an income statement is required to be presented.

25. *Other stockholders' equity.* (a) Separate captions shall be shown on the face of the balance sheet for (i) additional paid-in capital, (ii) other additional capital, and (iii) retained earnings, both (A) restricted and (B) unrestricted. (*See* 17 CFR 210.4–08(e).) Additional paid-in capital and other additional capital may be combined with the stock caption to which it applies, if appropriate. State whether or not the association is in compliance with the Federal regulatory capital requirements (and state requirements where applicable). Also include the dollar amount of those regulatory capital requirements and the amount by which the association exceeds or fails to meet those requirements.

(b) For a period of at least 10 years subsequent to the effective date of a quasi-reorganization, any description of retained earnings shall indicate the point in time from which the new retained earnings dates, and for a period of at least three years shall indicate, on the face of the balance sheet, the total amount of the deficit eliminated.

(c) Changes in stockholders' equity shall be disclosed in accordance with the requirements of 17 CFR 210.3–04.

26. *Total liabilities and stockholders' equity.*

II. Income Statement

1. *Interest and fees on loans.* (a) Include interest, service charges, and fees which are related to or are an adjustment of the loan interest yield.

(b) Current amortization of premiums on mortgages or other loans shall be deducted from interest on loans, and current accretion of discount on such items shall be added to interest on loans.

(c) Discounts and other deferred amounts which are related to or are an adjustment of the loan interest yield shall be amortized into income using the interest (level yield) method.

2. *Interest and dividends on investment securities.* Include accretion of discount on securities and deduct amortization of premiums on securities.

3. *Trading account interest.* Include interest from securities carried in a dealer trading account or accounts that are held principally for resale to customers.

4. *Other interest income.* Include interest on short-term investments (Federal funds sold and securities purchased under agreements to resell) and interest on bank deposits.

5. *Total interest income.*

6. *Interest on deposits.* Include interest on all deposits. On the income statement or in a note, state separately, in the same categories as those specified for deposits at balance sheet caption 14(a), the interest on those deposits. Early withdrawal penalties should be netted against interest on deposits and, if material, disclosed on the income statement.

7. *Interest on short-term borrowings.* Include interest on borrowed funds, including Federal funds purchased, securities sold under agreements to repurchase, commercial paper, and other short-term borrowings.

8. *Interest on long-term borrowings.* Include interest on bonds, capital notes, debentures, mortgages on association premises, capitalized leases, and similar debt.

9. *Total interest expense.*

10. *Net interest income.*

11. *Provision for loan losses.*

12. *Net interest income after provision for loan losses.*

13. *Other income.* Disclose separately any of the following amounts, or any other item of other income, which exceeds 1 percent of the aggregate of total interest income and other income. The remaining amount may be shown as one amount, except for investment securities gains or losses which shall be shown separately regardless of size.

(a) Commissions and fees from fiduciary activities.

(b) Fees for other services to customers.

(c) Commissions, fees, and markups on securities underwriting and other securities activities.

(d) Profit or loss on transactions in investment securities.

(e) Equity in earnings of unconsolidated subsidiaries and 50-percent- or less-owned persons.

(f) Gains or losses on disposition of investments in securities of subsidiaries and 50-percent- or less-owned persons.

(g) Profit or loss from real estate operations.

(h) Other fees related to loan originations or commitments not included in income statement caption 1.

The remaining other income may be shown in one amount.

(i) Investment securities gains or losses. The method followed in determining the cost of investments sold (*e.g.,* ''average cost,'' ''first-in, first-out,'' or ''identified certificate'') and related income taxes shall be disclosed.

14. *Other expenses.* Disclose separately any of the following amounts, or any other item of other expense, which exceeds 1 percent of the aggregate of total interest income and other income. The remaining amounts may be shown as one amount.

(a) Salaries and employee benefits.

(b) Net occupancy expense of premises.

(c) Net cost of operations of other real estate (including provisions for real estate losses, rental income, and gains and losses on sales of real estate).

(d) Minority interest in income of consolidated subsidiaries.

(e) Goodwill amortization.

15. *Other income and expenses.* State separately material events or transactions that are unusual in nature or occur infrequently, but not both, and therefore do not meet both criteria for classification as an extraordinary item. Examples of items which would be reported separately are gain or loss from the sale of premises and equipment, provision for loss on real estate owned, or provision for gain or loss on the sale of loans.

16. *Income or losses before income tax expense.*

17. *Income tax expense.* The information required by 17 CFR 210.4–08(h) should be disclosed.

18. *Income or loss before extraordinary items effects of changes in accounting principles.*

19. *Extraordinary items, less applicable tax.*

20. *Cumulative effects of changes in accounting principles.*

21. *Net income or loss.*

22. *Earnings-per-share data.*

23. *Conversion footnote.* If the association is an applicant for conversion from a mutual to a stock association or has converted within the last three years, describe in a note the general terms of the conversion and restrictions on the operations of the association imposed by the conversion. Also, state the amount of net proceeds received from the conversion and costs associated with the conversion.

24. *Mergers and acquisitions.* For the period in which a business combination occurs and is accounted for by the purchase method of accounting, in addition to those disclosures required by Accounting Principles Board Opinion No. 16, the association shall make those disclosures as noted below for all combinations involving significant acquisitions. (A significant acquisition is defined for this purpose to be one in which the assets of the acquired association, or group of associations, exceed 10 percent of the assets of the consolidated association at the end of the most recent period being reported upon.)

(a) Amounts and descriptions of discounts and premiums related to recording the aggregate interest-bearing assets and liabilities at their fair market value. The disclosure should also include the methods of amortization or accretion and the estimated remaining lives.

(b) The net effect on net income before taxes of the amortization and accretion of discounts, premiums, and intangible assets related to the purchase accounting transaction(s). For subsequent periods, the association shall disclose the remaining total unamortized or unaccreted amounts of discounts, premiums, and intangible assets as of the date of the most recent balance sheet presented. In addition, the association shall disclose the net effect on net income before taxes of the amortization and accretion of discounts, premiums, and intangible assets related to prior business combinations accounted for by the purchase method of accounting. Such disclosures need not be made if the total amounts of discounts, premiums, or intangible assets do not exceed 30 percent of stockholders' equity as of the date of the most recent balance sheet presented.

III. Statement of Cash Flows

The amounts shown in this statement should be those items which materially enhance the reader's understanding of the association's business. For example, gains from sales of loans should be segregated from sales of mortgage-backed securities and other securities, if material, proceeds from principal repayments and maturities from loans and mortgage-backed securities should be segregated from proceeds from sales of loans and mortgage-backed securities, purchases of loans, mortgage-backed securities and other securities should be segregated, if material. Additional guidance may be found in the FASB's Statement of Financial Accounting Standards No. 95 Statement of Cash Flows.

IV. Schedules Required to be Filed

The following schedules, which should be examined by an independent accountant, shall be filed unless the required information is not applicable or is presented in the related financial statements:

(1) *Schedule I—Indebtedness of and to related parties—Not Current.* For each period for which an income statement is required, the following schedule should be filed in support of the amounts required to be reported by balance sheet items 8(j) and 17(c) unless such aggregate amount does not exceed 5 percent of stockholders' equity at either the beginning or the end of the period:

INDEBTEDNESS OF AND TO RELATED PARTIES—NOT CURRENT

Indebtedness of—				
Name of person [1]	Balance at beginning	Additions [2]	Deductions [3]	Balance at end
A	B	C	D	E

INDEBTEDNESS OF AND TO RELATED PARTIES—NOT CURRENT

Indebtedness to—				
Name of person [1]	Balance at beginning	Additions [2]	Deductions [3]	Balance at end
A	F	G	H	I

[1] The persons named shall be grouped as in the related schedule required for investments in related parties. The information called for shall be shown separately for any persons whose investments were shown separately in such related schedule.
[2] For each person named in column A, explain in a note the nature and purpose of any increase during the period that is in excess of 10 percent of the related balance at either the beginning or end of the period.
[3] If deduction was other than a receipt or disbursement of cash, explain.

(2) *Schedule II—Guarantees of securities of other issuers.* The following schedule should be filed as of the date of the most recently audited balance sheet with respect to any guarantees of securities of other issuers by the person for which the statements are being filed:

GUARANTEES OF SECURITIES OF OTHER ISSUERS [1]

Col. A. Name of issuer of securities guaranteed by person for which statement is filed	Col. B. Title of issue of each class of securities guaranteed	Col. C. Total amount guaranteed and outstanding [2]	Col. D. Amount owned by person or persons for which statement is filed

GUARANTEES OF SECURITIES OF OTHER ISSUERS [1]

Col. A. Name of issuer of securities guaranteed by person for which statement is filed	Col. E. Amount in treasury of issuer of securities guaranteed	Col. F. Nature of guarantee [3]	Col. G. Nature of any default by issue of securities guaranteed in principal, interest, sinking fund or redemption provisions, or payment of dividends [4]

[1] Indicate in a note to the most recent schedule being filed for a particular person or group any significant changes since the date of the related balance sheet. If this schedule is filed in support of consolidated or combined statements, there shall be set forth guarantees by any person included in the consolidation or combination, except that such guarantees of securities which are included in the consolidated or combined balance sheet need not be set forth.
[2] Indicate any amounts included in column C which are included also in column D or E.
[3] There need be made only a brief statement of the nature of the guarantee, such as ''Guarantee of principal and interest,'' or ''Guarantee of dividends.'' If the guarantee is of interest or dividends, state the annual aggregate amount of interest or dividends so guaranteed.
[4] Only a brief statement as to any such defaults need be made.

(3) *Schedule III—Condensed financial information.* The following schedule shall be filed as of the dates and for the periods specified in the schedule.

Condensed Financial Information

[Parent only]

[Association may determine disclosure based on information provided in footnotes below]

(a) Provide condensed financial information as to financial position, changes in financial position, and results of operations of the association as of the same dates and for the same periods for which audited consolidated financial statements are required. The financial information required need not be presented in greater detail than is required for a condensed statement by 17 CFR 210.10–01(a) (2), (3), (4). Detailed footnote disclosure which would normally be included with complete financial statements may be omitted with the exception of disclosure regarding material contingencies, long-term obligations, and guarantees. Description of significant provisions of the association's long-term obligations, mandatory dividend, or redemption requirements of redeemable stocks, and guarantees of the association shall be provided along with a 5-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the association have been separately disclosed in the consolidated statements, they need not be repeated in this schedule.

(b) Disclose separately the amount of cash dividends paid to the association for each of the last three fiscal years by consolidated subsidiaries, unconsolidated subsidiaries, and 50-percent- or less-owned persons accounted for by the equity method, respectively.

PART 194—SECURITIES OF FEDERAL SAVINGS ASSOCIATIONS

Sec.

Subpart A—Regulations

194.1 Requirements under certain sections of the Securities Exchange Act of 1934.
194.2 [Reserved]
194.3 Liability for certain statements by Federal savings associations.
194.210 Form and content of financial statements.

Subpart B—Interpretations

194.801 Application of this subpart.
194.802 Description of business.

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B); 15 U.S.C. 78c(b), 78*l*, 78m, 78w, 78d–1.

Subpart A—Regulations

§ 194.1 Requirements under certain sections of the Securities Exchange Act of 1934.

In respect to any securities issued by Federal savings associations, the powers, functions, and duties vested in the Securities and Exchange Commission (the ''Commission'') to administer and enforce sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Securities Exchange Act of 1934, as amended, (the ''Act''); and sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 (codified at 15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265) are vested in the OCC. The rules, regulations and forms prescribed by the Commission pursuant to those sections or applicable in connection with obligations imposed by those sections, shall apply to securities issued by Federal savings associations, except as otherwise provided in this part. The term ''Securities and Exchange Commission'' or ''Commission'' as used in those rules and regulations shall, with respect to securities issued by Federal savings associations, be deemed to refer to the OCC unless the context otherwise requires. All filings with respect to securities issued by Federal savings associations required by those rules and regulations to be made with the Commission shall be made with the OCC's Securities and Corporate Practices Division. Except to the extent otherwise specifically provided by the OCC in the application fee schedule published in the Thrift Bulletin pursuant to 12 CFR part 102, all filing fees specified by the Commission's rules shall be paid to the OCC. If, after the OCC reviews a Form 10–K, Form 10–Q, Schedule 13D or Schedule 13G and determines that the filing is materially deficient such that the OCC requires that an amendment be filed to correct the deficiency, then, upon the filing of the amendment to the Form 10–K, Form 10–Q, Schedule 13D or Schedule 13G, as the case may be, the filer shall pay an additional filing fee to the OCC, in the amount specified by the OCC.

§ 194.2 [Reserved]

§ 194.3 Liability for certain statements by Federal savings associations.

This section replaces adherence to 17 CFR 240.3b–6 and applies as follows:

(a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.

(b) This section applies to the following statements:

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a proxy statement or offering circular filed with the OCC under part 192 of this chapter; in a registration statement filed with the OCC under the Act on Form 10 (17 CFR 249.210); in part I of a quarterly report filed with the OCC on Form 10–Q (17 CFR 249.308a); in an annual report to shareholders meeting the requirements of § 194.1 of this part, particularly 17 CFR 240.14a–3 (b) and (c) or 17 CFR 240.14c–3 (a) and (b) under the Act; in a statement reaffirming such forward-looking statement subsequent to the date the document was filed or the annual report was made publicly available; or a forward-looking statement made prior to the date the document was filed or the date the annual report was made publicly available if such statement is reaffirmed in a filed document or annual report made publicly available within a reasonable time after the making of such forward-looking statement: *Provided,* That

(i) At the time such statements are made or reaffirmed, either:

(A) The issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Act and has complied with the requirements of 17 CFR 240.13a–1 or 240.15d–1 thereunder, if applicable, to file its most recent annual report on Form 10–K; or

(B) If the issuer is not subject to the reporting requirements of section 13(a) or 15(d) of the Act, the statements are made either in a registration statement filed under part 197 of this chapter or pursuant to section 12 (b) or (g) of the Act, or in a proxy statement or offering circular filed with the OCC under part 192 of this chapter if such statements are reaffirmed in a registration statement under the Act on Form 10, filed with the OCC within 180 days of the Federal savings association's conversion, and

(ii) The statements are not made by or on behalf of an issuer that is an investment company registered under the Investment Company Act of 1940;

(2) Information relating to the effects of changing prices on the business enterprise presented voluntarily or pursuant to item 303 of Regulation S–K (17 CFR 229.303), management's discussion and analysis of financial condition and results of operations, or item 302 of Regulation S–K (17 CFR 229.302), supplementary financial information, and disclosed in a document filed with the OCC or in an annual report to shareholders meeting the requirements of 17 CFR 240.14a–3 (b) and (c) or 17 CFR 240.14c–3 (a) and (b) under the Act: *Provided,* That such information included in a proxy statement or offering circular filed pursuant to part 192 of this chapter shall be reaffirmed in a registration statement under the Act on Form 10 filed with the OCC within 180 days of the association's conversion.

(c) For purposes of this section, the term ''forward-looking statement'' shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations pursuant to item 303 of Regulation S–K; or

(4) A statement of the assumptions underlying or relating to any of the statements described in paragraph (c)(1), (c)(2), or (c)(3) of this section.

(d) For purposes of this section, the term ''fraudulent statement'' shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Act of 1933 or the rules or regulations promulgated thereunder.

§ 194.210 Form and content of financial statements.

The financial statements required to be contained in filings with the OCC under the Act are as set out in the applicable form and Regulation S–X, 17 CFR part 210. Those financial statements, however, shall conform as to form and content to the requirements of § 193.1 of this chapter.

Subpart B—Interpretations

§ 194.801 Application of this subpart.

This subpart contains interpretations pertaining to the requirements of the

Act and the rules and regulations thereunder as applied to Federal savings associations by the OCC.

§ 194.802 Description of business.

(a) This section applies to the description-of-business portion of:

(1) Registration statements filed on Form 10 (item 1) (17 CFR 249.210),

(2) Proxy and information statements relating to mergers, consolidations, acquisitions, and similar matters (item 14 of Schedule 14A and item 1 of Schedule 14C) (17 CFR 240.14a–101 and 240.14c–101), and

(3) Annual reports filed on Form 10–K (item 7) (17 CFR 249.310).

(b) The description of business should conform to the description of business required by item 7 of Form PS under part 192 of this chapter.

(c) No repetitive disclosure is required by virtue of similar requirements in item 7 of Form PS and items 301 and 303 of Regulation S–K (17 CFR 229.301, 303). However, there should be included appropriate disclosure which arises by virtue of the registrant being a stock Federal savings association. For example, the table regarding return on equity and assets, item 7(d)(5), should include a line item for ''dividend payout ratio (dividends declared per share divided by net income per share).''

PART 195—COMMUNITY REINVESTMENT

Sec.

Subpart A—General

195.11 Authority, purposes, and scope.
195.12 Definitions.

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Authority: 12 U.S.C. 1462a, 1463, 1464, 1814, 1816, 1828(c), 2901 through 2908, 5412(b)(2)(B).

Subpart A—General

§ 195.11 Authority, purposes, and scope.

(a) *Authority.* This part is issued under the Community Reinvestment Act of 1977 (CRA), as amended (12 U.S.C. 2901 *et seq.*); section 5, as amended, and sections 3, and 4, as added, of the Home Owners' Loan Act of 1933 (12 U.S.C. 1462a, 1463, and 1464); and sections 4, 6, and 18(c), as amended of the Federal Deposit Insurance Act (12 U.S.C. 1814, 1816, 1828(c)).

(b) *Purposes.* In enacting the CRA, the Congress required each appropriate Federal financial supervisory agency to assess an institution's record of helping to meet the credit needs of the local communities in which the institution is chartered, consistent with the safe and sound operation of the institution, and to take this record into account in the agency's evaluation of an application for a deposit facility by the institution. This part is intended to carry out the purposes of the CRA by:

(1) Establishing the framework and criteria by which the appropriate Federal banking agency assesses a savings association's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the savings association; and

(2) Providing that the appropriate Federal banking agency takes that record into account in considering certain applications.

(c) *Scope*— (1) *General.* This part applies to all savings associations except as provided in paragraph (c)(2) of this section.

(2) *Certain special purpose savings associations.* This part does not apply to special purpose savings associations that do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incident to their specialized operations. These associations include banker's banks, as defined in 12 U.S.C. 24 (Seventh), and associations that engage only in one or more of the following activities: Providing cash management controlled disbursement services or serving as correspondent associations, trust companies, or clearing agents.

§ 195.12 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company. The term ''control'' has the meaning given to that term in 12 U.S.C. 1841(a)(2), and a company is under common control with another company if both companies are directly or indirectly controlled by the same company.

(b) *Area median income* means:

(1) The median family income for the MSA, if a person or geography is located in an MSA, or for the metropolitan division, if a person or geography is located in an MSA that has been subdivided into metropolitan divisions; or

(2) The statewide nonmetropolitan median family income, if a person or geography is located outside an MSA.

(c) *Assessment area* means a geographic area delineated in accordance with § 195.41.

(d) *Automated teller machine (ATM)* means an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the savings association at which deposits are received, cash dispersed, or money lent.

(e) [Reserved]

(f) *Branch* means a staffed banking facility authorized as a branch, whether shared or unshared, including, for example, a mini-branch in a grocery store or a branch operated in conjunction with any other local business or nonprofit organization.

(g) *Community development* means:

(1) Affordable housing (including multifamily rental housing) for low or moderate-income individuals;

(2) Community services targeted to low- or moderate-income individuals;

(3) Activities that promote economic development by financing businesses or farms that meet the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs (13 CFR 121.301) or have gross annual revenues of $1 million or less;

(4) Activities that revitalize or stabilize—

(i) Low- or moderate-income geographies;

(ii) Designated disaster areas; or

(iii) Distressed or underserved, nonmetropolitan middle-income geographies designated by the appropriate Federal banking agency based on—

(A) Rates of poverty, unemployment, and population loss; or

(B) Population size, density, and dispersion. Activities revitalize and stabilize geographies designated based on population size, density, and dispersion if they help to meet essential community needs, including needs of

low- and moderate-income individuals; or

(5) Loans, investments, and services that—

(i) Support, enable or facilitate projects or activities that meet the ''eligible uses'' criteria described in Section 2301(c) of the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110–289, 122 Stat. 2654, as amended, and are conducted in designated target areas identified in plans approved by the United States Department of Housing and Urban Development in accordance with the Neighborhood Stabilization Program (NSP);

(ii) Are provided no later than two years after the last date funds appropriated for the NSP are required to be spent by grantees; and

(iii) Benefit low-, moderate-, and middle-income individuals and geographies in the savings association's assessment area(s) or areas outside the savings association's assessment area(s) provided the savings association has adequately addressed the community development needs of its assessment area(s).

(h) *Community development loan* means a loan that:

(1) Has as its primary purpose community development; and

(2) Except in the case of a wholesale or limited purpose savings association:

(i) Has not been reported or collected by the savings association or an affiliate for consideration in the savings association's assessment as a home mortgage, small business, small farm, or consumer loan, unless it is a multifamily dwelling loan (as described in appendix A to part 203 of this title); and

(ii) Benefits the savings association's assessment area(s) or a broader statewide or regional area that includes the savings association's assessment area(s).

(i) *Community development service* means a service that:

(1) Has as its primary purpose community development;

(2) Is related to the provision of financial services; and

(3) Has not been considered in the evaluation of the savings association's retail banking services under § 195.24(d).

(j) *Consumer loan* means a loan to one or more individuals for household, family, or other personal expenditures. A consumer loan does not include a home mortgage, small business, or small farm loan. Consumer loans include the following categories of loans:

(1) *Motor vehicle loan,* which is a consumer loan extended for the purchase of and secured by a motor vehicle;

(2) *Credit card loan,* which is a line of credit for household, family, or other personal expenditures that is accessed by a borrower's use of a ''credit card,'' as this term is defined in § 226.2 of this title;

(3) *Home equity loan,* which is a consumer loan secured by a residence of the borrower;

(4) *Other secured consumer loan,* which is a secured consumer loan that is not included in one of the other categories of consumer loans; and

(5) *Other unsecured consumer loan,* which is an unsecured consumer loan that is not included in one of the other categories of consumer loans.

(k) *Geography* means a census tract delineated by the United States Bureau of the Census in the most recent decennial census.

(l) *Home mortgage loan* means a ''home improvement loan,'' ''home purchase loan,'' or a ''refinancing'' as defined in § 203.2 of this title.

(m) *Income level* includes:

(1) *Low-income,* which means an individual income that is less than 50 percent of the area median income or a median family income that is less than 50 percent in the case of a geography.

(2) *Moderate-income,* which means an individual income that is at least 50 percent and less than 80 percent of the area median income or a median family income that is at least 50 and less than 80 percent in the case of a geography.

(3) *Middle-income,* which means an individual income that is at least 80 percent and less than 120 percent of the area median income or a median family income that is at least 80 and less than 120 percent in the case of a geography.

(4) *Upper-income,* which means an individual income that is 120 percent or more of the area median income or a median family income that is 120 percent or more in the case of a geography.

(n) *Limited purpose savings association* means a savings association that offers only a narrow product line (such as credit card or motor vehicle loans) to a regional or broader market and for which a designation as a limited purpose savings association is in effect, in accordance with § 195.25(b).

(o) *Loan location.* A loan is located as follows:

(1) A consumer loan is located in the geography where the borrower resides;

(2) A home mortgage loan is located in the geography where the property to which the loan relates is located; and

(3) A small business or small farm loan is located in the geography where the main business facility or farm is located or where the loan proceeds otherwise will be applied, as indicated by the borrower.

(p) *Loan production office* means a staffed facility, other than a branch, that is open to the public and that provides lending-related services, such as loan information and applications.

(q) *Metropolitan division* means a metropolitan division as defined by the Director of the Office of Management and Budget.

(r) *MSA* means a metropolitan statistical area as defined by the Director of the Office of Management and Budget.

(s) *Nonmetropolitan area* means any area that is not located in an MSA.

(t) *Qualified investment* means a lawful investment, deposit, membership share, or grant that has as its primary purpose community development.

(u) *Small savings association* —(1) *Definition. Small savings association* means a savings association that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion. *Intermediate small savings association* means a small savings association with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years.

(2) *Adjustment* . The dollar figures in paragraph (u)(1) of this section shall be adjusted annually and published by the OCC based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each twelve-month period ending in November, with rounding to the nearest million.

(v) *Small business loan* means a loan included in ''loans to small businesses'' as defined in the instructions for preparation of the Thrift Financial Report (TFR) or Consolidated Reports of Condition and Income (Call Report), as appropriate.

(w) *Small farm loan* means a loan included in ''loans to small farms'' as defined in the instructions for preparation of the TFR or Call Report, as appropriate.

(x) *Wholesale savings association* means a savings association that is not in the business of extending home mortgage, small business, small farm, or consumer loans to retail customers, and for which a designation as a wholesale savings association is in effect, in accordance with § 195.25(b).

Subpart B—Standards for Assessing Performance

§ 195.21 Performance tests, standards, and ratings, in general.

(a) *Performance tests and standards.* The appropriate Federal banking agency assesses the CRA performance of a savings association in an examination as follows:

(1) *Lending, investment, and service tests.* The appropriate Federal banking agency applies the lending, investment, and service tests, as provided in §§ 195.22 through 195.24, in evaluating the performance of a savings association, except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this section.

(2) *Community development test for wholesale or limited purpose savings associations.* The appropriate Federal banking agency applies the community development test for a wholesale or limited purpose savings association, as provided in § 195.25, except as provided in paragraph (a)(4) of this section.

(3) *Small savings association performance standards.* The appropriate Federal banking agency applies the small savings association performance standards as provided in § 195.26 in evaluating the performance of a small savings association or a savings association that was a small savings association during the prior calendar year, unless the savings association elects to be assessed as provided in paragraphs (a)(1), (a)(2), or (a)(4) of this section. The savings association may elect to be assessed as provided in paragraph (a)(1) of this section only if it collects and reports the data required for other savings associations under § 195.42.

(4) *Strategic plan.* The appropriate Federal banking agency evaluates the performance of a savings association under a strategic plan if the savings association submits, and the appropriate Federal banking agency approves, a strategic plan as provided in § 195.27.

(b) *Performance context.* The appropriate Federal banking agency applies the tests and standards in paragraph (a) of this section and also considers whether to approve a proposed strategic plan in the context of:

(1) Demographic data on median income levels, distribution of household income, nature of housing stock, housing costs, and other relevant data pertaining to a savings association's assessment area(s);

(2) Any information about lending, investment, and service opportunities in the savings association's assessment area(s) maintained by the savings association or obtained from community organizations, state, local, and tribal governments, economic development agencies, or other sources;

(3) The savings association's product offerings and business strategy as determined from data provided by the savings association;

(4) Institutional capacity and constraints, including the size and financial condition of the savings association, the economic climate (national, regional, and local), safety and soundness limitations, and any other factors that significantly affect the savings association's ability to provide lending, investments, or services in its assessment area(s);

(5) The savings association's past performance and the performance of similarly situated lenders;

(6) The savings association's public file, as described in § 195.43, and any written comments about the savings association's CRA performance submitted to the savings association or the appropriate Federal banking agency; and

(7) Any other information deemed relevant by the appropriate Federal banking agency.

(c) *Assigned ratings.* The appropriate Federal banking agency assigns to a savings association one of the following four ratings pursuant to § 195.28 and Appendix A of this part: ''outstanding''; ''satisfactory''; ''needs to improve''; or ''substantial noncompliance,'' as provided in 12 U.S.C. 2906(b)(2). The rating assigned by the appropriate Federal banking agency reflects the savings association's record of helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the savings association.

(d) *Safe and sound operations.* This part and the CRA do not require a savings association to make loans or investments or to provide services that are inconsistent with safe and sound operations. To the contrary, the appropriate Federal banking agency anticipates savings associations can meet the standards of this part with safe and sound loans, investments, and services on which the savings associations expect to make a profit. Savings associations are permitted and encouraged to develop and apply flexible underwriting standards for loans that benefit low- or moderate-income geographies or individuals, only if consistent with safe and sound operations.

(e) *Low-cost education loans provided to low-income borrowers.* In assessing and taking into account the record of a savings association under this part, the appropriate Federal banking agency considers, as a factor, low-cost education loans originated by the savings association to borrowers, particularly in its assessment area(s), who have an individual income that is less than 50 percent of the area median income. For purposes of this paragraph, ''low-cost education loans'' means any education loan, as defined in section 140(a)(7) of the Truth in Lending Act (15 U.S.C. 1650(a)(7)) (including a loan under a state or local education loan program), originated by the savings association for a student at an ''institution of higher education,'' as that term is generally defined in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001 and 1002) and the implementing regulations published by the U.S. Department of Education, with interest rates and fees no greater than those of comparable education loans offered directly by the U.S. Department of Education. Such rates and fees are specified in section 455 of the Higher Education Act of 1965 (20 U.S.C. 1087e).

(f) *Activities in cooperation with minority- or women-owned financial institutions and low-income credit unions.* In assessing and taking into account the record of a nonminority-owned and nonwomen-owned savings association under this part, the appropriate Federal banking agency considers as a factor capital investment, loan participation, and other ventures undertaken by the savings association in cooperation with minority- and women-owned financial institutions and low-income credit unions. Such activities must help meet the credit needs of local communities in which the minority- and women-owned financial institutions and low-income credit unions are chartered. To be considered, such activities need not also benefit the savings association's assessment area(s) or the broader statewide or regional area that includes the savings association's assessment area(s).

§ 195.22 Lending test.

(a) *Scope of test.* (1) The lending test evaluates a savings association's record of helping to meet the credit needs of its assessment area(s) through its lending activities by considering a savings association's home mortgage, small business, small farm, and community development lending. If consumer lending constitutes a substantial majority of a savings association's business, the appropriate Federal banking agency will evaluate the savings association's consumer lending

in one or more of the following categories: motor vehicle, credit card, home equity, other secured, and other unsecured loans. In addition, at a savings association's option, the appropriate Federal banking agency will evaluate one or more categories of consumer lending, if the savings association has collected and maintained, as required in § 195.42(c)(1), the data for each category that the savings association elects to have the appropriate Federal banking agency evaluate.

(2) The appropriate Federal banking agency considers originations and purchases of loans. The appropriate Federal banking agency will also consider any other loan data the savings association may choose to provide, including data on loans outstanding, commitments and letters of credit.

(3) A savings association may ask the appropriate Federal banking agency to consider loans originated or purchased by consortia in which the savings association participates or by third parties in which the savings association has invested only if the loans meet the definition of community development loans and only in accordance with paragraph (d) of this section. The appropriate Federal banking agency will not consider these loans under any criterion of the lending test except the community development lending criterion.

(b) *Performance criteria.* The appropriate Federal banking agency evaluates a savings association's lending performance pursuant to the following criteria:

(1) *Lending activity.* The number and amount of the savings association's home mortgage, small business, small farm, and consumer loans, if applicable, in the savings association's assessment area(s);

(2) *Geographic distribution.* The geographic distribution of the savings association's home mortgage, small business, small farm, and consumer loans, if applicable, based on the loan location, including:

(i) The proportion of the savings association's lending in the savings association's assessment area(s);

(ii) The dispersion of lending in the savings association's assessment area(s); and

(iii) The number and amount of loans in low-, moderate-, middle-, and upper-income geographies in the savings association's assessment area(s);

(3) *Borrower characteristics.* The distribution, particularly in the savings association's assessment area(s), of the savings association's home mortgage, small business, small farm, and consumer loans, if applicable, based on borrower characteristics, including the number and amount of:

(i) Home mortgage loans to low-, moderate-, middle-, and upper-income individuals;

(ii) Small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(iii) Small business and small farm loans by loan amount at origination; and

(iv) Consumer loans, if applicable, to low-, moderate-, middle-, and upper-income individuals;

(4) *Community development lending.* The savings association's community development lending, including the number and amount of community development loans, and their complexity and innovativeness; and

(5) *Innovative or flexible lending practices.* The savings association's use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies.

(c) *Affiliate lending.* (1) At a savings association's option, the appropriate Federal banking agency will consider loans by an affiliate of the savings association, if the savings association provides data on the affiliate's loans pursuant to § 195.42.

(2) The appropriate Federal banking agency considers affiliate lending subject to the following constraints:

(i) No affiliate may claim a loan origination or loan purchase if another institution claims the same loan origination or purchase; and

(ii) If a savings association elects to have the appropriate Federal banking agency consider loans within a particular lending category made by one or more of the savings association's affiliates in a particular assessment area, the savings association shall elect to have the appropriate Federal banking agency consider, in accordance with paragraph (c)(1) of this section, all the loans within that lending category in that particular assessment area made by all of the savings association's affiliates.

(3) The appropriate Federal banking agency does not consider affiliate lending in assessing a savings association's performance under paragraph (b)(2)(i) of this section.

(d) *Lending by a consortium or a third party.* Community development loans originated or purchased by a consortium in which the savings association participates or by a third party in which the savings association has invested:

(1) Will be considered, at the savings association's option, if the savings association reports the data pertaining to these loans under § 195.42(b)(2); and

(2) May be allocated among participants or investors, as they choose, for purposes of the lending test, except that no participant or investor:

(i) May claim a loan origination or loan purchase if another participant or investor claims the same loan origination or purchase; or

(ii) May claim loans accounting for more than its percentage share (based on the level of its participation or investment) of the total loans originated by the consortium or third party.

(e) *Lending performance rating.* The appropriate Federal banking agency rates a savings association's lending performance as provided in Appendix A of this part.

§ 195.23 Investment test.

(a) *Scope of test.* The investment test evaluates a savings association's record of helping to meet the credit needs of its assessment area(s) through qualified investments that benefit its assessment area(s) or a broader statewide or regional area that includes the savings association's assessment area(s).

(b) *Exclusion.* Activities considered under the lending or service tests may not be considered under the investment test.

(c) *Affiliate investment.* At a savings association's option, the appropriate Federal banking agency will consider, in its assessment of a savings association's investment performance, a qualified investment made by an affiliate of the savings association, if the qualified investment is not claimed by any other institution.

(d) *Disposition of branch premises.* Donating, selling on favorable terms, or making available on a rent-free basis a branch of the savings association that is located in a predominantly minority neighborhood to a minority depository institution or women's depository institution (as these terms are defined in 12 U.S.C. 2907(b)) will be considered as a qualified investment.

(e) *Performance criteria.* The appropriate Federal banking agency evaluates the investment performance of a savings association pursuant to the following criteria:

(1) The dollar amount of qualified investments;

(2) The innovativeness or complexity of qualified investments;

(3) The responsiveness of qualified investments to credit and community development needs; and

(4) The degree to which the qualified investments are not routinely provided by private investors.

(f) *Investment performance rating.* The appropriate Federal banking agency rates a savings association's investment

performance as provided in Appendix A of this part.

§ 195.24 Service test.

(a) *Scope of test.* The service test evaluates a savings association's record of helping to meet the credit needs of its assessment area(s) by analyzing both the availability and effectiveness of a savings association's systems for delivering retail banking services and the extent and innovativeness of its community development services.

(b) *Area(s) benefitted.* Community development services must benefit a savings association's assessment area(s) or a broader statewide or regional area that includes the savings association's assessment area(s).

(c) *Affiliate service.* At a savings association's option, the appropriate Federal banking agency will consider, in its assessment of a savings association's service performance, a community development service provided by an affiliate of the savings association, if the community development service is not claimed by any other institution.

(d) *Performance criteria—retail banking services.* The appropriate Federal banking agency evaluates the availability and effectiveness of a savings association's systems for delivering retail banking services, pursuant to the following criteria:

(1) The current distribution of the savings association's branches among low-, moderate-, middle-, and upper-income geographies;

(2) In the context of its current distribution of the savings association's branches, the savings association's record of opening and closing branches, particularly branches located in low- or moderate-income geographies or primarily serving low- or moderate-income individuals;

(3) The availability and effectiveness of alternative systems for delivering retail banking services (*e.g.,* ATMs, ATMs not owned or operated by or exclusively for the savings association, banking by telephone or computer, loan production offices, and bank-at-work or bank-by-mail programs) in low- and moderate-income geographies and to low- and moderate-income individuals; and

(4) The range of services provided in low-, moderate-, middle-, and upper-income geographies and the degree to which the services are tailored to meet the needs of those geographies.

(e) *Performance criteria—community development services.* The appropriate Federal banking agency evaluates community development services pursuant to the following criteria:

(1) The extent to which the savings association provides community development services; and

(2) The innovativeness and responsiveness of community development services.

(f) *Service performance rating.* The appropriate Federal banking agency rates a savings association's service performance as provided in Appendix A of this part.

§ 195.25 Community development test for wholesale or limited purpose savings associations.

(a) *Scope of test.* The appropriate Federal banking agency assesses a wholesale or limited purpose savings association's record of helping to meet the credit needs of its assessment area(s) under the community development test through its community development lending, qualified investments, or community development services.

(b) *Designation as a wholesale or limited purpose savings association.* In order to receive a designation as a wholesale or limited purpose savings association, a savings association shall file a request, in writing, with the appropriate Federal banking agency, at least three months prior to the proposed effective date of the designation. If the appropriate Federal banking agency approves the designation, it remains in effect until the savings association requests revocation of the designation or until one year after the appropriate Federal banking agency notifies the savings association that the appropriate Federal banking agency has revoked the designation on its own initiative.

(c) *Performance criteria.* The appropriate Federal banking agency evaluates the community development performance of a wholesale or limited purpose savings association pursuant to the following criteria:

(1) The number and amount of community development loans (including originations and purchases of loans and other community development loan data provided by the savings association, such as data on loans outstanding, commitments, and letters of credit), qualified investments, or community development services;

(2) The use of innovative or complex qualified investments, community development loans, or community development services and the extent to which the investments are not routinely provided by private investors; and

(3) The savings association's responsiveness to credit and community development needs.

(d) *Indirect activities.* At a savings association's option, the appropriate Federal banking agency will consider in its community development performance assessment:

(1) Qualified investments or community development services provided by an affiliate of the savings association, if the investments or services are not claimed by any other institution; and

(2) Community development lending by affiliates, consortia and third parties, subject to the requirements and limitations in § 195.22(c) and (d).

(e) *Benefit to assessment area(s)*—(1) *Benefit inside assessment area(s).* The appropriate Federal banking agency considers all qualified investments, community development loans, and community development services that benefit areas within the savings association's assessment area(s) or a broader statewide or regional area that includes the savings association's assessment area(s).

(2) *Benefit outside assessment area(s).* The appropriate Federal banking agency considers the qualified investments, community development loans, and community development services that benefit areas outside the savings association's assessment area(s), if the savings association has adequately addressed the needs of its assessment area(s).

(f) *Community development performance rating.* The appropriate Federal banking agency rates a savings association's community development performance as provided in Appendix A of this part.

§ 195.26 Small savings association performance standards.

(a) *Performance criteria*—(1) *Small savings associations that are not intermediate small savings associations.* The appropriate Federal banking agency evaluates the record of a small savings association that is not, or that was not during the prior calendar year, an intermediate small savings association, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraph (b) of this section.

(2) *Intermediate small savings associations.* The appropriate Federal banking agency evaluates the record of a small savings association that is, or that was during the prior calendar year, an intermediate small savings association, of helping to meet the credit needs of its assessment area(s) pursuant to the criteria set forth in paragraphs (b) and (c) of this section.

(b) *Lending test.* A small savings association's lending performance is evaluated pursuant to the following criteria:

(1) The savings association's loan-to-deposit ratio, adjusted for seasonal variation, and, as appropriate, other lending-related activities, such as loan originations for sale to the secondary markets, community development loans, or qualified investments;

(2) The percentage of loans and, as appropriate, other lending-related activities located in the savings association's assessment area(s);

(3) The savings association's record of lending to and, as appropriate, engaging in other lending-related activities for borrowers of different income levels and businesses and farms of different sizes;

(4) The geographic distribution of the savings association's loans; and

(5) The savings association's record of taking action, if warranted, in response to written complaints about its performance in helping to meet credit needs in its assessment area(s).

(c) *Community development test.* An intermediate small savings association's community development performance also is evaluated pursuant to the following criteria:

(1) The number and amount of community development loans;

(2) The number and amount of qualified investments;

(3) The extent to which the savings association provides community development services; and

(4) The savings association's responsiveness through such activities to community development lending, investment, and services needs.

(d) *Small savings association performance rating.* The appropriate Federal banking agency rates the performance of a savings association evaluated under this section as provided in Appendix A of this part.

§ 195.27 Strategic plan.

(a) *Alternative election.* The appropriate Federal banking agency will assess a savings association's record of helping to meet the credit needs of its assessment area(s) under a strategic plan if:

(1) The savings association has submitted the plan to the appropriate Federal banking agency as provided for in this section;

(2) The appropriate Federal banking agency has approved the plan;

(3) The plan is in effect; and

(4) The savings association has been operating under an approved plan for at least one year.

(b) *Data reporting.* The appropriate Federal banking agency's approval of a plan does not affect the savings association's obligation, if any, to report data as required by **§ 195.42.**

(c) *Plans in general*—(1) *Term.* A plan may have a term of no more than five years, and any multi-year plan must include annual interim measurable goals under which the appropriate Federal banking agency will evaluate the savings association's performance.

(2) *Multiple assessment areas.* A savings association with more than one assessment area may prepare a single plan for all of its assessment areas or one or more plans for one or more of its assessment areas.

(3) *Treatment of affiliates.* Affiliated institutions may prepare a joint plan if the plan provides measurable goals for each institution. Activities may be allocated among institutions at the institutions' option, provided that the same activities are not considered for more than one institution.

(d) *Public participation in plan development.* Before submitting a plan to the appropriate Federal banking agency for approval, a savings association shall:

(1) Informally seek suggestions from members of the public in its assessment area(s) covered by the plan while developing the plan;

(2) Once the savings association has developed a plan, formally solicit public comment on the plan for at least 30 days by publishing notice in at least one newspaper of general circulation in each assessment area covered by the plan; and

(3) During the period of formal public comment, make copies of the plan available for review by the public at no cost at all offices of the savings association in any assessment area covered by the plan and provide copies of the plan upon request for a reasonable fee to cover copying and mailing, if applicable.

(e) *Submission of plan.* The savings association shall submit its plan to the appropriate Federal banking agency at least three months prior to the proposed effective date of the plan. The savings association shall also submit with its plan a description of its informal efforts to seek suggestions from members of the public, any written public comment received, and, if the plan was revised in light of the comment received, the initial plan as released for public comment.

(f) *Plan content*—(1) *Measurable goals.* (i) A savings association shall specify in its plan measurable goals for helping to meet the credit needs of each assessment area covered by the plan, particularly the needs of low- and moderate-income geographies and low- and moderate-income individuals, through lending, investment, and services, as appropriate.

(ii) A savings association shall address in its plan all three performance categories and, unless the savings association has been designated as a wholesale or limited purpose savings association, shall emphasize lending and lending-related activities. Nevertheless, a different emphasis, including a focus on one or more performance categories, may be appropriate if responsive to the characteristics and credit needs of its assessment area(s), considering public comment and the savings association's capacity and constraints, product offerings, and business strategy.

(2) *Confidential information.* A savings association may submit additional information to the appropriate Federal banking agency on a confidential basis, but the goals stated in the plan must be sufficiently specific to enable the public and the appropriate Federal banking agency to judge the merits of the plan.

(3) *Satisfactory and outstanding goals.* A savings association shall specify in its plan measurable goals that constitute ''satisfactory'' performance. A plan may specify measurable goals that constitute ''outstanding'' performance. If a savings association submits, and the appropriate Federal banking agency approves, both ''satisfactory'' and ''outstanding'' performance goals, the appropriate Federal banking agency will consider the savings association eligible for an ''outstanding'' performance rating.

(4) *Election if satisfactory goals not substantially met.* A savings association may elect in its plan that, if the savings association fails to meet substantially its plan goals for a satisfactory rating, the appropriate Federal banking agency will evaluate the savings association's performance under the lending, investment, and service tests, the community development test, or the small savings association performance standards, as appropriate.

(g) *Plan approval*—(1) *Timing.* The appropriate Federal banking agency will act upon a plan within 60 calendar days after it receives the complete plan and other material required under paragraph (e) of this section. If the appropriate Federal banking agency fails to act within this time period, the plan shall be deemed approved unless the appropriate Federal banking agency extends the review period for good cause.

(2) *Public participation.* In evaluating the plan's goals, the appropriate Federal banking agency considers the public's involvement in formulating the plan, written public comment on the plan,

and any response by the savings association to public comment on the plan.

(3) *Criteria for evaluating plan.* The appropriate Federal banking agency evaluates a plan's measurable goals using the following criteria, as appropriate:

(i) The extent and breadth of lending or lending-related activities, including, as appropriate, the distribution of loans among different geographies, businesses and farms of different sizes, and individuals of different income levels, the extent of community development lending, and the use of innovative or flexible lending practices to address credit needs;

(ii) The amount and innovativeness, complexity, and responsiveness of the savings association's qualified investments; and

(iii) The availability and effectiveness of the savings association's systems for delivering retail banking services and the extent and innovativeness of the savings association's community development services.

(h) *Plan amendment.* During the term of a plan, a savings association may request the appropriate Federal banking agency to approve an amendment to the plan on grounds that there has been a material change in circumstances. The savings association shall develop an amendment to a previously approved plan in accordance with the public participation requirements of paragraph (d) of this section.

(i) *Plan assessment.* The appropriate Federal banking agency approves the goals and assesses performance under a plan as provided for in Appendix A of this part.

§ 195.28 Assigned ratings.

(a) *Ratings in general.* Subject to paragraphs (b) and (c) of this section, the appropriate Federal banking agency assigns to a savings association a rating of ''outstanding,'' ''satisfactory,'' ''needs to improve,'' or ''substantial noncompliance'' based on the savings association's performance under the lending, investment and service tests, the community development test, the small savings association performance standards, or an approved strategic plan, as applicable.

(b) *Lending, investment, and service tests.* The appropriate Federal banking agency assigns a rating for a savings association assessed under the lending, investment, and service tests in accordance with the following principles:

(1) A savings association that receives an ''outstanding'' rating on the lending test receives an assigned rating of at least ''satisfactory'';

(2) A savings association that receives an ''outstanding'' rating on both the service test and the investment test and a rating of at least ''high satisfactory'' on the lending test receives an assigned rating of ''outstanding''; and

(3) No savings association may receive an assigned rating of ''satisfactory'' or higher unless it receives a rating of at least ''low satisfactory'' on the lending test.

(c) *Effect of evidence of discriminatory or other illegal credit practices.* (1) The appropriate Federal banking agency's evaluation of a savings association's CRA performance is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the savings association or in any assessment area by any affiliate whose loans have been considered as part of the savings association's lending performance. In connection with any type of lending activity described in § 195.22(a), evidence of discriminatory or other credit practices that violate an applicable law, rule, or regulation includes, but is not limited to:

(i) Discrimination against applicants on a prohibited basis in violation, for example, of the Equal Credit Opportunity Act or the Fair Housing Act;

(ii) Violations of the Home Ownership and Equity Protection Act;

(iii) Violations of section 5 of the Federal Trade Commission Act;

(iv) Violations of section 8 of the Real Estate Settlement Procedures Act; and

(v) Violations of the Truth in Lending Act provisions regarding a consumer's right of rescission.

(2) In determining the effect of evidence of practices described in paragraph (c)(1) of this section on the savings association's assigned rating, the appropriate Federal banking agency considers the nature, extent, and strength of the evidence of the practices; the policies and procedures that the savings association (or affiliate, as applicable) has in place to prevent the practices; any corrective action that the savings association (or affiliate, as applicable) has taken or has committed to take, including voluntary corrective action resulting from self-assessment; and any other relevant information.

§ 195.29 Effect of CRA performance on applications.

(a) *CRA performance.* Among other factors, the appropriate Federal banking agency takes into account the record of performance under the CRA of each applicant savings association, and for applications under section 10(e) of the Home Owners' Loan Act (12 U.S.C. 1467a(e)), of each proposed subsidiary savings association, in considering an application for:

(1) The establishment of a domestic branch or other facility that would be authorized to take deposits;

(2) The relocation of the main office or a branch;

(3) The merger or consolidation with or the acquisition of the assets or assumption of the liabilities of an insured depository institution requiring appropriate Federal banking agency approval under the Bank Merger Act (12 U.S.C. 1828(c));

(4) A Federal thrift charter; and

(5) Acquisitions subject to section 10(e) of the Home Owners' Loan Act (12 U.S.C. 1467a(e)).

(b) *Charter application.* An applicant for a Federal thrift charter shall submit with its application a description of how it will meet its CRA objectives. The appropriate Federal banking agency takes the description into account in considering the application and may deny or condition approval on that basis.

(c) *Interested parties.* The appropriate Federal banking agency takes into account any views expressed by interested parties that are submitted in accordance with the applicable comment procedures in considering CRA performance in an application listed in paragraphs (a) and (b) of this section.

(d) *Denial or conditional approval of application.* A savings association's record of performance may be the basis for denying or conditioning approval of an application listed in paragraph (a) of this section.

(e) *Insured depository institution.* For purposes of this section, the term ''insured depository institution'' has the meaning given to that term in 12 U.S.C. 1813.

Subpart C—Records, Reporting, and Disclosure Requirements

§ 195.41 Assessment area delineation.

(a) *In general.* A savings association shall delineate one or more assessment areas within which the appropriate Federal banking agency evaluates the savings association's record of helping to meet the credit needs of its community. The appropriate Federal banking agency does not evaluate the savings association's delineation of its assessment area(s) as a separate performance criterion, but the appropriate Federal banking agency reviews the delineation for compliance with the requirements of this section.

(b) *Geographic area(s) for wholesale or limited purpose savings associations.* The assessment area(s) for a wholesale or limited purpose savings association must consist generally of one or more MSAs or metropolitan divisions (using the MSA or metropolitan division boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns, in which the savings association has its main office, branches, and deposit-taking ATMs.

(c) *Geographic area(s) for other savings associations.* The assessment area(s) for a savings association other than a wholesale or limited purpose savings association must:

(1) Consist generally of one or more MSAs or metropolitan divisions (using the MSA or metropolitan division boundaries that were in effect as of January 1 of the calendar year in which the delineation is made) or one or more contiguous political subdivisions, such as counties, cities, or towns; and

(2) Include the geographies in which the savings association has its main office, its branches, and its deposit-taking ATMs, as well as the surrounding geographies in which the savings association has originated or purchased a substantial portion of its loans (including home mortgage loans, small business and small farm loans, and any other loans the savings association chooses, such as those consumer loans on which the savings association elects to have its performance assessed).

(d) *Adjustments to geographic area(s).* A savings association may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve. An adjustment is particularly appropriate in the case of an assessment area that otherwise would be extremely large, of unusual configuration, or divided by significant geographic barriers.

(e) *Limitations on the delineation of an assessment area.* Each savings association's assessment area(s):

(1) Must consist only of whole geographies;

(2) May not reflect illegal discrimination;

(3) May not arbitrarily exclude low- or moderate-income geographies, taking into account the savings association's size and financial condition; and

(4) May not extend substantially beyond an MSA boundary or beyond a state boundary unless the assessment area is located in a multistate MSA. If a savings association serves a geographic area that extends substantially beyond a state boundary, the savings association shall delineate separate assessment areas for the areas in each state. If a savings association serves a geographic area that extends substantially beyond an MSA boundary, the savings association shall delineate separate assessment areas for the areas inside and outside the MSA.

(f) *Savings associations serving military personnel.* Notwithstanding the requirements of this section, a savings association whose business predominantly consists of serving the needs of military personnel or their dependents who are not located within a defined geographic area may delineate its entire deposit customer base as its assessment area.

(g) *Use of assessment area(s).* The appropriate Federal banking agency uses the assessment area(s) delineated by a savings association in its evaluation of the savings association's CRA performance unless the appropriate Federal banking agency determines that the assessment area(s) do not comply with the requirements of this section.

§ 195.42 Data collection, reporting, and disclosure.

(a) *Loan information required to be collected and maintained.* A savings association, except a small savings association, shall collect, and maintain in machine readable form (as prescribed by the appropriate Federal banking agency) until the completion of its next CRA examination, the following data for each small business or small farm loan originated or purchased by the savings association:

(1) A unique number or alpha-numeric symbol that can be used to identify the relevant loan file;

(2) The loan amount at origination;

(3) The loan location; and

(4) An indicator whether the loan was to a business or farm with gross annual revenues of $1 million or less.

(b) *Loan information required to be reported.* A savings association, except a small savings association or a savings association that was a small savings association during the prior calendar year, shall report annually by March 1 to the appropriate Federal banking agency in machine readable form (as prescribed by the agency) the following data for the prior calendar year:

(1) *Small business and small farm loan data.* For each geography in which the savings association originated or purchased a small business or small farm loan, the aggregate number and amount of loans:

(i) With an amount at origination of $100,000 or less;

(ii) With amount at origination of more than $100,000 but less than or equal to $250,000;

(iii) With an amount at origination of more than $250,000; and

(iv) To businesses and farms with gross annual revenues of $1 million or less (using the revenues that the savings association considered in making its credit decision);

(2) *Community development loan data.* The aggregate number and aggregate amount of community development loans originated or purchased; and

(3) *Home mortgage loans.* If the savings association is subject to reporting under part 203 of this title, the location of each home mortgage loan application, origination, or purchase outside the MSAs in which the savings association has a home or branch office (or outside any MSA) in accordance with the requirements of part 203 of this title.

(c) *Optional data collection and maintenance*—(1) *Consumer loans.* A savings association may collect and maintain in machine readable form (as prescribed by the appropriate Federal banking agency) data for consumer loans originated or purchased by the savings association for consideration under the lending test. A savings association may maintain data for one or more of the following categories of consumer loans: Motor vehicle, credit card, home equity, other secured, and other unsecured. If the savings association maintains data for loans in a certain category, it shall maintain data for all loans originated or purchased within that category. The savings association shall maintain data separately for each category, including for each loan:

(i) A unique number or alpha-numeric symbol that can be used to identify the relevant loan file;

(ii) The loan amount at origination or purchase;

(iii) The loan location; and

(iv) The gross annual income of the borrower that the savings association considered in making its credit decision.

(2) *Other loan data.* At its option, a savings association may provide other information concerning its lending performance, including additional loan distribution data.

(d) *Data on affiliate lending.* A savings association that elects to have the appropriate Federal banking agency consider loans by an affiliate, for purposes of the lending or community development test or an approved strategic plan, shall collect, maintain, and report for those loans the data that

the savings association would have collected, maintained, and reported pursuant to paragraphs (a), (b), and (c) of this section had the loans been originated or purchased by the savings association. For home mortgage loans, the savings association shall also be prepared to identify the home mortgage loans reported under part 203 of this title by the affiliate.

(e) *Data on lending by a consortium or a third-party.* A savings association that elects to have the appropriate Federal banking agency consider community development loans by a consortium or third party, for purposes of the lending or community development tests or an approved strategic plan, shall report for those loans the data that the savings association would have reported under paragraph (b)(2) of this section had the loans been originated or purchased by the savings association.

(f) *Small savings associations electing evaluation under the lending, investment, and service tests.* A savings association that qualifies for evaluation under the small savings association performance standards but elects evaluation under the lending, investment, and service tests shall collect, maintain, and report the data required for other savings associations pursuant to paragraphs (a) and (b) of this section.

(g) *Assessment area data.* A savings association, except a small savings association or a savings association that was a small savings association during the prior calendar year, shall collect and report to the appropriate Federal banking agency by March 1 of each year a list for each assessment area showing the geographies within the area.

(h) *CRA Disclosure Statement.* The appropriate Federal banking agency prepares annually for each savings association that reports data pursuant to this section a CRA Disclosure Statement that contains, on a state-by-state basis:

(1) For each county (and for each assessment area smaller than a county) with a population of 500,000 persons or fewer in which the savings association reported a small business or small farm loan:

(i) The number and amount of small business and small farm loans reported as originated or purchased located in low-, moderate-, middle-, and upper-income geographies;

(ii) A list grouping each geography according to whether the geography is low-, moderate-, middle-, or upper-income;

(iii) A list showing each geography in which the savings association reported a small business or small farm loan; and

(iv) The number and amount of small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(2) For each county (and for each assessment area smaller than a county) with a population in excess of 500,000 persons in which the savings association reported a small business or small farm loan:

(i) The number and amount of small business and small farm loans reported as originated or purchased located in geographies with median income relative to the area median income of less than 10 percent, 10 or more but less than 20 percent, 20 or more but less than 30 percent, 30 or more but less than 40 percent, 40 or more but less than 50 percent, 50 or more but less than 60 percent, 60 or more but less than 70 percent, 70 or more but less than 80 percent, 80 or more but less than 90 percent, 90 or more but less than 100 percent, 100 or more but less than 110 percent, 110 or more but less than 120 percent, and 120 percent or more;

(ii) A list grouping each geography in the county or assessment area according to whether the median income in the geography relative to the area median income is less than 10 percent, 10 or more but less than 20 percent, 20 or more but less than 30 percent, 30 or more but less than 40 percent, 40 or more but less than 50 percent, 50 or more but less than 60 percent, 60 or more but less than 70 percent, 70 or more but less than 80 percent, 80 or more but less than 90 percent, 90 or more but less than 100 percent, 100 or more but less than 110 percent, 110 or more but less than 120 percent, and 120 percent or more;

(iii) A list showing each geography in which the savings association reported a small business or small farm loan; and

(iv) The number and amount of small business and small farm loans to businesses and farms with gross annual revenues of $1 million or less;

(3) The number and amount of small business and small farm loans located inside each assessment area reported by the savings association and the number and amount of small business and small farm loans located outside the assessment area(s) reported by the savings association; and

(4) The number and amount of community development loans reported as originated or purchased.

(i) *Aggregate disclosure statements.* The appropriate Federal banking agency, in conjunction with the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation or the OCC, as appropriate, prepares annually, for each MSA or metropolitan division (including an MSA or metropolitan division that crosses a state boundary) and the nonmetropolitan portion of each state, an aggregate disclosure statement of small business and small farm lending by all institutions subject to reporting under this part or parts 25, 228, or 345 of this title. These disclosure statements indicate, for each geography, the number and amount of all small business and small farm loans originated or purchased by reporting institutions, except that the appropriate Federal banking agency may adjust the form of the disclosure if necessary, because of special circumstances, to protect the privacy of a borrower or the competitive position of an institution.

(j) *Central data depositories.* The appropriate Federal banking agency makes the aggregate disclosure statements, described in paragraph (i) of this section, and the individual savings association CRA Disclosure Statements, described in paragraph (h) of this section, available to the public at central data depositories. The appropriate Federal banking agency publishes a list of the depositories at which the statements are available.

§ 195.43 Content and availability of public file.

(a) *Information available to the public.* A savings association shall maintain a public file that includes the following information:

(1) All written comments received from the public for the current year and each of the prior two calendar years that specifically relate to the savings association's performance in helping to meet community credit needs, and any response to the comments by the savings association, if neither the comments nor the responses contain statements that reflect adversely on the good name or reputation of any persons other than the savings association or publication of which would violate specific provisions of law;

(2) A copy of the public section of the savings association's most recent CRA Performance Evaluation prepared by the appropriate Federal banking agency. The savings association shall place this copy in the public file within 30 business days after its receipt from the appropriate Federal banking agency;

(3) A list of the savings association's branches, their street addresses, and geographies;

(4) A list of branches opened or closed by the savings association during the current year and each of the prior two calendar years, their street addresses, and geographies;

(5) A list of services (including hours of operation, available loan and deposit products, and transaction fees) generally offered at the savings association's branches and descriptions of material differences in the availability or cost of services at particular branches, if any. At its option, a savings association may include information regarding the availability of alternative systems for delivering retail banking services (*e.g.,* ATMs, ATMs not owned or operated by or exclusively for the savings association, banking by telephone or computer, loan production offices, and bank-at-work or bank-by-mail programs);

(6) A map of each assessment area showing the boundaries of the area and identifying the geographies contained within the area, either on the map or in a separate list; and

(7) Any other information the savings association chooses.

(b) *Additional information available to the public*—(1) *Savings associations other than small savings associations.* A savings association, except a small savings association or a savings association that was a small savings association during the prior calendar year, shall include in its public file the following information pertaining to the savings association and its affiliates, if applicable, for each of the prior two calendar years:

(i) If the savings association has elected to have one or more categories of its consumer loans considered under the lending test, for each of these categories, the number and amount of loans:

(A) To low-, moderate-, middle-, and upper-income individuals;

(B) Located in low-, moderate-, middle-, and upper-income census tracts; and

(C) Located inside the savings association's assessment area(s) and outside the savings association's assessment area(s); and

(ii) The savings association's CRA Disclosure Statement. The savings association shall place the statement in the public file within three business days of its receipt from the appropriate Federal banking agency.

(2) *Savings associations required to report Home Mortgage Disclosure Act (HMDA) data.* A savings association required to report home mortgage loan data pursuant to part 203 of this title shall include in its public file a copy of the HMDA Disclosure Statement provided by the Federal Financial Institutions Examination Council pertaining to the savings association for each of the prior two calendar years. In addition, a savings association that elected to have the appropriate Federal banking agency consider the mortgage lending of an affiliate for any of these years shall include in its public file the affiliate's HMDA Disclosure Statement for those years. The savings association shall place the statement(s) in the public file within three business days after its receipt.

(3) *Small savings associations.* A small savings association or a savings association that was a small savings association during the prior calendar year shall include in its public file:

(i) The savings association's loan-to-deposit ratio for each quarter of the prior calendar year and, at its option, additional data on its loan-to-deposit ratio; and

(ii) The information required for other savings associations by paragraph (b)(1) of this section, if the savings association has elected to be evaluated under the lending, investment, and service tests.

(4) *Savings associations with strategic plans.* A savings association that has been approved to be assessed under a strategic plan shall include in its public file a copy of that plan. A savings association need not include information submitted to the appropriate Federal banking agency on a confidential basis in conjunction with the plan.

(5) *Savings associations with less than satisfactory ratings.* A savings association that received a less than satisfactory rating during its most recent examination shall include in its public file a description of its current efforts to improve its performance in helping to meet the credit needs of its entire community. The savings association shall update the description quarterly.

(c) *Location of public information.* A savings association shall make available to the public for inspection upon request and at no cost the information required in this section as follows:

(1) At the main office and, if an interstate savings association, at one branch office in each state, all information in the public file; and

(2) At each branch:

(i) A copy of the public section of the savings association's most recent CRA Performance Evaluation and a list of services provided by the branch; and

(ii) Within five calendar days of the request, all the information in the public file relating to the assessment area in which the branch is located.

(d) *Copies.* Upon request, a savings association shall provide copies, either on paper or in another form acceptable to the person making the request, of the information in its public file. The savings association may charge a reasonable fee not to exceed the cost of copying and mailing (if applicable).

(e) *Updating.* Except as otherwise provided in this section, a savings association shall ensure that the information required by this section is current as of April 1 of each year.

§ 195.44 Public notice by savings associations.

A savings association shall provide in the public lobby of its main office and each of its branches the appropriate public notice set forth in Appendix B of this part. Only a branch of a savings association having more than one assessment area shall include the bracketed material in the notice for branch offices. Only a savings association that is an affiliate of a holding company shall include the last two sentences of the notices.

§ 195.45 Publication of planned examination schedule.

The appropriate Federal banking agency publishes at least 30 days in advance of the beginning of each calendar quarter a list of savings associations scheduled for CRA examinations in that quarter.

Appendix A to Part 195—Ratings

(a) *Ratings in general.* (1) In assigning a rating, the appropriate Federal banking agency evaluates a savings association's performance under the applicable performance criteria in this part, in accordance with §§ 195.21 and 195.28. This includes consideration of low-cost education loans provided to low-income borrowers and activities in cooperation with minority- or women-owned financial institutions and low-income credit unions, as well as adjustments on the basis of evidence of discriminatory or other illegal credit practices.

(2) A savings association's performance need not fit each aspect of a particular rating profile in order to receive that rating, and exceptionally strong performance with respect to some aspects may compensate for weak performance in others. The savings association's overall performance, however, must be consistent with safe and sound banking practices and generally with the appropriate rating profile as follows.

(b) *Savings associations evaluated under the lending, investment, and service tests*—(1) *Lending performance rating.* The appropriate Federal banking agency assigns each savings association's lending performance one of the five following ratings.

(i) *Outstanding.* The appropriate Federal banking agency rates a savings association's lending performance ''outstanding'' if, in general, it demonstrates:

(A) Excellent responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A substantial majority of its loans are made in its assessment area(s);

(C) An excellent geographic distribution of loans in its assessment area(s);

(D) An excellent distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the savings association;

(E) An excellent record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Extensive use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It is a leader in making community development loans.

(ii) *High satisfactory.* The appropriate Federal banking agency rates a savings association's lending performance ''high satisfactory'' if, in general, it demonstrates:

(A) Good responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A high percentage of its loans are made in its assessment area(s);

(C) A good geographic distribution of loans in its assessment area(s);

(D) A good distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the savings association;

(E) A good record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made a relatively high level of community development loans.

(iii) *Low satisfactory.* The appropriate Federal banking agency rates a savings association's lending performance ''low satisfactory'' if, in general, it demonstrates:

(A) Adequate responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) An adequate percentage of its loans are made in its assessment area(s);

(C) An adequate geographic distribution of loans in its assessment area(s);

(D) An adequate distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the savings association;

(E) An adequate record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Limited use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made an adequate level of community development loans.

(iv) *Needs to improve.* The appropriate Federal banking agency rates a savings association's lending performance ''needs to improve'' if, in general, it demonstrates:

(A) Poor responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A small percentage of its loans are made in its assessment area(s);

(C) A poor geographic distribution of loans, particularly to low- or moderate-income geographies, in its assessment area(s);

(D) A poor distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the savings association;

(E) A poor record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) Little use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made a low level of community development loans.

(v) *Substantial noncompliance.* The appropriate Federal banking agency rates a savings association's lending performance as being in ''substantial noncompliance'' if, in general, it demonstrates:

(A) A very poor responsiveness to credit needs in its assessment area(s), taking into account the number and amount of home mortgage, small business, small farm, and consumer loans, if applicable, in its assessment area(s);

(B) A very small percentage of its loans are made in its assessment area(s);

(C) A very poor geographic distribution of loans, particularly to low- or moderate-income geographies, in its assessment area(s);

(D) A very poor distribution, particularly in its assessment area(s), of loans among individuals of different income levels and businesses (including farms) of different sizes, given the product lines offered by the savings association;

(E) A very poor record of serving the credit needs of highly economically disadvantaged areas in its assessment area(s), low-income individuals, or businesses (including farms) with gross annual revenues of $1 million or less, consistent with safe and sound operations;

(F) No use of innovative or flexible lending practices in a safe and sound manner to address the credit needs of low- or moderate-income individuals or geographies; and

(G) It has made few, if any, community development loans.

(2) *Investment performance rating.* The appropriate Federal banking agency assigns each savings association's investment performance one of the five following ratings.

(i) *Outstanding.* The appropriate Federal banking agency rates a savings association's investment performance ''outstanding'' if, in general, it demonstrates:

(A) An excellent level of qualified investments, particularly those that are not routinely provided by private investors, often in a leadership position;

(B) Extensive use of innovative or complex qualified investments; and

(C) Excellent responsiveness to credit and community development needs.

(ii) *High satisfactory.* The appropriate Federal banking agency rates a savings association's investment performance ''high satisfactory'' if, in general, it demonstrates:

(A) A significant level of qualified investments, particularly those that are not routinely provided by private investors, occasionally in a leadership position;

(B) Significant use of innovative or complex qualified investments; and

(C) Good responsiveness to credit and community development needs.

(iii) *Low satisfactory.* The appropriate Federal banking agency rates a savings association's investment performance ''low satisfactory'' if, in general, it demonstrates:

(A) An adequate level of qualified investments, particularly those that are not routinely provided by private investors, although rarely in a leadership position;

(B) Occasional use of innovative or complex qualified investments; and

(C) Adequate responsiveness to credit and community development needs.

(iv) *Needs to improve.* The appropriate Federal banking agency rates a savings association's investment performance ''needs to improve'' if, in general, it demonstrates:

(A) A poor level of qualified investments, particularly those that are not routinely provided by private investors;

(B) Rare use of innovative or complex qualified investments; and

(C) Poor responsiveness to credit and community development needs.

(v) *Substantial noncompliance.* The appropriate Federal banking agency rates a savings association's investment performance as being in ''substantial noncompliance'' if, in general, it demonstrates:

(A) Few, if any, qualified investments, particularly those that are not routinely provided by private investors;

(B) No use of innovative or complex qualified investments; and

(C) Very poor responsiveness to credit and community development needs.

(3) *Service performance rating.* The appropriate Federal banking agency assigns each savings association's service performance one of the five following ratings.

(i) *Outstanding.* The appropriate Federal banking agency rates a savings association's service performance ''outstanding'' if, in

general, the savings association demonstrates:

(A) Its service delivery systems are readily accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has improved the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) are tailored to the convenience and needs of its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It is a leader in providing community development services.

(ii) *High satisfactory.* The appropriate Federal banking agency rates a savings association's service performance ''high satisfactory'' if, in general, the savings association demonstrates:

(A) Its service delivery systems are accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has not adversely affected the accessibility of its delivery systems, particularly in low- and moderate-income geographies and to low- and moderate-income individuals;

(C) Its services (including, where appropriate, business hours) do not vary in a way that inconveniences its assessment area(s), particularly low- and moderate-income geographies and low- and moderate-income individuals; and

(D) It provides a relatively high level of community development services.

(iii) *Low satisfactory.* The appropriate Federal banking agency rates a savings association's service performance ''low satisfactory'' if, in general, the savings association demonstrates:

(A) Its service delivery systems are reasonably accessible to geographies and individuals of different income levels in its assessment area(s);

(B) To the extent changes have been made, its record of opening and closing branches has generally not adversely affected the accessibility of its delivery systems, particularly in low- and moderate-income geographies and to low- and moderate-income individuals;

(C) Its services (including, where appropriate, business hours) do not vary in a way that inconveniences its assessment area(s), particularly low- and moderate-income geographies and low- and moderate-income individuals; and

(D) It provides an adequate level of community development services.

(iv) *Needs to improve.* The appropriate Federal banking agency rates a savings association's service performance ''needs to improve'' if, in general, the savings association demonstrates:

(A) Its service delivery systems are unreasonably inaccessible to portions of its assessment area(s), particularly to low- or moderate-income geographies or to low- or moderate-income individuals;

(B) To the extent changes have been made, its record of opening and closing branches has adversely affected the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) vary in a way that inconveniences its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It provides a limited level of community development services.

(v) *Substantial noncompliance.* The appropriate Federal banking agency rates a savings association's service performance as being in ''substantial noncompliance'' if, in general, the savings association demonstrates:

(A) Its service delivery systems are unreasonably inaccessible to significant portions of its assessment area(s), particularly to low- or moderate-income geographies or to low- or moderate-income individuals;

(B) To the extent changes have been made, its record of opening and closing branches has significantly adversely affected the accessibility of its delivery systems, particularly in low- or moderate-income geographies or to low- or moderate-income individuals;

(C) Its services (including, where appropriate, business hours) vary in a way that significantly inconveniences its assessment area(s), particularly low- or moderate-income geographies or low- or moderate-income individuals; and

(D) It provides few, if any, community development services.

(c) *Wholesale or limited purpose savings associations.* The appropriate Federal banking agency assigns each wholesale or limited purpose savings association's community development performance one of the four following ratings.

(1) *Outstanding.* The appropriate Federal banking agency rates a wholesale or limited purpose savings association's community development performance ''outstanding'' if, in general, it demonstrates:

(i) A high level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Extensive use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Excellent responsiveness to credit and community development needs in its assessment area(s).

(2) *Satisfactory.* The appropriate Federal banking agency rates a wholesale or limited purpose savings association's community development performance ''satisfactory'' if, in general, it demonstrates:

(i) An adequate level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Occasional use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Adequate responsiveness to credit and community development needs in its assessment area(s).

(3) *Needs to improve.* The appropriate Federal banking agency rates a wholesale or limited purpose savings association's community development performance as ''needs to improve'' if, in general, it demonstrates:

(i) A poor level of community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) Rare use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Poor responsiveness to credit and community development needs in its assessment area(s).

(4) *Substantial noncompliance.* The appropriate Federal banking agency rates a wholesale or limited purpose savings association's community development performance in ''substantial noncompliance'' if, in general, it demonstrates:

(i) Few, if any, community development loans, community development services, or qualified investments, particularly investments that are not routinely provided by private investors;

(ii) No use of innovative or complex qualified investments, community development loans, or community development services; and

(iii) Very poor responsiveness to credit and community development needs in its assessment area(s).

(d) *Savings associations evaluated under the small savings association performance standard.*—(1) *Lending test ratings.* (i) *Eligibility for a satisfactory lending test rating.* The appropriate Federal banking agency rates a small savings association's lending performance ''satisfactory'' if, in general, the savings association demonstrates:

(A) A reasonable loan-to-deposit ratio (considering seasonal variations) given the savings association's size, financial condition, the credit needs of its assessment area(s), and taking into account, as appropriate, other lending-related activities such as loan originations for sale to the secondary markets and community development loans and qualified investments;

(B) A majority of its loans and, as appropriate, other lending-related activities, are in its assessment area;

(C) A distribution of loans to and, as appropriate, other lending-related activities for individuals of different income levels (including low- and moderate-income individuals) and businesses and farms of different sizes that is reasonable given the demographics of the savings association's assessment area(s);

(D) A record of taking appropriate action, when warranted, in response to written complaints, if any, about the savings association's performance in helping to meet the credit needs of its assessment area(s); and

(E) A reasonable geographic distribution of loans given the savings association's assessment area(s).

(ii) *Eligibility for an ''outstanding'' lending test rating.* A small savings association that meets each of the standards for a ''satisfactory'' rating under this paragraph and exceeds some or all of those standards may warrant consideration for a lending test rating of ''outstanding.''

(iii) *Needs to improve or substantial noncompliance ratings.* A small savings association may also receive a lending test rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standard for a ''satisfactory'' rating.

(2) *Community development test ratings for intermediate small savings associations*—(i) *Eligibility for a satisfactory community development test rating.* The appropriate Federal banking agency rates an intermediate small savings association's community development performance ''satisfactory'' if the savings association demonstrates adequate responsiveness to the community development needs of its assessment area(s) through community development loans, qualified investments, and community development services. The adequacy of the savings association's response will depend on its capacity for such community development activities, its assessment area's need for such community development activities, and the availability of such opportunities for community development in the savings association's assessment area(s).

(ii) *Eligibility for an outstanding community development test rating.* The appropriate Federal banking agency rates an intermediate small savings association's community development performance ''outstanding'' if the savings association demonstrates excellent responsiveness to community development needs in its assessment area(s) through community development loans, qualified investments, and community development services, as appropriate, considering the savings association's capacity and the need and availability of such opportunities for community development in the savings association's assessment area(s).

(iii) *Needs to improve or substantial noncompliance ratings.* An intermediate small savings association may also receive a community development test rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standards for a ''satisfactory'' rating.

(3) *Overall rating*—(i) *Eligibility for a satisfactory overall rating.* No intermediate small savings association may receive an assigned overall rating of ''satisfactory'' unless it receives a rating of at least ''satisfactory'' on both the lending test and the community development test.

(ii) *Eligibility for an outstanding overall rating.* (A) An intermediate small savings association that receives an ''outstanding'' rating on one test and at least ''satisfactory'' on the other test may receive an assigned overall rating of ''outstanding.''

(B) A small savings association that is not an intermediate small savings association that meets each of the standards for a ''satisfactory'' rating under the lending test and exceeds some or all of those standards may warrant consideration for an overall rating of ''outstanding.'' In assessing whether a savings association's performance is ''outstanding,'' the appropriate Federal banking agency considers the extent to which the savings association exceeds each of the performance standards for a ''satisfactory'' rating and its performance in making qualified investments and its performance in providing branches and other services and delivery systems that enhance credit availability in its assessment area(s).

(iii) *Needs to improve or substantial noncompliance overall ratings.* A small savings association may also receive a rating of ''needs to improve'' or ''substantial noncompliance'' depending on the degree to which its performance has failed to meet the standards for a ''satisfactory'' rating.

(e) *Strategic plan assessment and rating*—(1) *Satisfactory goals.* The appropriate Federal banking agency approves as ''satisfactory'' measurable goals that adequately help to meet the credit needs of the savings association's assessment area(s).

(2) *Outstanding goals.* If the plan identifies a separate group of measurable goals that substantially exceed the levels approved as ''satisfactory,'' the appropriate Federal banking agency will approve those goals as ''outstanding.''

(3) *Rating.* The appropriate Federal banking agency assesses the performance of a savings association operating under an approved plan to determine if the savings association has met its plan goals:

(i) If the savings association substantially achieves its plan goals for a satisfactory rating, the appropriate Federal banking agency will rate the savings association's performance under the plan as ''satisfactory.''

(ii) If the savings association exceeds its plan goals for a satisfactory rating and substantially achieves its plan goals for an outstanding rating, the appropriate Federal banking agency will rate the savings association's performance under the plan as ''outstanding.''

(iii) If the savings association fails to meet substantially its plan goals for a satisfactory rating, the appropriate Federal banking agency will rate the savings association as either ''needs to improve'' or ''substantial noncompliance,'' depending on the extent to which it falls short of its plan goals, unless the savings association elected in its plan to be rated otherwise, as provided in § 195.27(f)(4).

Appendix B to Part 195—CRA Notice

(a) *Notice for main offices and, if an interstate savings association, one branch office in each state.*

Community Reinvestment Act Notice

Under the Federal Community Reinvestment Act (CRA), the [Office of the Comptroller of the Currency (OCC) or Federal Deposit Insurance Corporation (FDIC)] evaluates our record of helping to meet the credit needs of this community consistent with safe and sound operations. The [OCC or FDIC] also takes this record into account when deciding on certain applications submitted by us.

Your involvement is encouraged.

You are entitled to certain information about our operations and our performance under the CRA, including, for example, information about our branches, such as their location and services provided at them; the public section of our most recent CRA Performance Evaluation, prepared by the [OCC or FDIC]; and comments received from the public relating to our performance in helping to meet community credit needs, as well as our responses to those comments. You may review this information today.

At least 30 days before the beginning of each quarter, the [OCC or FDIC] publishes a nationwide list of the savings associations that are scheduled for CRA examination in that quarter. This list is available from the [OCC Deputy Comptroller (address) or FDIC appropriate regional director (address)]. You may send written comments about our performance in helping to meet community credit needs to (name and address of official at savings association) and the [OCC Deputy Comptroller (address) or FDIC appropriate regional director (address)]. Your letter, together with any response by us, will be considered by the [OCC or FDIC] in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the [OCC Deputy Comptroller or FDIC appropriate regional director]. You may also request from the [OCC Deputy Comptroller or FDIC appropriate regional director] an announcement of our applications covered by the CRA filed with the [OCC or FDIC]. We are an affiliate of (name of holding company), a savings and loan holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____ (address) an announcement of applications covered by the CRA filed by savings and loan holding companies.

(b) *Notice for branch offices.*

Community Reinvestment Act Notice

Under the Federal Community Reinvestment Act (CRA), the [Office of the Comptroller of the Currency (OCC) or Federal Deposit Insurance Corporation (FDIC)] evaluates our record of helping to meet the credit needs of this community consistent with safe and sound operations. The [OCC or FDIC] also takes this record into account when deciding on certain applications submitted by us.

Your involvement is encouraged.

You are entitled to certain information about our operations and our performance under the CRA. You may review today the public section of our most recent CRA evaluation, prepared by the [OCC or FDIC] and a list of services provided at this branch. You may also have access to the following additional information, which we will make available to you at this branch within five calendar days after you make a request to us: (1) A map showing the assessment area containing this branch, which is the area in which the [OCC or FDIC] evaluates our CRA performance in this community; (2) information about our branches in this assessment area; (3) a list of services we provide at those locations; (4) data on our lending performance in this assessment area;

and (5) copies of all written comments received by us that specifically relate to our CRA performance in this assessment area, and any responses we have made to those comments. If we are operating under an approved strategic plan, you may also have access to a copy of the plan.

[If you would like to review information about our CRA performance in other communities served by us, the public file for our entire savings association is available at (name of office located in state), located at (address).]

At least 30 days before the beginning of each quarter, the [OCC or FDIC] publishes a nationwide list of the savings associations that are scheduled for CRA examination in that quarter. This list is available from the [OCC Deputy Comptroller (address) or FDIC appropriate regional office (address)]. You may send written comments about our performance in helping to meet community credit needs to (name and address of official at savings association) and the [OCC or FDIC]. Your letter, together with any response by us, will be considered by the [OCC or FDIC] in evaluating our CRA performance and may be made public.

You may ask to look at any comments received by the [OCC Deputy Comptroller or FDIC appropriate regional director]. You may also request an announcement of our applications covered by the CRA filed with the [OCC Deputy Comptroller or FDIC appropriate regional director]. We are an affiliate of (name of holding company), a savings and loan holding company. You may request from the (title of responsible official), Federal Reserve Bank of _____ (address) an announcement of applications covered by the CRA filed by savings and loan holding companies.

PART 196—MANAGEMENT OFFICIAL INTERLOCKS

Sec.

196.1 Authority, purpose, and scope.
196.2 Definitions.
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196.5 Small market share exemption.
196.6 General exemption.
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Authority: 12 U.S.C. 3201–3208; 5412(b)(2)(B).

§ 196.1 Authority, purpose, and scope.

(a) *Authority.* This part is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this part is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of Federal savings associations and their affiliates.

§ 196.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Affiliate.* (1) The term *affiliate* has the meaning given in section 202 of the Interlocks Act (12 U.S.C. 3201). For purposes of that section 202, shares held by an individual include shares held by members of his or her immediate family. ''Immediate family'' means spouse, mother, father, child, grandchild, sister, brother, or any of their spouses, whether or not any of their shares are held in trust.

(2) For purposes of section 202(3)(B) of the Interlocks Act (12 U.S.C. 3201(3)(B)), an affiliate relationship involving a savings association based on common ownership does not exist if the OCC determines, after giving the affected persons the opportunity to respond, that the asserted affiliation was established in order to avoid the prohibitions of the Interlocks Act and does not represent a true commonality of interest between the depository organizations. In making this determination, the OCC considers, among other things, whether a person, including members of his or her immediate family, whose shares are necessary to constitute the group owns a nominal percentage of the shares of one of the organizations and the percentage is substantially disproportionate to that person's ownership of shares in the other organization.

(b) *Area median income* means:

(1) The median family income for the metropolitan statistical area (MSA), if a depository organization is located in an MSA; or

(2) The statewide nonmetropolitan median family income, if a depository organization is located outside an MSA.

(c) *Community* means a city, town, or village, and contiguous or adjacent cities, towns, or villages.

(d) *Contiguous or adjacent cities, towns, or villages* means cities, towns, or villages whose borders touch each other or whose borders are within 10 road miles of each other at their closest points. The property line of an office located in an unincorporated city, town, or village is the boundary line of that city, town, or village for the purpose of this definition.

(e) *Depository holding company* means a bank holding company or a savings and loan holding company (as more fully defined in section 202 of the Interlocks Act (12 U.S.C. 3201)) having its principal office located in the United States.

(f) *Depository institution* means a commercial bank (including a private bank), a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union, chartered under the laws of the United States and having a principal office located in the United States. Additionally, a United States office, including a branch or agency, of a foreign commercial bank is a depository institution.

(g) *Depository institution affiliate* means a depository institution that is an affiliate of a depository organization.

(h) *Depository organization* means a depository institution or a depository holding company.

(i) *Low- and moderate-income areas* means census tracts (or, if an area is not in a census tract, block numbering areas delineated by the United States Bureau of the Census) where the median family income is less than 100 percent of the area median income.

(j) *Management official.* (1) The term *management official* means:

(i) A director;

(ii) An advisory or honorary director of a depository institution with total assets of $100 million or more;

(iii) A senior executive officer as that term is defined in § 163.555 of this chapter;

(iv) A branch manager;

(v) A trustee of a depository organization under the control of trustees; and

(vi) Any person who has a representative or nominee serving in any of the capacities in this paragraph (j)(1).

(2) The term *management official* does not include:

(i) A person whose management functions relate exclusively to the business of retail merchandising or manufacturing;

(ii) A person whose management functions relate principally to the business outside the United States of a foreign commercial bank; or

(iii) A person described in the provisos of section 202(4) of the Interlocks Act (12 U.S.C. 3201(4)) (referring to an officer of a state-chartered savings bank, cooperative bank, or trust company that neither makes real estate mortgage loans nor accepts savings).

(k) *Office* means a principal or branch office of a depository institution located in the United States. *Office* does not include a representative office of a

foreign commercial bank, an electronic terminal, or a loan production office.

(l) *Person* means a natural person, corporation, or other business entity.

(m) *Relevant metropolitan statistical area (RMSA)* means an MSA, a primary MSA, or a consolidated MSA that is not comprised of designated Primary MSAs to the extent that these terms are defined and applied by the Office of Management and Budget.

(n) *Representative or nominee* means a natural person who serves as a management official and has an obligation to act on behalf of another person with respect to management responsibilities. The OCC will find that a person has an obligation to act on behalf of another person only if the first person has an agreement, express or implied, to act on behalf of the second person with respect to management responsibilities. The OCC will determine, after giving the affected persons an opportunity to respond, whether a person is a *representative or nominee.*

(o) *Savings association* means:

(1) Any Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2));

(2) [Reserved]; and

(3) Any corporation (other than a bank as defined in section 3(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)(1)) the deposits of which are insured by the Federal Deposit Insurance Corporation, that the Board of Directors of the Federal Deposit Insurance Corporation and the Comptroller of the Currency jointly determine to be operating in substantially the same manner as a Federal savings association.

(p) *Total assets.* (1) The term *total assets* means assets measured on a consolidated basis and reported in the most recent fiscal year-end Consolidated Report of Condition and Income.

(2) The term *total assets* does not include:

(i) Assets of a diversified savings and loan holding company as defined by section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) other than the assets of its depository institution affiliate;

(ii) Assets of a bank holding company that is exempt from the prohibitions of section 4 of the Bank Holding Company Act of 1956 pursuant to an order issued under section 4(d) of that Act (12 U.S.C. 1843(d)) other than the assets of its depository institution affiliate; or

(iii) Assets of offices of a foreign commercial bank other than the assets of its United States branch or agency.

(q) *United States* means the United States of America, any state or territory of the United States of America, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

§ 196.3 Prohibitions.

(a) *Community.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

(b) *RMSA.* A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $50 million or more.

(c) *Major assets.* A management official of a depository organization with total assets exceeding $2.5 billion (or any affiliate of such an organization) may not serve at the same time as a management official of an unaffiliated depository organization with total assets exceeding $1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. The OCC will adjust these thresholds, as necessary, based on the year-to-year change in the average of the Consumer Price Index for the Urban Wage Earners and Clerical Workers, not seasonally adjusted, with rounding to the nearest $100 million. The OCC will announce the revised thresholds by publishing a final rule without notice and comment in the Federal Register.

§ 196.4 Interlocking relationships permitted by statute.

The prohibitions of § 196.3 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

(a) A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

(b) A corporation operating under section 25 or section 25A of the Federal Reserve Act (12 U.S.C. 601 *et seq.* and 12 U.S.C. 611 *et seq.,* respectively) (Edge Corporations and Agreement Corporations);

(c) A credit union being served by a management official of another credit union;

(d) A depository organization that does not do business within the United States except as an incident to its activities outside the United States;

(e) A state-chartered savings and loan guaranty corporation;

(f) A Federal Home Loan Bank or any other bank organized solely to serve depository institutions (a bankers' bank) or solely for the purpose of providing securities clearing services and services related thereto for depository institutions and securities companies;

(g) A depository organization that is closed or is in danger of closing as determined by the appropriate Federal depository institutions regulatory agency and is acquired by another depository organization. This exemption lasts for five years, beginning on the date the depository organization is acquired;

(h)(1) A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(1)(F)) with respect to the service of a director of such company who also is a director of an unaffiliated depository organization if:

(i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate Federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and

(ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

(2) The OCC may disapprove a notice of proposed service if it finds that:

(i) The service cannot be structured or limited so as to preclude an anticompetitive effect in financial services in any part of the United States;

(ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or

(iii) The notificant failed to furnish all the information required by the OCC.

(3) The OCC may require that any interlock permitted under this paragraph (h) be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period; and

(i) Any savings association which has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of the Home Owners' Loan Act, except that this paragraph (i) shall apply only with regard to service as a single management official of such savings association, or any subsidiary of such savings association, by a single management official of the savings and loan holding company which purchased the stock issued in connection with

such qualified stock issuance, and shall apply only when the OCC has determined that such service is consistent with the purposes of the Interlocks Act and the Home Owners' Loan Act.

§ 196.5 Small market share exemption.

(a) *Exemption.* A management interlock that is prohibited by § 196.3 is permissible, if:

(1) The interlock is not prohibited by § 196.3(c); and

(2) The depository organizations (and their depository institution affiliates) hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or community in which both depository organizations (or their depository institution affiliates) have offices. The amount of deposits shall be determined by reference to the most recent annual Summary of Deposits published by the FDIC for the RMSA or community.

(b) *Confirmation and records.* Each depository organization must maintain records sufficient to support its determination of eligibility for the exemption under paragraph (a) of this section, and must reconfirm that determination on an annual basis.

§ 196.6 General exemption.

(a) *Exemption.* The OCC may by agency order exempt an interlock from the prohibitions in § 196.3 if it finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns. A depository organization may apply to the OCC for an exemption under part 116, subpart E, of this chapter.

(b) *Presumptions.* In reviewing an application for an exemption under this section, the OCC will apply a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition if the depository organization seeking to add a management official:

(1) Primarily serves low- and moderate-income areas;

(2) Is controlled or managed by persons who are members of a minority group, or women;

(3) Is a depository institution that has been chartered for less than two years; or

(4) Is deemed to be in ''troubled condition'' as defined in § 163.555 of this chapter.

(c) *Duration.* Unless a shorter expiration period is provided in the OCC approval, an exemption permitted by paragraph (a) of this section may continue so long as it does not result in a monopoly or substantial lessening of competition, or is unsafe or unsound. If the OCC grants an interlock exemption in reliance upon a presumption under paragraph (b) of this section, the interlock may continue for three years, unless otherwise provided by the OCC in writing.

§ 196.7 Change in circumstances.

(a) *Termination.* A management official shall terminate his or her service or apply for an exemption if a change in circumstances causes the service to become prohibited. A change in circumstances may include an increase in asset size of an organization, a change in the delineation of the RMSA or community, the establishment of an office, an increase in the aggregate deposits of the depository organization, or an acquisition, merger, consolidation, or reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

(b) *Transition period.* A management official described in paragraph (a) of this section may continue to serve the depository organization involved in the interlock for 15 months following the date of the change in circumstances. The OCC may shorten this period under appropriate circumstances.

§ 196.8 Enforcement.

Except as provided in this section, the OCC administers and enforces the Interlocks Act with respect to savings associations and their affiliates, and may refer any case of a prohibited interlocking relationship involving these entities to the Attorney General of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of a savings association is subject to the primary regulation of another Federal depository organization supervisory agency, then the OCC does not administer and enforce the Interlocks Act with respect to that affiliate.

§ 196.9 Interlocking relationships permitted pursuant to Federal Deposit Insurance Act.

A management official or prospective management official of a depository organization may enter into an otherwise prohibited interlocking relationship with another depository organization for a period of up to 10 years if such relationship is approved by the Federal Deposit Insurance Corporation pursuant to section 13(k)(1)(A)(v) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1823(k)(1)(A)(v)).

PART 197—SECURITIES OFFERINGS

Sec.

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Appendix A to Part 197—Form for Securities Sale Report

Authority: 12 U.S.C. 1462a, 1463, 1464 5412(b)(2)(B); 15 U.S.C. 78c(b), 78*l,* 78m, 78n, 78p, 78w.

§ 197.1 Definitions.

(a) For purposes of this part, the following definitions apply:

(1) *Accredited investor* means the same as in Commission Rule 501(a) (17 CFR 230.501(a)) under the Securities Act, and includes any savings association.

(2) *Commission* means the Securities and Exchange Commission.

(3) *Dividend or interest reinvestment plan* means a plan which is offered solely to existing security holders of the savings association which allows such persons to reinvest dividends or interest paid to them on securities issued by the savings association, and which also may allow additional cash amounts to be contributed by the participants in the plan, provided that the securities to be issued are newly issued, or are purchased for the account of plan participants, at prices not in excess of current market prices at the time of purchase, or at prices not in excess of an amount determined in accordance with a pricing formula specified in the plan and based upon average or current market prices at the time of purchase.

(4) *Employee benefit plan* means any purchase, savings, option, rights, bonus, ownership, appreciation, profit sharing, thrift, incentive, pension or similar plan solely for officers, directors or employees.

(5) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj).

(6) *Filing date* means the date on which a document is actually received

during business hours, 9 a.m. to 5 p.m. Eastern Standard Time, by the OCC. However if the last date on which a document can be accepted falls on a Saturday, Sunday, or holiday, such document may be filed on the next business day.

(7) *Issuer* means a savings association which issues or proposes to issue any security.

(8) *Offer; Sale* or *sell*. For purposes of this part, the term *offer, offer to sell,* or *offer for sale* shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. However, these terms shall not include preliminary negotiations or agreements between an issuer and any underwriter or among underwriters who are or are to be in privity of contract with the issuer. *Sale* and *sell* includes every contract to sell or otherwise dispose of a security or interest in a security for value. Every offer or sale of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.

(9) *Person* means the same as in § 192.25 of this chapter, and includes a savings association.

(10) *Purchase* and *buy* mean the same as in § 192.25 of this chapter.

(11) *Savings association* means a Federal savings association and includes a Federally-chartered savings association in organization under this chapter, which is granted conditional approval of insurance of accounts by the Federal Deposit Insurance Corporation (FDIC). In addition, for purposes of § 197.2 of this part, *savings association* includes any underwriter participating in the distribution of securities of a savings association.

(12) *Securities Act* means the Securities Act of 1933 (15 U.S.C. 77a–77aa).

(13) *Security* means any non-withdrawable account, note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization or subscription, transferable share, investment contract, voting trust certificate or, in general, any interest or instrument commonly known as a *security,* or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing, except that a *security* shall not include an account insured, in whole or in part, by the FDIC.

(14) *Underwriter* means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission and such term shall also not include any person who has continually held the securities being transferred for a period of two (2) consecutive years provided that the securities sold in any one (1) transaction shall be less than ten percent (10%) of the issued and outstanding securities of the same class. The following shall apply for the purpose of determining the period securities have been held:

(i) *Stock dividends, splits and recapitalizations*. Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization.

(ii) *Conversions*. If the securities sold were acquired from the issuer for consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion.

(iii) *Contingent issuance of securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.

(iv) *Pledged securities*. Securities which are *bona fide* pledged by any person other than the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

(v) *Gifts of securities*. Securities acquired from any person, other than the issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.

(vi) *Trusts*. Securities acquired from the settler of a trust by the trust or acquired from the trust by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the settler.

(vii) *Estates*. Securities held by the estate of a deceased person or acquired from such an estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

(viii) *Exchange transactions*. A person receiving securities in a transaction involving an exchange of the securities of one issuer for securities of another issuer shall be deemed to have acquired the securities received when such person acquired the securities exchanged.

(b) A term not defined in this part but defined in another part of this chapter, when used in this part, shall have the meanings given in such other part, unless the context otherwise requires.

(c) When used in the rules, regulations, or forms of the Commission referred to in this part, the term *Commission* shall be deemed to refer to the OCC, the term *registrant* shall be deemed to refer to an issuer defined in this part, and the term *registration statement* or *prospectus* shall be deemed to refer to an offering circular filed under this part, unless the context otherwise requires.

§ 197.2 Offering circular requirement.

(a) *General*. No savings association shall offer or sell, directly or indirectly, any security issued by it unless:

(1) The offer or sale is accompanied or preceded by an offering circular

which includes the information required by this part and which has been filed and declared effective pursuant to this part; or

(2) An exemption is available under this part.

(b) *Communications not deemed an offer.* The following communications shall not be deemed an offer under this section:

(1) Prior to filing an offering circular, any notice of a proposed offering which satisfies the requirements of Commission Rule 135 (17 CFR 230.135) under the Securities Act;

(2) Subsequent to filing an offering circular, any notice circular, advertisement, letter, or other communication published or transmitted to any person which satisfies the requirements of Commission Rule 134 (17 CFR 230.134) under the Securities Act; and

(3) Oral offers of securities covered by an offering circular made after filing the offering circular with the OCC.

(c) *Preliminary offering circular.* Notwithstanding paragraph (a) of this section, a preliminary offering circular may be used for an offer of any security prior to the effective date of the offering circular if:

(1) The preliminary offering circular has been filed pursuant to this part;

(2) The preliminary offering circular includes the information required by this part, except for the omission of information relating to offering price, discounts or commissions, amount of proceeds, conversion rates, call prices, or other matters dependent on the offering price; and

(3) The offering circular declared effective by the OCC is furnished to the purchaser prior to, or simultaneously with, the sale of any such security.

§ 197.3 Exemptions.

The offering circular requirement of § 197.2 of this part shall not apply to an issuer's offer or sale of securities:

(a) [Reserved]

(b) Exempt from registration under either section 3(a) or section 4 of the Securities Act, but only by reason of an exemption other than section 3(a)(5) (for regulated savings associations), and section 3(a)(11) (for intrastate offerings) of the Securities Act;

(c) In a conversion from the mutual to the stock form of organization pursuant to part 192 of this chapter, except for a supervisory conversion undertaken pursuant to subpart C of part 192 of this chapter;

(d) In a non-public offering which satisfies the requirements of § 197.4 of this part;

(e) That are debt securities issued in denominations of $100,000 or more, which are fully collateralized by cash, any security issued, or guaranteed as to principal and interest, by the United States, the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Government National Mortgage Association or by interests in mortgage notes secured by real property;

(f) Distributed exclusively abroad to foreign nationals: *Provided,* That (1) the offering is made subject to safeguards reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States, and (2) such safeguards include, without limitation, measures that would be sufficient to ensure that registration of the securities would not be required if the securities were not exempt under the Securities Act; or

(g) To its officers, directors or employees pursuant to an employee benefit plan or a dividend or interest reinvestment plan, and provided that any such plan has been approved by the majority of shareholders present in person or by proxy at an annual or special meeting of the shareholders of the savings association.

§ 197.4 Non-public offering.

Offers and sales of securities by an issuer that satisfy the conditions of paragraph (a) or (b) of this section and the requirements of paragraphs (c) and (d) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Securities Act and §§ 197.3(b) and 197.3(d) of this part. However, an issuer shall not be deemed to be not in compliance with the provisions of this section solely by reason of making an untimely filing of the notice required to be filed by paragraph (c) of this section so long as the notice is actually filed and all other conditions and requirements of this section are satisfied.

(a) *Regulation D.* The offer and sale of all securities in the transaction satisfies the Commission's Regulation D (17 CFR 230.501–230.506), except for the notice requirements of Commission Rule 503 (17 CFR 230.503) and the limitations on resale in Commission Rule 502(d) (17 CFR 230.502(d)).

(b) *Sales to 35 persons.* The offer and sale of all securities in the transaction satisfies each of the following conditions:

(1) Sales of the security are not made to more than 35 persons during the offering period, as determined under the integration provisions of Commission Rule 502(a) (17 CFR 230.502(a)). The number of purchasers referred to above is exclusive of any accredited investor, officer, director or affiliate of the issuer. For purposes of paragraph (b) of this section, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person and a partnership, corporation or other organization which was not specifically formed for the purpose of purchasing the security offered in reliance upon this exemption, is counted as one person.

(2) All purchasers either have a preexisting personal or business relationship with the issuer or any of its officers, directors or controlling persons, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could reasonably be assumed to have the capacity to protect their own interests in connection with the transaction.

(3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

(4) The offer and sale of the security is not accomplished by the publication of any advertisement.

(c) *Filing of notice of sales.* Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to this section, the issuer, shall file with the OCC's Securities and Corporate Practices Division, a report describing the results of the sale of securities as required by § 197.12(b) of this part.

(d) *Limitation on resale.* The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of § 197.1(a)(14) of this part, which reasonable care shall include, but not be limited to, the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for the purchaser or for other persons;

(2) Written disclosure to each purchaser prior to the sale that the securities are not offered by an offering circular filed with, and declared effective by, the OCC pursuant to § 197.2 of this part, but instead are being sold in reliance upon the exemption from the offering circular requirement provided for by this section; and

(3) Placement of a legend on the certificate, or other document evidencing the securities, indicating

that the securities have not been offered by an offering circular filed with, and declared effective by, the OCC and that due care should be taken to ensure that the seller of the securities is not an underwriter within the meaning of § 197.1(a)(14) of this part.

§ 197.5 Filing and signature requirements.

(a) *Procedures.* An offering circular, amendment, notice, report, or other document required by this part shall, unless otherwise indicated, be filed in accordance with the requirements of §§ 192.115(a), 192.150(a)(6), 192.155, 192.180(b), and Form AC, General Instruction B, of this chapter.

(b) *Number of copies.* (1) Unless otherwise required, any filing under this part shall include four copies of the document, one manually signed copy with exhibits and three conformed copies with exhibits, to be filed as follows:

(i) For a *de novo* savings association, with the appropriate District Counsel office; and

(ii) For an existing savings association, with the OCC's Securities and Corporate Practices Division.

(2) Within five days after the effective date of an offering circular or the commencement of a public offering after the effective date, whichever occurs later, four copies of the offering circular used shall be filed with the OCC, as described in (b)(1).

(3) After the effective date of an offering circular, an offering circular which varies from the form previously filed shall not be used, unless it includes only non-material supplemental or additional information and until 4 copies have been filed with the OCC in the manner required.

(c) *Signature.* (1) Any offering circular, amendment, or consent filed with the OCC pursuant to this part shall include an attached manually signed signature page which authorizes the filing and has been signed by:

(i) The issuer, by its duly authorized representative;

(ii) The issuer's principal executive officer;

(iii) The issuer's principal financial officer;

(iv) The issuer's principal accounting officer; and

(v) At least a majority of the issuer's directors.

(2) Any other document filed pursuant to this part shall be signed by a person authorized to do so.

(3) At least one copy of every document filed pursuant to this part shall be manually signed, and every copy of a document filed shall:

(i) Have the name of each person who signs typed or printed beneath the signature;

(ii) State the capacity or capacities in which the signature is provided;

(iii) Provide the name of each director of the issuer, if a majority of directors is required to sign the document; and

(iv) With regard to any copies not manually signed, bear typed or printed signatures.

§ 197.6 Effective date.

(a) Except as provided for in paragraph (d) of this section, an offering circular filed by a savings association shall be deemed to be automatically declared effective by the OCC on the twentieth day after filing or on such earlier date as the OCC may determine for good cause shown.

(b) If any amendment is filed prior to the effective date, the offering circular shall be deemed to have been filed when such amendment was filed.

(c) The period until automatic effectiveness under this section shall be stated at the bottom of the facing page of the Form OC or any amendment.

(d) The effectiveness will be delayed if a duly authorized amendment, telegram confirmed in writing, or letter states that the effective date is delayed until a further amendment is filed specifically stating that the offering circular will become effective in accordance with this section.

(e) An amendment filed after the effective date of the offering circular shall become effective on such date as the OCC may determine.

(f) If it appears to the OCC at any time that the offering circular includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, then the OCC may pursue any remedy it is authorized to pursue under section 5(d) of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. 1464(d)) or section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818), including, but not limited to, institution of cease-and-desist proceedings.

§ 197.7 Form, content, and accounting.

(a) *Form and content.* Any offering circular or amendment filed pursuant to this part shall:

(1) Be filed under cover of Form OC, which is under part 192 of this chapter;

(2) Comply with the requirements of Items 3 and 4 of Form OC and the requirements of all items of the form for registration (17 CFR part 239) that the issuer would be eligible to use were it required to register the securities under the Securities Act;

(3) Comply with all item requirements of the Form S–1 (17 CFR part 239) for registration under the Securities Act, if the association issuing the securities is not in compliance with the OCC's regulatory capital requirements during the time the offering is made;

(4) Where a form specifies that the information required by an item in the Commission's Regulation S–K (17 CFR part 229) should be furnished, include such information and all of the information required by Item 7 of Form PS, which is under part 192 of this chapter;

(5) Include after the facing page of the Form OC a cross-reference sheet listing each item requirement of the form for registration under the Securities Act and indicate for each item the applicable heading or subheading in the offering circular under which the required information is disclosed;

(6) Include in part II of the Form OC the applicable undertakings required by the form for registration under the Securities Act;

(7) If the issuer has not previously been required to file reports pursuant to section 13(a) of the Exchange Act or § 197.18 of this part, include in part II of Form OC the following undertaking: ''The issuer hereby undertakes, in connection with any distribution of the offering circular, to have a preliminary or effective offering circular including the information required by this part distributed to all persons expected to be mailed confirmations of sale not less than 48 hours prior to the time such confirmations are expected to be mailed'';

(8) In offerings involving the issuance of options, warrants, subscription rights or conversion rights within the meaning of § 197.1(a)(8) of this part, include in part II of Form OC an undertaking to provide a copy of the issuer's most recent audited financial statements to persons exercising such options, warrants or rights promptly upon receiving written notification of the exercise thereof;

(9) Include as supplemental information and not as part of the Form OC and only with respect to *de novo* offerings, a copy of the application for permission to organize as submitted to the OCC for Federally-chartered associations, or a copy of the application for insurance of accounts as submitted to the FDIC for state-chartered associations; and

(10) In addition to the information expressly required to be included by this section, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances

under which they are made, not misleading.

(b) *Accounting requirements.* To be declared effective an offering circular or amendment shall satisfy the accounting requirements in subpart A of part 193 of this chapter.

§ 197.8 Use of the offering circular.

(a) An offering circular or amendment declared effective by the OCC shall not be used more than nine months after the effective date, unless the information contained therein is as of a date not more than 16 months prior to such use.

(b) An offering circular filed under § 197.5(b)(3) of this part shall not extend the period for which an effective offering circular or amendment may be used under paragraph (c) of this section.

(c) If any event arises, or change in fact occurs, after the effective date and such event or change in fact, individually or in the aggregate, results in the offering circular containing any untrue statement of material fact, or omitting to state a material fact necessary in order to make statements made in the offering circular not misleading under the circumstances, then no offering circular, which has been declared effective under this part, shall be used until an amendment reflecting such event or change in fact has been filed with, and declared effective by, the OCC.

§ 197.9 Escrow requirement.

(a) Any funds received in an offering which is offered and sold on a best efforts all-or-none condition or with a minimum-maximum amount to be sold shall be held in an escrow or similar separate account until such time as all of the securities are sold with respect to a best efforts all-or-none offering or the stated minimum amount of securities are sold in a minimum-maximum offering.

(b) If the amount of securities required to be sold under escrow conditions in paragraph (a) of this section are not sold within the time period for the offering as disclosed in the offering circular, all funds in the escrow account shall be promptly refunded unless the OCC otherwise approves an extension of the offering period upon a showing of good cause and provided that the extension is consistent with the public interest and the protection of investors.

§ 197.10 Unsafe or unsound practices.

(a) No person shall directly or indirectly,

(1) Employ any device, scheme or artifice to defraud,

(2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, or

(3) Engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security of a savings association.

(b) Violations of this section shall constitute an unsafe or unsound practice within the meaning of section (3)(a) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1462a(a), and section 8 of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818.

(c) Nothing in this section shall be construed as a limitation on the applicability of section 10(b) of the Exchange Act (15 U.S.C. 78j(b)) or Rule 10b–5 promulgated thereunder (17 CFR 240.10b–5).

§ 197.11 Withdrawal or abandonment.

(a) Any offering circular, amendment, or exhibit may be withdrawn prior to the effective date. A withdrawal shall be signed and state the grounds upon which it is made. Any document withdrawn will not be removed from the files of the OCC, but will be marked ''Withdrawn upon the request of the issuer on (date).''

(b) When an offering circular or amendment has been on file with the OCC for a period of nine months and has not become effective, the OCC may, in its discretion, determine whether the filing has been abandoned, after notifying the issuer that the filing is out of date and must either be amended to comply with the applicable requirements of this part or be withdrawn within 30 days after the date of such notice. When a filing is abandoned, the filing will not be removed from the files of the OCC, but will be marked ''Declared abandoned by the OCC on (date).''

§ 197.12 Securities sale report.

(a) Within 30 days after the first sale of the securities, every six months after such 30 day period and not later than 30 days after the later of the last sale of securities in an offering pursuant to § 197.2 of this part or the application of the proceeds therefrom, the issuer shall file with the OCC, a report describing the results of the sale of the securities and the application of the proceeds, which shall include all of the information required by Form G–12 set forth appendix A to this part and shall also include the following:

(1) The name, address, and docket number of the issuer;

(2) The title, number, aggregate and per-unit offering price of the securities sold;

(3) The aggregate and per-unit dollar amounts of actual itemized expenses, discounts or commissions, and other fees;

(4) The aggregate and per-unit dollar amounts of the net proceeds raised, and the use of proceeds therefrom; and

(5) The number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities after the issuance of the securities or termination of the offer.

(b) Within 30 days after the first sale of the securities, every six months after the first sale of the securities and not later than 30 days after the last sale of securities in an offering pursuant to § 197.4 of this part, the issuer shall file with the OCC a report describing the results of the sale of securities, which shall include all of the information required by Form G–12 set forth at appendix A to this part, and shall also include the following:

(1) All of the information required by paragraph (a) of this section; and

(2) A detailed statement of the factual and legal grounds for the exemption claimed.

§ 197.13 Public disclosure and confidential treatment.

(a) Any offering circular, amendment, exhibit, notice, or report filed pursuant to this part will be publicly available. Any other related documents will be treated in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), and part 4 of this chapter.

(b) Any requests for confidential treatment of information in a document required to be filed under this part shall be made as required under Commission Rule 24b–2 (17 CFR 240.24b–2) under the Exchange Act.

§ 197.14 Waiver.

(a) The OCC may waive any requirement of this part, or any required information:

(1) Determined to be unnecessary by the OCC;

(2) In connection with a transaction approved by the OCC for supervisory reasons, or

(3) Where a provision of this part conflicts with a requirement of applicable state law.

(b) Any condition, stipulation or provision binding any person acquiring a security issued by a savings association which seeks to waive compliance with any provision of this

part shall be void, unless approved by the OCC.

§ 197.15 Requests for interpretive advice or waiver.

Any requests to the OCC for interpretive advice or a waiver with respect to any provision of this part shall satisfy the following requirements:

(a) A copy of the request, including any attachments, shall be filed consistent with the procedures in § 197.5 of this part;

(b) The provisions of this part to which the request relates, the participants in the proposed transaction, and the reasons for the request, shall be specifically identified or described; and

(c) The request shall include a legal opinion as to each legal issue raised and an accounting opinion as to each accounting issue raised.

§ 197.16 Delayed or continuous offering and sale of securities.

Any offer or sale of securities under § 197.2 of this part may be made on a continuous or delayed basis in the future, if:

(a) The securities would satisfy all of the eligibility requirements of the Commission's Rule 415, 17 CFR 230.415; and

(b) The association issuing the securities is in compliance with the OCC's regulatory capital requirements during the time the offering is made.

§ 197.17 Sales of securities at an office of a savings association.

Sales of securities of a savings association or its affiliates at an office of a savings association may only be made in accordance with the provisions of 12 CFR 197.76.

§ 197.18 Current and periodic reports.

(a) Each savings association which files an offering circular which becomes effective pursuant to this part, after such effective date, shall file with the OCC periodic and current reports on Forms 8–K, 10–Q and 10–K as may be required by section 13 of the Exchange Act (15 U.S.C. 78m) as if the securities sold by such offering circular were securities registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). The duty to file periodic and current reports under this section shall be automatically suspended if and so long as any issue of securities of the savings association is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*). The duty to file under this section shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such offering circular became effective, if, at the beginning of such fiscal year, the securities of each class to which the offering circular relates are held of record by less than three hundred persons and upon the filing of a Form 15.

(b) For purposes of registering securities under section 12(b) or 12(g) of the Exchange Act, an issuer subject to the reporting requirements of paragraph (a) of this section may use the Commission's registration statement on Form 10 or Form 8–A or 8–B as applicable.

§ 197.19 Approval of the security.

Any securities of a savings association which are not exempt under this part and are offered or sold pursuant to an offering circular which becomes effective under this part, are deemed to be approved as to form and terms for purposes of § 197.3 of this chapter.

§ 197.21 Filing of copies of offering circulars in certain exempt offerings.

A copy of the offering circular, or similar document, if any, used in connection with an offering exempt from the offering circular requirement of § 197.2 by reason of § 197.3(e) or § 197.4 of this part shall be mailed to the OCC, in the manner described in § 197.5, within 30 days after the first sale of such securities. Such copy of the offering circular, or similar document, is solely for the information of the OCC and shall not be deemed to be ''filed'' with the OCC pursuant to § 197.2 of this part. The mailing to the OCC of such offering circular, or similar document, shall not be a pre-condition of the applicable exemption from the offering circular requirements of § 197.2 of this part.

Appendix A to Part 197—Form for Securities Sale Report

Office of the Comptroller of the Currency

[Form G–12]

Securities Sale Report Pursuant to § 197.12

OCC No. _____

Issuer's Name: _____

Address: _____

If in organization, state the date of FDIC certification of insurance of accounts:

_____

State the title, number, aggregate and per-unit offering price of the securities sold:

_____

State the aggregate and per-unit dollar amounts of actual itemized offering expenses, discounts, commissions, and other fees:

_____

State the aggregate and per-unit dollar amounts of the net proceeds raised: _____

Describe the use of proceeds. If unknown, provide reasonable estimates of the dollar amount allocated to each purpose for which the proceeds will be used: _____

State the number of purchasers of each class of securities sold and the number of owners of record of each class of the issuer's equity securities at the close or termination of the offering: _____

For a non-public offering, also state the factual and legal grounds for the exemption claimed (attach additional pages if necessary): _____

For a non-public offering, all offering materials used should be listed: _____

Person to Contact: _____

Telephone No.: _____

This issuer has duly caused this securities sale report to be signed on its behalf by the undersigned person.

Date of securities sale report _____

Issuer: _____

Signature: _____

Name: _____

Title: _____

Instruction: Print the name and title of the signing representative under his or her signature. Ten copies of the securities sale report should be filed, including one copy manually signed, as required under 12 CFR 197.5.

Attention

Intentional misstatements or omissions of fact constitute violations of Federal law (*see* 18 U.S.C. 1001 and 12 CFR 197.180(b)).

Dated: July 7, 2011.

John Walsh,

Acting Comptroller of the Currency.

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Part III

Department Of The Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Four Foreign Parrot Species; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R9–ES–2010–0099; MO 92210–0–0010 B6]

RIN 1018–AX50

Endangered and Threatened Wildlife and Plants; Four Foreign Parrot Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; 12-month finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list as endangered the Philippine cockatoo (*Cacatua haematuropygia*) and the yellow-crested cockatoo (*C. sulphurea*), and to list as threatened the white cockatoo (*C. alba*), under the Endangered Species Act of 1973, as amended (ESA). We are taking this action in response to a petition to list the following four parrot species: Crimson shining parrot (*Prosopeia splendens*), Philippine cockatoo (*Cacatua haematuropygia*), white cockatoo (*C. alba*), and yellow-crested cockatoo (*C. sulphurea*) as endangered or threatened under the ESA. This document, which also serves as the completion of the status review and as the 12-month finding on the petition, announces our finding that listing is not warranted for the crimson shining parrot. We also propose a special rule for the white cockatoo in conjunction with our proposed listing as threatened for this species. We seek information from the public on the proposed listing, proposed special rule, and status review for these species.

DATES: We will consider comments and information received or postmarked on or before October 11, 2011.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R9–ES–2010–0099.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R9–ES–2010–0099, Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept comments by e-mail or fax. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Requested section below for more information).

FOR FURTHER INFORMATION CONTACT: Janine Van Norman, Chief, Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703–358–2171. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION

Background

Section 4(b)(3)(B) of the ESA (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition (''12-month finding''). In this finding, we determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the ESA requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register.**

If the listing of a species is found to be warranted but precluded by higher-priority listing actions, then the petition to list that species is treated as if it is a petition that is resubmitted on the date of the finding and is, therefore, subject to a new 12-month finding within one year. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

In this document, we announce that listing Philippine cockatoo and yellow-crested cockatoo as endangered is warranted, and we are issuing a proposed rule to add those species as endangered under the Federal Lists of Endangered and Threatened Wildlife and Plants. We find that listing the crimson shining parrot as endangered or threatened is not warranted. We further find that listing white cockatoo as threatened is warranted, and we are issuing a proposed rule to add that species as threatened under the Federal Lists of Endangered and Threatened Wildlife and Plants.

Prior to issuing a final rule on this proposed action, we will take into consideration all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses of commenters, will become part of the administrative record.

Previous Federal Actions

Petition History

On January 31, 2008, the Service received a petition dated January 29, 2008, from Friends of Animals, as represented by the Environmental Law Clinic, University of Denver, Sturm College of Law, requesting we list 14 parrot species under the ESA. The petition clearly identified itself as a petition and included the requisite information required in the Code of Federal Regulations (50 CFR 424.14(a)). On July 14, 2009 (74 FR 33957), we published a 90-day finding in which we determined that the petition presented substantial scientific and commercial information to indicate that listing may be warranted for 12 of the 14 parrot species. In our 90-day finding on this petition, we announced the initiation of a status review to list as endangered or threatened under the ESA the following 12 parrot species: Blue-headed macaw (*Primolius couloni*), crimson shining parrot (*Prosopeia splendens*), great green macaw (*Ara ambiguus*), grey-cheeked parakeet (*Brotogeris pyrrhoptera*), hyacinth macaw (*Anodorhynchus hyacinthinus*), military macaw (*Ara militaris*), Philippine cockatoo (*Cacatua haematuropygia*), red-crowned parrot (*Amazona viridigenalis*), scarlet macaw (*Ara macao*), white cockatoo (*Cacatua alba*), yellow-billed parrot (*Amazona collaria*), and yellow-crested cockatoo (*Cacatua sulphurea*). We initiated the status review to determine if listing each of the 12 species is warranted, and initiated a 60-day public comment period to allow all interested parties an opportunity to provide information on the status of these 12 species of parrots. The public comment period closed on September 14, 2009.

On July 21, 2010, a settlement agreement was approved by the Court (CV–10–357, D. D.C.), in which the Service agreed to (in part) submit to the **Federal Register** by July 29, 2011, a determination whether the petitioned action is warranted, not warranted, or warranted but precluded by other listing actions for no less than four of the

petitioned species. This **Federal Register** document complies with the first deadline in that court-ordered settlement agreement. We will announce the 12-month findings for the remaining parrot species for which a 90-day finding was made on July 14, 2009 (74 FR 33957) in subsequent **Federal Register** notices.

Information Requested

We intend that any final actions resulting from this proposed rule will be based on the best scientific and commercial data available. Therefore, we request comments or information from other concerned governmental agencies, the scientific community, or any other interested parties concerning this proposed rule. We particularly seek clarifying information concerning:

(1) Information on taxonomy, distribution, habitat selection and trends (especially breeding and foraging habitats), diet, and population abundance and trends (especially current recruitment data) of these species.

(2) Information on the effects of habitat loss and changing land uses on the distribution and abundance of these species (particularly the conversion of habitat to biofuel production on Halmahera Island and any data on Bacan Island related to the white cockatoo).

(3) Information on the effects of other potential threat factors, including live capture and hunting, domestic and international trade, predation by other animals, and any diseases that are known to affect these species or their principal food sources.

(4) Information on management programs for parrot conservation, including mitigation measures related to conservation programs, and any other private, nongovernmental, or governmental conservation programs that benefit these species.

(5) The potential effects of climate change on these species and their habitats.

Please include sufficient information with your submission (such as full references) to allow us to verify any scientific or commercial information you include. Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the ESA directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

Public Hearing

At this time, we do not have a public hearing scheduled for this proposed rule. The main purpose of most public hearings is to obtain public testimony or comment. In most cases, it is sufficient to submit comments through the Federal eRulemaking Portal, described above in the **ADDRESSES** section. If you would like to request a public hearing for this proposed rule, you must submit your request, in writing, to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by September 23, 2011.

Factors Affecting the Species

Section 4 of the ESA (16 U.S.C. 1533) and implementing regulations (50 CFR 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the ESA, a species may be determined to be endangered or threatened based on any one or a combination of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In considering what factors might constitute threats, we look beyond the actual or perceived exposure of the species to the factor to determine how the species responds to the factor and whether the factor causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a factor it is. If the factor is significant, it may drive or contribute to the risk of extinction of the species such that it is considered to be a threat. In some cases, there is little information available regarding the status of the species, in part due to their remoteness.

This finding addresses the following four species of parrots: crimson shining parrot, Philippine cockatoo, white cockatoo, and yellow-crested cockatoo. For each of these parrots, we evaluate the five factors under ESA Section 4(a)(1) on the species. In some cases, we found under a factor that a threat was contributing to the extinction risk for multiple species, while some factors constituted a threat for some of the species but not others. In some cases, the factors affecting species are the same or very similar and in other cases the factors are unique. In each evaluation, we clearly identify what species is being addressed, and if the threat applies to more than one species.

Species Information

A. Crimson Shining Parrot (*Prosopeia splendens*)

Taxonomy and Species Description

The crimson shining parrot (*Prosopeia splendens,* Peale, 1848) is endemic to Fiji, where it is found in forests, on agricultural lands, and around human habitation (International Union for Conservation of Nature (IUCN) 2008). Its most closely related species are *P. personata* (G. R. Gray, 1848), masked shining parrot, which occurs on Viti Levu; and *P. tabuensis* (Gmelin, 1788), maroon (red) shining parrot, which occurs on Vanua Levu and Taveuni. *P. splendens* and these two other species are recognized by the Integrated Taxonomic Information System (ITIS) (ITIS 2011, *http://www.itis.gov*) as valid species. Absent peer-reviewed information to the contrary and based on the best available information, we consider *P. splendens* to be a valid species.

The crimson shining parrot's head, neck, and underparts are a bright red. It is a medium-sized parrot, with a length of 45 centimeters (cm) (18 inches (in)). It has been observed in flocks of up to 40 birds in the past, but more recently in flocks of up to 12 birds. During the day, this species is generally quiet and becomes vocal towards dusk, at which time it becomes more active. A blue collar extends across the back of its neck; its back and rump are bright green. Its flight feathers and tail are green, strongly covered with blue. Its bill and feet are black, and its irises are orange. Males and females are similar morphologically; however, the bill of males is larger, and the head of males is more square-shaped than females. It differs from the maroon shining parrot in its size and coloration; crimson shining parrots are generally smaller than maroon shining parrots. Rump feathers on the crimson shining parrot do not have the red edges that can be seen on the maroon shining parrot. The main visible features that distinguish the crimson shining parrot from the masked shining parrot and the maroon shining parrot are the scarlet rather than maroon underparts and the blue collar at the back of the neck.

Distribution, Habitat, Biology

There is little to no information available regarding this species. The crimson shining parrot, also known as the Kadavu musk parrot, is endemic to the islands of Kadavu and Ono in Fiji. These two islands are separated by a narrow channel, often navigated by kayaks and other small boats. This species has also been reported on the island of Viti Levu in the Upper Navua Conservation Area (Tokaduadu 2008, pp. 5, 7), where they are thought to be escaped pet birds. There are no known records of this species successfully breeding other than on the islands of Kadavu and Ono (*http://www.NatureFiji.org,* accessed January 4, 2011). The island of Kadavu is remarkable in that it has the highest number of endemic birds per land area in the world. It hosts two areas designated by Birdlife International (BLI) as Important Bird Areas (IBAs), including Mount Nabukelevu which is located on the southwestern end of Kadavu Island. Mt. Nabukelevu, has the largest area of montane forest on the island. These IBAs are a way to identify conservation priorities (BLI 2008j, pp. 1–2) and are considered to be globally important areas for the conservation of bird populations. A site is recognized as an IBA based on the occurrence of key bird species that are vulnerable to global extinction or whose populations are otherwise irreplaceable. These key sites for conservation are small enough to be conserved in their entirety and large enough to support self-sustaining populations of the key bird species. Mount Nabukelevu's montane forest is critical for five globally threatened bird species, including the crimson shining parrot (BLI 2011d, p. 1; BLI 2010c, p. 1).

Very little is known about the ecology of this species in the wild (NatureFiji 2011, pp. 1–2). Although in captivity this species has been known to exhibit aggression in males, it is a social species in the wild (Lin and Lee 2006, p. 188). It has been observed in flocks of up to approximately 40 birds (Tabaranza 1992 as cited in BLI 2001, p. 1679) but more recently it has been observed in flocks of up to 12 individuals. Flocking is thought to serve several purposes including mate selection, and learning food sources and eating techniques (Cameron 2007, pp. 115, 144)

In 2004, the population estimate was 6,000 mature birds, with a declining population (Jackson and Jit 2004 in BLI 2010a, p. 1). However, the species' population estimate was inferred from population surveys conducted on another species, the Masked Shining-Parrot (*Prosopeia personata*) (BLI 2010a, pp. 1–2). Surveys found that the crimson shining parrot occurred at similar population densities as that of the masked shining parrot. In two BirdLife International surveys, 86 crimson shining parrots were recorded in 38 standardized observer-hours, similar to the mean of 1.9 masked shining parrots per hour recorded at 18 sites across Viti Levu (BLI 2010a, pp. 1–2). Masked shining parrots were estimated to occur at approximately 29 birds per km^2 in lowland native forest. The 2004 crimson shining parrot population was estimated using the density of masked shining parrots and the estimated 225 km^2 (87 mi^2) area of dense and medium-dense forest on Kadavu (Jackson and Jit 2004 in BLI 2010a, p. 1). However, we do not have detailed information about how the surveys on Kadavu were conducted; they may have occurred at a time when the species is not active or visible. There is no evidence that the survey protocol used is appropriate to infer the population density of this species. Nor is there evidence suggesting the two species have the same ecological characteristics, levels of disturbance, and habitat requirements. For example, Viti Levu has a more dense human population than that on the islands of Kadavu and Ono, and human population density often directly influences species population density. Additionally, we do not know the historical population of the crimson shining parrot; this species may never have had a large population, as it is only known to be endemic to Kadavu and Ono Islands, so we do not know if this species has experienced a decrease in population size or if its population has been fairly consistent. Furthermore, species that are endemic to islands tend to have smaller population sizes due to a smaller carrying capacity of the island. This species is described as being ''widespread and common'' on Kadavu and population information on the East Kadavu IBA also lists this species as common (BLI 2011a, p. 1; BLI 2011f, unpaginated). Additionally, notes from a 2006 birding trip report indicate that the crimson shining parrot would be ''hard to miss'' on Kadavu (Skevington and Mathieson 2006, unpaginated). Although the best scientific information available indicates the population of crimson shining parrots number 6,000 individuals, there is no historical population data to indicate this species has declined or is currently declining. Given the reports from BirdLife International (BLI 2011a, p. 1; BLI 2011f, unpaginated) and the lack of support for a declining population, we consider the crimson shining parrot to be common on Kadavu.

Its range is estimated to be 460 km^2 (178 mi^2). However, BLI (2000, pp. 22, 27) defines a species' ''range'' as the ''extent of occurrence,'' which is ''the area contained within the shortest continuous imaginary boundary which can be drawn to encompass all the known, inferred, or projected sites of present occurrence of a species, excluding cases of vagrancy.''

Kadavu is the fourth largest of Fiji's islands, at 410 km^2 (158 mi^2). Kadavu has a human population of 8,700 people and is a mountainous, rugged island with high peaks and precipitous cliffs (Fiji Guide 2011). There are few roads and is therefore mainly accessible by boat. The Kadavu Island group is 83 km (45 nautical miles) south of Viti-Levu, Fiji's main island. Kadavu is rugged and mountainous with few roads. The Kadavu Island group also includes nearby Ono Island, off the eastern tip of Kadavu, as well as a number of smaller islands. Ono is 30 km^2 (12 mi^2) in size (Planetary Coral Reef Foundation (PCRF) 2010). This island group has 12,000 Fijians living in 72 traditional village communities (PCRF 2010), and there is one airstrip. The primary means of income is subsistence agriculture and fishing.

Conservation Status for the Crimson Shining Parrot

Fiji is actively involved in forest protection efforts; a new Forest Policy was adopted in 2007 (Fiji Ministry of Fisheries and Forestry 2009, p. 1). Crimson shining parrot is also protected by Fiji's Endangered and Protected Species (EPS) Act of 2002. Additionally, Fiji's first national nongovernmental organization (NGO), Nature Fiji, was established recently, and its goal is conservation of its wildlife. Nature Fiji is working closely with BLI to develop a conservation program to protect endangered wildlife in Fiji such as the crimson shining parrot.

In 1981, the crimson shining parrot was listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). At that time, almost all Psittaciformes species (*i.e.,* parrots) were included in Appendix II. CITES is an international agreement where member countries work together to ensure that international trade in CITES-listed animals and plants is not detrimental to the survival of wild populations. This is achieved by regulating import, export, and re-export of CITES-listed animal and plant species and their parts and products through the use of a permitting system (*http://*

www.cites.org). CITES entered into force in 1975, and is an international treaty among 175 nations, including Fiji and the United States. In the United States, CITES is implemented through the U.S. Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*).

Appendix II includes species that are not necessarily threatened with extinction, but may become so unless trade is subject to strict regulation to avoid utilization incompatible with the species' survival. International trade in specimens (dead or live) of Appendix II species is authorized through permits or certificates. International trade in specimens of Appendix II species is authorized when: (1) The CITES Scientific Authority of the country of export has determined that the export will not be detrimental to the survival of the species in the wild; and (2) the CITES Management Authority of the country of export has determined that the specimens to be exported were legally acquired (UNEP–WCMC 2008a, p. 1).

In 1988, the crimson shining parrot was described by the IUCN as lower risk/least concern, and the status changed to vulnerable in 2000 (IUCN 2008; BLI 2010a), which is its current IUCN classification. The authority for compilation of information and determining the appropriate risk extinction category for bird species on the IUCN Red List is Birdlife International, and is cited frequently throughout this document. However, IUCN rankings do not confer any actual protection or management.

Evaluation of Factors Affecting the Crimson Shining Parrot

This section contains an assessment in which we evaluate the effects of any of the five factors listed in section 4(a)(1) of the ESA on the species. Listing actions may be warranted based on whether any of the five factors under section 4(a)(1), singly or in combination, places the species in danger of extinction now or in the foreseeable future. Each evaluation is specific to this species identified unless we specify that the evaluation is for more than one species.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

There is little to no evidence of destruction, modification, or curtailment of this species' habitat, in fact, there is recent evidence of reforestation efforts and conservation of the species' habitat taking place (BLI 2011a, p. 1; Fiji Daily Post 2007, 2009, unpaginated). It was suggested that this species is roughly estimated to be declining at the rate of forest loss, which had been estimated to be 0.5 to 0.8 percent per year across Fiji (Claasen 1991 in BLI 2011a, p. 1), and that forest loss may be higher on Kadavu due to fires in recent years (BLI 2011a, p. 1). However, there is no information on the extent of past or current forest loss. Not only does the United Nations describe deforestation in Fiji as modest when compared with the rest of Melanesia (UN 2011, p. 1), but also local communities on Kadavu are implementing reforestation efforts and conservation of this species' habitat as described above (Fiji Daily News 2007, unpaginated). Although the eastern part of the island is experiencing pressures from agricultural encroachment, there is no evidence that agricultural encroachment or forest loss due to fires currently threatens the crimson shining parrot (NatureFiji 2011, pp. 1–2).

Forests on Kadavu were heavily logged in the late 1960s and early 1970s, and habitat loss and degradation of habitat for agricultural purposes continues. However, approximately 75 percent of the island remains forested; East Kadavu IBA is reported to have the largest area of old-growth forest in Kadavu, including extensive areas of lowland rainforest. Furthermore, the crimson shining parrot is reported to use degraded habitats extensively (BLI 2011a, p. 1; BLI 2011f, unpaginated). Most river estuaries and bays still hold large areas of mangroves, which are used by the crimson shining parrot for feeding (and possibly breeding), and pressure on mangrove forest here is not currently significant (BLI 2011a, p. 1).

BLI and Nature Fiji are working with landowners on Kadavu to conserve these forested natural areas and to increase awareness of the value of maintaining these areas in a little-disturbed state (BLI 2011e, p. 1). NGOs are working with the landowners in the Mount Nabukelevu area to create awareness about the value of their forests and the benefits of establishing ''Permanent Forest Estates'' (PFEs) (described below) on their lands. These NGOs are also working to help build the capacity of indigenous communities to continue forest conservation on their own (BLI 2011e, p. 3). BLI, through the Darwin Initiative, has worked with the Kadavu's Department of Forestry and local communities on Kadavu to protect this species' habitat. The Darwin Initiative, implemented by the United Kingdom, assists countries that are rich in biodiversity but poor in financial resources to meet their objectives under one or more of the three major biodiversity conventions. BLI conducted a workshop on Kadavu to teach sustainable agricultural practices and ways to reduce soil erosion which subsequently supports community livelihoods. Later, the villages of Lomati, Nabukelevuira, Qalira, and Daviqele committed to protect 1,500 hectares (3,707 ac) of their forest that had been designated as an Important Bird Area (IBA) on Mount Nabukelevu in Kadavu (Fiji Daily News 2007).

On Kadavu, particularly in the area of Mount Nabukelevu, many forest-owning mataqalis (clan or landowning units) are under pressure to convert their forests into agricultural land (BLI 2011e, p. 1). In 2010, 10 mataqalis signed an agreement with an NGO to protect the forests of Mount Nabukelevu for the next 20 years (BLI 2011f; NatureFiji 2011). The community-declared protected area now includes 10 mataqali (clan) lands plus a native reserve. Additionally, the Government of Fiji recognizes that maintaining forests is critically important for Fiji's people and biodiversity and has taken steps to preserve its country's resources. In 2007, Fiji introduced the Fiji Forest Policy, which promotes sustainable forest management. One of the foundations of the new Forest Policy is the concept of ''Permanent Forest Estates'' (PFEs). The policy promotes sustainable management of healthy forests by providing sustainable development incentives for landowners. In addition, the government of Fiji initiated a campaign to plant one million trees in 2010 to halt or slow ecological degradation associated with the depletion of the world's forests. Fiji launched its One Million Trees Campaign in support of the 2010 International Year of Biodiversity, and in 2011 as the International Year of Forests. Fiji indicated that they had surpassed their goal, and participants had succeeded in planting over one million trees (Fiji Ministry of Information 2011).

Although forest loss may be occurring within the range of the crimson shining parrot, we have no information on the extent of forest loss or evidence to suggest that this loss has impacted or is currently affecting this species. The crimson shining parrot is found in forests, agriculture lands, around human habitation, and is known to use degraded habitats extensively. Furthermore, there is no information indicating this species is declining. Additionally, we have no information to suggest that habitat loss may become a threat to this species in the future such that it may contribute to the risk of extinction of this species. Fiji has implemented proactive policies and

protections with respect to its forests. Local conservation activities are occurring on Kadavu; indigenous communities are interested in preserving this species and its habitat. Therefore, we do not find that the present or threatened destruction, modification, or curtailment of its habitat or range is a threat to the crimson shining parrot now or in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Conservation projects on Kadavu are believed to have reduced the numbers of parrots trapped for trading, but this species is still thought to be captured in small numbers for domestic and international trade (BLI 2010a, p. 1). As indicated above, this species has been listed in Appendix II of CITES since 1981. The United Nations Environment Programme—World Conservation Monitoring Centre (UNEP–WCMC) manages a CITES Trade Database on behalf of the CITES Secretariat. We queried the UNEP–WCMC CITES Trade Database for gross data on export and import of this species since 2000, and found no record of trade in this species (UNEP–WCMC 2011, accessed January 4, 2011.)

Each Party to CITES is responsible for compiling and submitting annual reports to the CITES Secretariat regarding their country's trade in species listed in the CITES Appendices. The data from submitted annual reports is compiled into the database, and it provides a mechanism by which CITES trade can be assessed. Due to the time needed to compile the data, the most recent year for which comprehensive trade statistics are available is normally 2 years prior to the current year. UNEP–WCMC acknowledges that the data are not always accurate (UNEP–WCMC 2011, p. 5). They indicate that it is not uncommon for the quantity of specimens traded to be considerably less than the amount specified on the permits and that the quantity specified on the permits is frequently the quantity that is reported in annual reports. They further clarify that trade transactions that may have been authorized by the issuance of permits but never have taken place, as well as inaccurately reported volumes of trade, will exist in the UNEP–WCMC CITES database. UNEP–WCMC also acknowledges that gross and net outputs from the CITES database are often overestimates of the quantities traded because in cases where different quantities are reported by the importing and exporting countries, the CITES database program selects the larger quantity. Errors do occur in the database, and the numbers may not be entirely accurate, but they do provide an approximate representation of international trade that is occurring through CITES. However, we consider the UNEP–WCMC CITES trade data to be the best available information pertaining to international trade in CITES-listed species.

Although it has been reported that birds are taken as gifts and there is some illegal trade overseas, it is thought to occur in small numbers (BLI 2010a, p. 1). Conservation projects described under Factor A have reduced the numbers of birds trapped for the pet bird trade (BLI 2011a, p. 1). BLI reports that four communities have set up village protected areas on Kadavu, and they conduct regular bird surveys under their own initiative. Additionally, it is protected by law against trading and transfers out of Kadavua and Ono (NatureFiji 2011, p. 2). There appears to be substantial protection, awareness, and local conservation of this species occurring. Because there is no evidence of poaching (*i.e.,* hunting by people to gain at least a temporary living from the activity) or illegal trade of this species occurring at levels such that it may contribute to the risk of extinction of the crimson shining parrot, or information indicating poaching or trade may increase in the future and rise to the level of a threat, we believe that overutilization for commercial, recreation, scientific, or educational purposes is not a threat to the species.

We are unaware of any other information currently available that addresses overutilization for commercial, recreation, scientific, or education purposes that may be affecting the crimson shining parrot. We found no evidence of overutilization due to historic or cultural use of this species by local populations. Based on the best available scientific and commercial information, we find that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the crimson shining parrot now or in the foreseeable future.

Factor C. Disease or Predation

Predation by introduced mammals such as feral cats (*Felis catus*) and rats (*Rattus* spp.) were identified as possible factors affecting this species. There was little to no information found regarding the occurrence of predation or disease in Fiji, particularly with respect to the crimson shining parrot. As is the case on many remote islands, Fiji has no native terrestrial mammals. Introduced mammals such as rats, mongoose (*Herpestes javanicus),* cats and dogs prey heavily on Fiji's native wildlife (Morley 2004 in Olson *et al.* 2009, p. 1). However, the mongoose is not present on Kadavu Island and the only current predator definitely known to occur on Kadavu is cats. Cats on Kadavu are known to threaten ground-nesting birds, particularly on the coasts, but they are not known to threaten the crimson shining parrot. There are no known predators on Ono Island to our knowledge. Studies have found that predation rates by introduced predators are lowest in natural forests more than 4.5 km (2 mi) from forest edges or roads (Olson *et al.* 2006). Kadavu's terrain consists of volcanic, mountainous, dense rainforest; sandy beaches; rocky coastline; and mangrove swamps. The island has a significant portion of relatively undisturbed forested areas. The islands' forested areas may act as refugia from predation by alien predators, such as the feral cat, for native species such as the crimson shining parrot.

Researchers suggest that maintaining minimally-disturbed forests is one of the most cost-effective strategies for protecting species (Olson *et al.* 2009, p. 1). Because this species resides in dense forests far from edges and roads, this species is not likely to be significantly affected by nonnative predators. The crimson shining parrot likely has natural predators, but we were unable to find information that any natural predators are having an impact on this species. Although predation occurs in Fiji, particularly by nonnative species, the best available information does not indicate that predation is a threat to the crimson shining parrot on Kadavu or Ono now, or may become a threat in the future.

We are not aware of any occurrence of disease that may be affecting the crimson shining parrot. In conclusion, we find that neither disease nor predation is a threat to the crimson shining parrot in any portion of its range now or in the foreseeable future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Various regulatory mechanisms are in place to protect the crimson shining parrot. This species is listed on Fiji's Endangered and Protected Species (EPS) Act of 2002 which is the legislation that implements CITES. As discussed under Factor B, the government of Fiji is adequately controlling international trade. According to a review conducted for CITES with respect to national legislation to determine each country's ability to implement CITES effectively, Fiji meets the requirements for

implementing CITES (CITES 2011a; *http://www.cites.org,* SC59 Document 11, Annex p. 1). In addition to the absence of legal trade, there is no indication that this species is traded illegally at levels such that it may contribute to the risk of extinction of the crimson shining parrot. Based on the lack of trade, and as discussed under Factor B, we do not consider international trade to be a threat to the crimson shining parrot. Therefore, protection under CITES is an adequate regulatory mechanism.

Wild Bird Conservation Act

The import into the United States of all of these species: the crimson shining parrot, Philippine cockatoo, white cockatoo, and yellow-crested cockatoo, is regulated by the Wild Bird Conservation Act (WBCA) (16 U.S.C. 4901 *et seq.*), which was enacted on October 23, 1992. The WBCA is implemented under 50 CFR part 15 and has limited or prohibited imports of exotic bird species into the United States since 1992. The purpose of the WBCA is to promote the conservation of exotic birds by ensuring that all trade involving the United States is sustainable and is not detrimental to the species. The WBCA is a stricter conservation measure than CITES, and import of these parrot species into the United States requires issuance of a WBCA import permit. WBCA permits may be issued to allow import of listed birds for various purposes, such as scientific research, zoological breeding or display, or personal pets, when certain criteria are met. The Service may approve cooperative breeding programs and subsequently issue import permits under such programs. Under the cooperative breeding program, wild-caught birds may be imported into the United States if they are a part of Service-approved management plans for sustainable use. At this time, none of the four parrot species discussed in this document is part of a Service-approved cooperative breeding program, and there are no approved management plans for wild-caught birds of these species.

Under the provisions of WBCA, any individual importing their pet bird to the United States for the first time must reside outside of the United States for at least 12 continuous months. In addition, in order to control diseases, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service requires veterinary health certificates and health inspections for pet birds, and implements quarantine procedures for birds imported into the United States. A report published in 2006 showed that imports of parrot species to the United States declined from the mid-1980s to 1991 (Pain *et al.* 2006, pp. 322–324). Parrot imports to the United States were already declining before the enactment of the WBCA, but the WBCA largely curtailed the import of wild parrots; we find it is an adequate regulatory mechanism for all four of these parrot species.

As discussed under Factor B, local protections are in place on the islands where this species exists. The governmental institutions responsible for oversight of the conservation of this species have a good legal framework to manage wildlife and their habitats. Not only are local NGOs involved in conservation activities for this species, but there also appears to be adequate capacity at various levels to protect this species and its habitat. The forestry regulations appear to be effective; there are no reports of illegal logging on the islands of Kadavu and Ono. Most of Fiji's forests are managed or owned by local communities, which have incentive to protect the native habitat. Ownership of native lands is not transferable through land sales, but user rights can be transferred via land leases (Leslie and Tuinivanua 2010, p. 10). These landowning groups are deeply attached to their lands and Fiji's forestry policy supports the local ownership of its lands. Within this species' habitat, the forested areas are being adequately managed and protected by these mataqalis.

Environmental education, conservation initiatives, and restoration efforts are occurring on Kadavu. Another NGO working on Kadavu to protect this species is the Matava Foundation (*http://foundation.matava.com/2011-projects*) which is a local NGO associated with a resort on the island. In addition to the conservation efforts in place, the remoteness of these islands likely serves as an additional protection for this species. The crimson shining parrot occurs on two islands, and both islands are extremely remote and fairly undeveloped. These factors all likely serve as additional protections for this species.

In summary, the existing regulatory mechanisms appear to be adequate. There are no current records of this species in international trade, and the government of Fiji is actively conducting environmental stewardship projects. There is nothing to suggest that this factor is a threat to the species. Local conservation activities involving indigenous communities are occurring on Kadavu and this species and its habitat appear to be well protected. Fiji has enacted various laws and regulatory mechanisms to protect and manage wildlife and their habitats. As described above in our review, we found that the government of Fiji and NGOs are implementing many projects and mechanisms that will likely have a positive impact on this species and its habitat. Reforestation and conservation efforts are occurring. The best scientific and commercial information available indicates that the crimson shining parrot is not in danger of extinction or likely to become so within the foreseeable future due to inadequate regulatory mechanisms.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

In this section, we examined whether invasive species are threats to the crimson shining parrot. The eastern part of Kadavu supports several bird species that are endemic to Kadavu. BLI indicated that logging and roads (see Factor A) may be facilitating the movement of invasive species. Logging enables alien invasive species such as rats and cats, and in some cases, Indian or common mynahs (*Acridotheres tristis),* jungle mynahs *(Acridotheres fuscus),* and *Spathodea campanulata (*African tulip trees), to invade the forests along logging roads and clearings. The island of Kadavu may be experiencing invasive species, but there is no evidence that invasive species are occurring to an extent that they are threats to the crimson shining parrot. Nor is there evidence that invasive species are a threat on Ono Island, where the crimson shining parrot is also known to occur. BLI is creating community-based conservation groups at Fiji's key conservation sites such as Kadavu Island, and is working with communities to address issues such as effectively dealing with invasive species (BLI 2011g, p. 3). We found no other natural or manmade factors that might affect the continued existence of the crimson shining parrot now or in the future. Based on the best available information, we find that there are no other natural or manmade threats to the continued existence of the crimson shining parrot throughout its range now or in the foreseeable future.

Significant Portion of the Range

Having determined that the crimson shining parrot is not in danger of extinction or likely to become so within the foreseeable future throughout all of its range, we must next consider whether there are any significant portions of the range where the crimson shining parrot is in danger of extinction

or is likely to become endangered in the foreseeable future.

The Act defines an endangered species as one ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as one ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The term ''significant portion of its range'' is not defined by the statute. For the purposes of this finding, a portion of a species' range is ''significant'' if it is part of the current range of the species, and it provides a crucial contribution to the representation, resiliency, or redundancy of the species. For the contribution to be crucial it must be at a level such that, without that portion, the species would be in danger of extinction.

In determining whether a species is threatened or endangered in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant'' (*i.e.,* the loss of that portion clearly would not reasonably be expected to increase the vulnerability to extinction of the entire species to the point that the species would then be in danger of extinction), such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine their status (*i.e.,* whether in fact the species is endangered or threatened in a significant portion of its range). Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address either the ''significant'' question first, or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.''

Applying the process described above for determining whether a species is threatened in a significant portion of its range, we considered status first to determine if any threats or potential threats acting individually or collectively threaten or endanger the species in a portion of its range. We have analyzed the potential threats and determined they are essentially uniform throughout the species' range.

Finding for the Crimson Shining Parrot

Section 3 of the ESA defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' In this finding, we determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted but precluded (see Background, above).

As required by the ESA, we considered the five factors separately and in combination in assessing whether the crimson shining parrot is endangered or threatened throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the crimson shining parrot. We reviewed the petition, information available in our files, and available published and unpublished information regarding this species and its habitat.

We do not have long-term population trend data for the crimson shining parrot. This species has always been an island endemic and may have always had a small population; island endemics tend to have smaller population sizes. Without historical population information, we do not know if this species has experienced a decrease in population size or if its population has been fairly consistent. Furthermore, this species is reported as common and widespread. During our review of the status of the species, we evaluated the potential threats to the crimson shining parrot including: habitat loss and habitat degradation, take for the pet trade, disease and predation, the inadequacy of regulatory mechanisms, and other natural or manmade factors such as invasive species. We found no information that habitat loss is a threat to the crimson shining parrot. We conclude that the present or threatened destruction, modification, or curtailment of its habitat or range is not a threat to the crimson shining parrot. We found no information that poaching for the pet trade is a threat to the species. This species is not in international trade according to the UNEP–WCMC trade database. Additionally, education and public awareness campaigns are occurring in Kadavu. Fiji is actively involved in forest protection efforts; a new Forest Policy was adopted in 2007 (Fiji Ministry of Fisheries and Forestry 2009, p. 1). We found no evidence that disease or predation affects the wild crimson shining parrot population. In addition, this species is protected by laws against trading and transfers out of Kadavu and Ono. We also concluded that there are no other natural or manmade factors that are threats to the species (Factor E).

The best available information indicates that there is little disturbance on the islands where the crimson shining parrot naturally occurs. Habitat loss is often a threat to wildlife, however, in this case, there is no evidence that habitat loss is affecting the crimson shining parrot. On the contrary, this species is said to occupy altered habitat extensively. Conservation efforts for this species have been underway within the past few years to ensure long-term conservation of habitat where this species exists; local groups on Kadavu are implementing reforestation and conservation programs. Based on the lack of threats acting on this species throughout its range as described above, and the lack of information indicating the species population is in decline, we determine that this species is not in danger of extinction now, nor is it likely to become endangered within the foreseeable future, throughout all or a significant portion of its range. Therefore, we find that listing the crimson shining parrot as a threatened or endangered species is not warranted.

Species Information

B. Philippine Cockatoo (*Cacatua haematuropygia*)

Taxonomy and Species Description

The species was first taxonomically described by Müller in 1776 (BLI 2011b). We accept the species as *C. haematuropygia,* which follows the Integrated Taxonomic Information System (ITIS 2011).

Cockatoos are only found in Australasia—a few archipelagos in Southeast Asia (Philippines, Indonesia,

East Timor, Tanimbar, Bismarck, and Solomon), New Guinea, and Australia—suggesting that the modern species arose after the breakup of Gondwanaland, the southern supercontinent that existed 200 to 500 million years ago. The 19th century naturalist Alfred Russell Wallace was among the first to note the break in Australasian and Asian fauna. Wallace's line runs between the islands of Bali and Lombok, Borneo and Sulawesi, and south of the Philippines. Cockatoos are present on Lombok and Sulawesi, but not on Bali and Borneo. The line represents the western edge of a zone of overlap between Australasian and Asian fauna (known as Wallacea), with the eastern edge defined by the Australian continental shelf (Lydekker's Line) (White and Bruce 1986, p. 32; Cameron 2007, pp. 1–3). These oceanic islands of Wallacea have high levels of endemism, meaning the species that occur there are unique to those islands.

The Philippine cockatoo, or red-vented cockatoo, is locally known as the ''katala'' and ''kalangay,'' and has a helmet crest and a red undertail (Rowley 1997). Cockatoos are a distinct group of parrots (order Psittaciformes), distinguished by the presence of an erectile crest (Collar 1989, p. 5; Cameron 2007, p. 1) and the lack of dyck texture in their feathers. Dyck texturing is a microscopic texturing that produces blue and green coloration and is present in the plumage of other parrots (Brown and Toft 1999, p. 141).

Biology, Distribution, and Habitat

This species is endemic to the Philippines, an archipelago of approximately 7,000 islands. The total area of the Philippines is 30,000,000 ha (74,131,614 ac) (Kummer 1991, p. 44). The Philippine cockatoo requires lowland primary or secondary forests with suitable nesting tree cavities and food sources, within or adjacent to riparian or coastal areas with mangroves (IUCN 2008i). The species is reported to use regenerating forest and even heavily degraded forest, as long as emergent nest trees survive. However, its nest sites are restricted to lowlands (Widmann and Widmann 2010, pers. comm.).

The Philippine cockatoo is a food generalist; its diet varies based on the seasons. It consumes seeds, legumes, fruit, flowers, buds, and nectar. It will also eat agricultural crops such as corn and rice, and has been observed feeding on *Moringa oleifera (*commonly known as malunggay or horseradish tree). Interestingly, the government of the Philippines introduced a bill in 2010, in the Fifteenth Congress of the Republic of the Philippines, First Regular Session, to encourage planting *Moringa oleifera* due to economic benefits (Senate Bill 1349 2010, pp. 1–7). The Philippine cockatoo has also been observed feeding on the fruits of *Sonneratia,* a mangrove species (Tabaranza 1992; Lambert 1994b in BLI 2001, p. 1683).

This species nests in tree cavities, and produces two to three eggs per season (Cameron 2007, p. 140). Breeding generally occurs March through June (BLI 2001, p. 1684), and both sexes participate in nest building (Widmann *et al.* 2001, p. 135). The period between incubation and fledging is generally about 95 days (Cameron 2007, p. 140). The species prefers nests high in the tree canopy, generally around 30 m (98 ft) (BLI 2001, p. 1683), but nest heights between 12 and 35 m (39 to 114 ft) have also been observed (Widmann *et al.* 2001, p. 135). The diameter of the cavity openings observed has been between 10 and 25 cm (4 and 10 in) (Widmann *et al.* 2001, p. 135). Some artificial nest boxes have been installed to increase nesting habitat; the species exhibits a preference for horizontal rather than vertical nest boxes (Low 2001, p. 3). Some of the tree species they use for roosting include *Dipterocarpus grandiflorus (*common names: apitong, tempudau, tunden, lagan bras aput) and *Intsia bijuga* (common names: Borneo-teak, Moluccan ironwood, and merbau asam), as well as coconut trees (Lambert 1994b in BLI 2001, p. 1686). They also use *Garuga floribunda* (no common name [ncn]) and *Sonneratia alba* (ncn) (Cameron 2007, p. 35).

Population Estimates

Based on recent reports, it is likely that between 450 and 1,245 individuals remain in the wild. Surveys indicated that until around the 1980s, the Philippine cockatoo was fairly common within the Philippine archipelago (Collar *et al.* 1998; Boussekey 2000, p. 138, BLI 2010, p. 1). Historically, it was known to exist on 52 islands in the Philippines; now, it is believed to exist on eight islands (BLI 2011a, p. 1).

The species' current range is significantly reduced from its historic range. In the past, the species was reported to have been commonly found throughout the Philippines except for northern and central Luzon (Delacour and Mayr 1946; DuPont 1971 in Boussekey 2000, p. 138; Collar *et al.* 1999 in Widmann and Widmann 2008, p. 23). It was common throughout the Philippines as recently as the 1950s. Between 1980 and 2000, there was a 60 to 90 percent population decline throughout its range (Boussekey 2000, p. 138). In the early 1990s, the population was estimated to be between 1,000 and 4,000 (Tabaranza 1992 and Lambert 1994b in BLI 2001, p. 1681).

Snyder *et al.* (2000) reported the following population surveys. A 1991 survey estimated between 800 and 3,000 birds exist on Palawan (Pandanas, Bugsok, and Bancalan Islands were thought to support 100 to 300 individuals and Dumaran 150 to 250 individuals), and possibly a few hundred were thought to exist in the Tawi-Tawi region (Lambert 1993b, 1994b). A single pair was found on Siquijor in 1991 (Evans *et al.* 1993). A few were found at Mount Isarog, Luzon in 1988 (Goodman and Gonzales 1990), and a few pairs were found in Mindoro at Malpalon (Dutson *et al.* 1992). On Masbate, birds were observed in 1993 (Curio 1994), and the species has been recorded a few times in singles or small numbers in Rajah Sikatuna National Park, Bohol since 1989 (Brooks *et al.* 1995b). In 1994, two pairs (Dutson in litt. 1997) were seen on Tawi-Tawi, and the species was considered widespread there in 1995–1996, although apparently more often seen in captivity than in the wild (two singles were observed in Batu-Batu and a single and a pair in Buan) (Allen in litt. 1997). Three birds were observed on Simunul, Tawi-Tawi in 1996 (Allen in litt. 1997; Dutson *et al.* 1996). The species is considered extinct on Cebu (Brooks *et al.* 1995a) and Negros (Brooks *et al.* 1992). Recent population counts and estimates are below; however, this information is not a complete representation of the population, but is the best available information. Some islands may not hold viable populations and may be functionally extinct.

Between 2004 and 2010, the population estimate decreased from 1,000 to 4,000 individuals to 450 to 1,245 individual birds in the wild (Widmann and Widmann 2008, p. 23; BLI 2010b; Widmann and Widmann 2010, pers. comm.). This species currently is found in the Culasian Managed Resource Protected Area (CMRPA), Palawan, Dumaran Island (negligible population), Pandanan and Bugsok Islands, Polillo Island Group, Rasa Island, Tawi-Tawi, and possibly on Samar Island. An estimated additional 400 individuals may survive in the Sulu archipelago; however, only sparse information is available for this area (Widmann *et al.* 2007; Widmann *et al.* 2009a; Widmann *et al.* 2010a). Subpopulations away from Palawan and the Sulus are thought to be very small, and do not likely have viable populations (Widmann 2010, pers. comm.) The extent these populations are interbreeding is unclear at this time.

Detailed discussion of each of these areas follows.

TABLE 1—POPULATION COUNTS AND ESTIMATES OF PHILIPPINE COCKATOO BETWEEN 2007 AND 2010 ON ISLANDS IN THE PHILIPPINES

Number of individuals based on recent observation, population count, or estimate	Location
60	Bugsok Island (40 to 80 estimated).
20	Burdeos, Polillo Islands.
3	CMRPA, Palawan Island.
23	Dumaran, Lagan.
80	Pandanan Island.
2	Patnanungan, Polillo Islands.
280	Rasa Island.
4	Samar.
200	Tawi-Tawi (100 to 400 estimated).
672	TOTAL*

* Note: This is not a full population survey; it documents birds actually counted, observed, or estimated (Widmann 2010, pers. comm.).

Culasian Managed Resource Protected Area

This area is in the south of Palawan Island and is 1,954 hectares (ha) (4,828 acres (ac)). The total land area of Palawan is approximately 1.5 million ha (3.7 million ac), including the 1,767 islands and islets surrounding the main island. This species exists both within the actual designated protected area (CMRPA) and in the areas surrounding the protected area on Palawan Island. Philippine cockatoos are thought to travel between Palawan Island and nearby Rasa Island. This species has been known to fly from the mainland to offshore islands as far as 8 km (5 mi) away from the mainland to roost and breed. No roosting sites are known in the CMRPA and surrounding areas (Widmann *et al.* 2010a, p. 23); however, there have been recent sightings there: four were observed in September 2009, and three were observed in December 2009 (Widmann *et al.* 2010a, p. 37). At least two Philippine cockatoos persist inside the protected area, but they have not bred in the last 4 years.

CMRPA has been described as exhibiting the ''empty forest syndrome.'' Although its forest is largely intact, little wildlife remains due to hunting pressure and poaching. In the small population that was protected only recently here, there are no indications that the species' status is improving. Only one breeding pair exists outside of the reserve. Cockatoo poaching occurred in this area within the past 3 years, and breeding in the 2009–2010 season failed. Because all nests have been systematically poached over many years, extinction of this population is likely to occur suddenly due to lack of recruitment (Widmann and Widmann 2010, pers. comm.).

Dumaran Island

On Dumaran Island, which is off the northeastern coast of Palawan, three areas are managed by the Katala Foundation's Philippine Cockatoo Conservation Programme (PCCP). Two of those are protected areas: the Omoi Cockatoo Reserve and the Manambaling Cockatoo Reserve (Widmann *et al.* 2009b, p. 7). The third area is Lagan, which is also monitored and managed by the PCCP. On Dumaran Island, the protected suitable forest patches are each very small: 1.5 and 0.6 km² (0.6 and 0.2 mi²), respectively (Widmann and Widmann 2008, p. 24). On this island in 2008, although 10 eggs were counted, only two birds fledged (Widmann *et al.* 2009b, p. 6). Recovery is slow; they started with fewer than 20 birds before protection started (Widmann and Widmann 2010, pers. comm.).

Pandanan and Bugsok Islands

Pandanan and Bugsok (119 km²) (46 mi²) are small islands south of Palawan, within the Balabac Island Region. It is likely that Pandanan holds possibly the second-most important population of Philippine cockatoos, containing at least 80 individuals (Widmann and Widmann 2010, pers. comm.). Approximately 40 birds were observed in a coconut plantation in 2009 on Malinsuno Island, a 10-hectare (24-acre) nearby island that is part of the Pandanan Barangay (equivalent to county or province) (Widmann *et al.* 2010c, p. 5; Widmann and Widmann 2010, pers. comm.). On Bugsok Island, Balabac, also in the Pandanan Barangay, approximately 40 cockatoos were also recently observed roosting (Widmann *et al.* 2010c, p. 5). A large part of Pandanan Island itself is not easily accessible, and because it is privately managed, it is protected for the most part. PCCP is working on building a relationship with organizations to monitor and formally protect this island, and wardens are being hired as of 2010 (Widmann *et al.* 2010, pp. 26, 56).

Polillo Islands Group

This group of islands is approximately 110 km (68 mi) east of Manila, in Quezon Province in the northern Philippines. Patnanungan Island is part of the Polillo Island Group and is not yet very developed. Polillo Island itself is 1,000 km² (386 mi²). As of 2009, within the Polillo group of islands, Patnanungan Island was known to contain a population of the Philippine cockatoo (Widmann *et al.* 2010, p. 15). However, no roosting sites have been identified on this island (Widmann *et al.* 2010, p. 23). Patnanungan Island is mainly covered with secondary vegetation and coconut plantations (Widmann *et al.* 2010, p. 22). Seven nest trees are being monitored in this area (Widmann *et al.* 2009b, p. 7). To the best of our knowledge, there is not a viable population on Polillo Island, although the species has been observed there. In 2009, in Burdeos, six Philippine cockatoos were spotted in Duyan-Duyan Forest in the Anibawan Barangay, where it is regularly heard (Widmann *et al.* 2009a, p. 41; Widmann *et al.* 2010, p. 38). In part, because there were fewer than 20 birds prior to their protection, recovery is slow (Widmann and Widmann 2010, pers. comm.).

Rasa Island

Rasa Island is a protected 8 km² (3 mi²) island off the east coast of Narra, Palawan. This island was declared a wildlife sanctuary in 2006 (Widmann *et al.* 2010, p. 15). As of 2007, 1.75 km² (0.6 mi²) of the island was coastal and mangrove forest. In 2008, 32 nest trees were found to be occupied, 21 pairs had successful fledglings, and the population was estimated to be 205 individuals (Widmann *et al.* 2008, p. 14; Widmann and Widmann 2008, p. 27; Widmann *et al.* 2009b, p. 5–6). Breeding success was 63 percent; 49 fledglings were banded (Widmann and Widmann 2008, p. 24). Population recruitment in years that experienced sufficient precipitation in Rasa has been good. As of 2009, Rasa Island had 64 nest trees, and its cockatoo population was approximately 280 individuals, making it the area with the highest natural density of Philippine cockatoos (Widmann 2010b). PCCP estimates that Rasa Island contains about 20 percent of the total Philippine cockatoo population (Widmann *et al.* 2010c, p. 19). The success of cockatoos on this island is likely due to the lack of potable water, which makes it unattractive to human settlement (BLI 2001, p. 1687). The Philippine cockatoo population on this island has grown due to intense management; in 1997, there were only about 50 birds on Rasa Island (Widmann and Widmann 2008, p. 24).

Other Islands

Little current data exists regarding the status of the Philippine cockatoo on

other islands, such as Samar and Tawi-Tawi, in part because these areas are extremely remote. The Katala Foundation Inc. (KFI) surveyed Samar in 2002, at which time only two individual Philippine cockatoos were verified. Sightings were reported recently in Busuanga Island (Coron) and on Bellatan Island in the Tawi-Tawi region. KFI recently received a report from a member of the Wild Bird Club, Philippines, that approximately 30 to 40 individuals were sighted on Bellatan Island (Widmann and Widmann 2010, pers. comm.). Sightings of this species on Dinagat, Surigao del Norte, and Samal Islands, Davao, have been reported, but they remain unverified (Widmann and Widmann 2010, pers. comm.).

An older survey indicated that possibly 100 to 200 Philippine cockatoos existed in the Tawi-Tawi region; however, those data are from over 20 years ago, and, therefore, no longer likely to be an accurate population estimate (Lambert 1993, Dutson 1997, and Allen 1997 in Snyder 2000, p. 84; BLI 2010b, p. 1). Tawi-Tawi is in the southwestern part of the Philippines in the Sulu Archipelago. Tawi-Tawi consists of 107 islands and islets and is approximately 1,197 km^2 (462 mi^2) in area. The island of Tawi-Tawi itself is 484 km^2 (187 mi^2) (Dutson *et al.* 1996, p. 32) and is part of the Autonomous Region in Muslim Mindanao (ARMM). This area has experienced problems with logging, military activity, and insurgency but is now encouraging ecotourism (Philippines Department of Natural Resources (DENR) 2005; IUCN 2010b; Manila Bulletin 2010), which may have positive effects on the Philippine cockatoo.

Samar is the third largest island in the Philippines archipelago. It experienced threats from logging and mining in the past, but in 1989, an unexpected natural disaster resulted in initiation of conservation actions (Samar Island Natural Park 2010, p. 1). Due to the intense landslides that occurred as a result of logging activities, a logging moratorium was put into place that year. Samar Island Natural Park was subsequently established on the island, which may have positive results for the Philippine cockatoo. Samar has been reported to contain one of the Philippines' largest unfragmented tracts of lowland rainforest. There have been several reports of Philippine cockatoo sightings on Samar, but there is no current estimate of how many exist there other than the reported sightings (Widmann *et al.* 2006, p. 13; BLI 2010 p. 1; Widmann and Widmann 2010, pers. comm.).

Conservation Status for the Philippine Cockatoo

Protections exist through various national, local, and international mechanisms. This species was transferred from Appendix II to Appendix I of CITES in 1992 (refer to the discussions under Factors B and D for the crimson shining parrot above for more information about CITES). Inclusion in Appendix I means that international commercial trade is generally prohibited (*http://www.cites.org*). From 1981 to 1992, the Philippine cockatoo was listed in Appendix II of CITES. The species is protected under the Philippines Republic Act 9147, otherwise known as the Wildlife Resources Conservation and Protection Act of 2001 or the ''Wildlife Act of 2001.'' It is classified as ''Critically Endangered'' by the government of the Philippines under this Act (DENR 2010b, p. 2). It is on the Philippines list of protected species (DENR 2010b, p. 2), under the Republic Act No. 9147. The Republic No. provides for the conservation and protection of wildlife resources and their habitats. It prohibits certain activities such as capture and trade of live wildlife, including the Philippine cockatoo. It is also protected in the U.S. by the WBCA (refer to discussion under the Crimson Shining Parrot, factor D).

The Philippine cockatoo is also listed as Critically Endangered in the 2010 IUCN Red List. Critically endangered is IUCN's most severe category of extinction assessment, which equates to an extremely high risk of extinction in the wild. IUCN criteria include rate of decline, population size, area of geographic distribution, and degree of population and distribution fragmentation; however, IUCN rankings do not confer any actual protection or management.

Evaluation of Factors Affecting the Philippine Cockatoo

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Widespread deforestation and destruction of native mangroves have affected the habitat of the Philippine cockatoo. The loss of this species' habitat through deforestation largely occurred prior to the 1980s (Kummer 1991, p. 46; Galang 2004, p. 13). Forest cover decreased in Palawan from 10,703 km^2 (4,132 mi^2) in 1950, to 6,605 km^2 (2,550 mi^2) in 1987 (Kummer 1991, p. 57). In the 1990s, commercial logging on Palawan, the primary location of the Philippine cockatoo, was suspended by presidential decree; however, nearly all of the island's forests were already leased to logging operations (Lambert 1994b in BLI 2001, p. 1686; Galang 2004, p. 14). Many of Palawan's mangroves, which covered 46,000 ha (13,668 ac) in 1988, were also cleared for fishpond construction (Quinnell and Balmford 1988 in BLI 2001, p. 1686). As a result of the pressures for resources, much of the forest is now either secondary forest or has been converted to plantations or agriculture (Heaney *et al.* 1998, 88 pp.; Galang 2004, pp. 13–14). In most areas within the range of the Philippine cockatoo, there is a severe shortage of timber and firewood; consequently, illegal logging is widespread. In addition to mangrove logging, slash-and-burn farming (referred to as ''kaingin'' in the Philippines) is a problem in many areas, particularly in the Polillo Island Group.

Soil erosion is a secondary impact that further degrades suitable habitat (Kummer 1991, p. 41), as demonstrated on Samar Island. In addition to habitat degradation and destruction through road construction, digging, removal of trees, and mining are causing secondary habitat degradation through severe erosion. During the rainy season, water creates deep clefts along the roads that are created for mining operations, causing road collapse. No mitigation measures have been put into place to reduce erosion (IUCNb 2010, pp. 1–2). Virtually all chainsaw operations in Patnanungan and Burdeos are not registered with the appropriate authority (Widmann *et al.* 2010).

Cockatoos are highly impacted by selective logging of primary forests because they are large birds and subsequently require large nests. Selective logging, which targets mature trees, has a negative impact on tree-cavity nesters such as the Philippine cockatoo. Research has found that the abundance of cockatoos is positively related to the density of its favored nest tree and strangling figs (*Ficus* spp.) (Kinnaird *et al.* 2003, p. 227). These are trees that would be impacted by logging, especially since reduced-impact logging techniques are seldom applied. Once the primary forest is logged, the secondary forest is generally converted to other uses or logged again rather than being allowed to return to primary forest. Therefore, although cockatoos may continue to inhabit secondary forests, the population is usually at a substantially lower number due to a decrease in suitable nesting sites.

It is well documented that habitat loss is one of the most significant effects

humans have on wild species (Fahrig 1997, p. 603; Vitousek *et al.* 1997). In some cases, corridors are established to promote connectivity between populations of species to reduce the effects of habitat fragmentation, and this has been shown to be effective (Haddad *et al.* 2003, pp. 609–615; Cameron 2007, pp. 110–112). In the case of the Philippine cockatoo, a ''virtual'' corridor is being created by artificially transplanting captive-reared cockatoos into suitable, relatively protected habitat; however, it is unclear how much this species naturally moves from one island habitat to another. This species in the past has been known to fly from the mainland to nearby islands at distances of 8 km (5 mi). Researchers point out that at the metapopulation scale, habitat fragmentation causes habitat patches to be reduced in size and to be isolated from one another, and gene flow between patches is decreased (Blanchet *et al.* 2010, p. 291). Because this species' population reduction and fragmentation has occurred so recently and rapidly, it is unlikely that there are significant genetic differences between the existing populations. However, habitat loss and fragmentation are affecting this species.

The Palawan Islands Region is essentially the last area where Philippine cockatoos have a viable population. Although Palawan has been seen as a center for environmental preservation (McNally 2002, p. 9), it still faces many threats, in part due to a burgeoning human population (IUCN 2010b, p. 1; Laurance *et al.* 2010, p. 377). The human population of the Philippines in 2009 was estimated at 91,983,000 (United Nations (UN) 2009, p. 41) and is experiencing a growth rate of 1.7 percent annually (UN 2009, p. 51). Palawan, in particular, has experienced rapid human population growth (McNally 2002, pp. 8–9). As of 2002, ''Palawan remains a highly attractive place of destination for migrants from other areas within the Philippines'' (McNally 2002, p. 11). While the burgeoning human population on Palawan may not directly affect the Philippine cockatoo, it does indirectly affect the species by contributing to the habitat losses and pressures described within this section.

Despite the protection measures that are in place to prohibit mining and other activities that degrade habitat, mining operations and oil palm plantations are being developed on Palawan Island (IUCN 2010c, pp. 1–3; Novellino 2010, pp. 2–48). The Philippine cockatoo has not been recorded in areas in southern Palawan where mining and oil palm plantations exist (Widmann and Widmann 2010, pers. comm.). Although mining does not occur directly within Philippine cockatoo habitat, it indirectly adds to habitat loss and degradation on the island (Novellino *et al.* 2010, pp. 1–48). These threats to the ecosystem still exist despite legislative protections in Palawan (refer to Factor D).

Rasa Island contains a large percentage of the Philippine cockatoo population, although small in actual numbers. In addition to the formal protection measures in place on Rasa Island, this population is actively monitored and protected by PCCP staff (Widmann *et al.* 2010a, b, c). While this population is reasonably protected, in part due to island's undesirable characteristics for human settlement such as the lack of potable water, any deforestation and habitat loss here are significant factors affecting the species. This is because so little of the species' habitat remains and because they are experiencing other pressures as well, such as poaching, described under Factor B, below.

On Dumaran Island, the pending implementation of a Jatropha plantation is occurring within the few remaining forest patches left (Widmann *et al.* 2010a, pp. 6, 32, 46). *Jatropha curcas* trees produce a fruit with an inedible oil that contains a high energy content and is being explored as an alternative fuel (Mendoza *et al.* 2007, p. 1). A hectare of Jatropha has been claimed to produce 1,892 liters (500 gallons) of fuel. Many industries such as the air transportation industry are considering this as a biofuel source, and it is also being touted as a mechanism for carbon credits. However, because this species occurs in areas that are managed and protected by the PCCP, the Omoi Cockatoo Reserve and the Manambaling Cockatoo Reserve (Widmann *et al.* 2009b, p. 7), we do not find that pending implementation of a Jatropha plantation is a threat to the species on Dumaran Island.

PCCP currently manages three areas on Dumaran Island, including a newly acquired buffer area in Omoi (Widmann *et al.* 2010, p. 32). Dumaran Island also experiences widespread slash-and-burn agriculture, which has begun to affect more forested areas on steeper slopes here (Widmann 2008a, p. 19). Larger forested parts of the island are now replaced with grass and shrubland, and dense stands of bamboo, as a consequence of this practice. Due to lack of water, irrigation systems, and level areas, lowland rice cultivation is very restricted. However, permanent forms of cultivation are coconut and cashew plantations. Forest and grass fires are common, particularly during the dry season. Fire is not only used to clear areas for cultivation, but also to further growth of fresh grass for pastures.

In the other areas where this species exists, the current extent of the present and threatened destruction, modification, or curtailment of the species' habitat is unclear; however, it is likely that the pressures on the species are similar, if not worse (BLI 2010b; Widmann *et al.* 2010, p. 15). Human encroachment and concomitant increasing human population pressures exacerbate the destructive effects of ongoing human activities throughout the Philippine cockatoo's habitat. Increased urbanization and mining lead to increased infrastructure development. Road building and mining projects further facilitate human access to remaining forest fragments, throughout the species' range, including protected areas. Mining projects, such as those proposed or occurring on Palawan, open new areas to exploitation and attract people seeking employment; these pressures from human development will likely spill over into nearby Philippine cockatoo habitat.

Summary of Factor A

We have identified a number of threats to the habitat of the Philippine cockatoo that have operated in the past, are impacting the species now, and will continue to impact the species. Habitat loss and degradation from past events, such as selective and commercial logging, conversion to plantations or agriculture, and mining, have decreased this species' suitable habitat; and these activities are still occurring. Illegal logging (discussed under Factor D) is widespread in the Philippines (Kummer 1991, pp. 70–75; Galang 2004, pp. 12, 17, 22; Laurence 2007, p. 1544), which adds to any pressures of legal deforestation. Based on the best available scientific and commercial data available, we find that the present and threatened destruction, modification, or curtailment of the species' habitats, particularly in the Palawan area, is a threat to the Philippine cockatoo throughout all of its range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Illegal Pet Trade

The Philippine cockatoo, like all cockatoos, is a desirable pet (Cameron 2007, p. vii). In the Philippines, cockatoos are reported to be popular pets due to their ability to mimic human voices (Catigob-Sinha 1993 in

Boussekey 2000, p. 138). On Palawan, Pandanan, and Samar Islands, trapping is a particularly serious threat (Widmann *et al.* 2010a, pp. 21–22; Widmann *et al.* 2010c, p. 16) and is still considered to be one of the most significant threats to the species. Awareness campaigns have been initiated since the late 1990s to increase understanding of why these birds should not be removed from the wild for pets, and these campaigns are somewhat effective (Widmann *et al.* 2010). Due to the high value of these birds (valued at $160 U.S. dollars (USD) in Manila in 1997, and $300 USD in 2006 (BLI 2010, p. 1)), chicks are taken from virtually every accessible nest on these islands (Widmann *et al.* 2010a, pp. 21–22). A researcher observed that in the 1980s, up to 10 Philippine cockatoos were trapped per day (Tabaranza 1992 in BLI 2001, p. 1685).

In recent years, several programs to combat the poaching problem, such as public awareness programs and the rehabilitation and release of confiscated parrots were established by the PCCP to support the conservation of the Philippine cockatoo. PCCP started these awareness programs to educate adults and children in villages near areas where the birds are concentrated. The programs use the Philippine cockatoo as a flagship species for conservation, especially with children, because the image of the endemic Philippine cockatoo is unique (Widmann *et al.* 2010, pp. 21–22). PCCP focuses in areas where this species is found in the wild, such as the CMRPA, to educate the local communities in an attempt to reduce poaching. In 2005, on Palawan Island, PCCP began an initiative specifically targeted towards anti-poaching in the CMRPA. Former poachers were identified and converted into wildlife wardens. This ''conversion'' practice is common in developing countries that have human populations that rely heavily on forests and wildlife for their survival (Cribb 2006, p. 3). These converted poachers-now-wardens safeguard the nesting trees, and patrol and monitor inside CMRPA in the southwest region of Palawan (Widmann *et al.* 2010).

Because illegal trade is difficult to monitor and quantify, it is unclear to what extent poaching for the pet trade is affecting this species. Considering that in the early 1990s, the population was estimated to be only between 1,000 and 4,000 birds (Tabaranza 1992 and Lambert 1994b in BLI 2001, p. 1681), relatively high numbers were legally traded internationally in the 1980s (*e.g.,* 422 reported in 1983; BLI 2010, p. 1). This species is still is being poached in the wild (Widmann *et al.* 2010).

Although we are unsure of the magnitude of the pet trade and its effect on the survival of this species, several reports describe how poaching is still a problem for parrot species, particularly in poorer countries (Dickson 2005, p. 548; *http://www.philippinecockatoo.org,* accessed February 14, 2011). In areas with extreme poverty, poaching can be a lucrative and relatively risk-free source of income (Dickson 2005; Cribb 2007; Widmann *et al.* 2010c, p. 22). In many cases, poachers have limited income prospects (Widmann *et al.* 2010a, p. 37). A common conservation practice is to provide poachers with alternative sources of income. After the benefits of species and habitat conservation are explained to them, they are generally receptive to resource conservation and ultimately gain a sense of stewardship of the resources. This technique has been effective in the past, but it is resource-intensive and has only a localized effect.

PCCP also broadcasts local radio programs raising conservation awareness. For example, in August 2010, they broadcast an interview regarding wildlife trade and a recent confiscation in Palawan (Widmann *et al.* 2010c, p. 73). Conservation-focused radio programs have occurred here since 1996 (Boussekey 2000, p. 140). However, even with these education and conservation measures in place, poaching still occurs in the Philippines (Widmann *et al.* 2010c). Based on the available information, and the relatively small number of Philippine cockatoos remaining in the wild, we find that poaching for the pet trade in the Philippines is a threat to the Philippine cockatoo throughout all of its range.

International Trade and CITES

The Philippine cockatoo was transferred to CITES' Appendix I in June 1992 because populations were declining rapidly due to uncontrolled trapping for the pet bird trade. Refer to the Factor B discussion above under the crimson shining parrot for additional information about CITES. An Appendix-I listing includes species threatened with extinction whose trade is permitted only under exceptional circumstances, which generally precludes commercial trade. The import of an Appendix-I species requires the issuance of both an import and export permit. Import permits are issued only if findings are made that the import would be for purposes that are not detrimental to the survival of the species in the wild and that the specimen will not be used for primarily commercial purposes (CITES Article III(3)). Export permits are issued only if findings are made that the specimen was legally acquired and trade is not detrimental to the survival of the species. (CITES Appendix III(2)). These two findings made prior to issuance of a CITES permit are designed to ensure that international trade in a CITES-listed species is not detrimental to that species.

An exception to permitting requirements for international trade of Appendix I species exists specimens originating from a CITES-registered captive-breeding operation. Under the exception in the CITES Treaty and Resolution Conf. 12.10 (Rev. CoP15), specimens of Appendix-I species originating from CITES-registered captive-breeding operations can be traded for commercial purposes, and shipments only need to be accompanied by an export permit issued by the exporting country. An import permit is not required because these specimens are treated as CITES' Appendix-II species. There is one CITES-registered captive-breeding operation in the Philippines that is authorized to export captive bred specimens of this species (*http://www.cites.org/common/reg/e_cb.html,* accessed December 12, 2010). Countries operating CITES-registered operations must ensure that the operation ''will make a continuing meaningful contribution according to the conservation needs of the species'' (CITES 2007b, pp. 1–2). Countries that are parties to CITES are advised to restrict their imports of Appendix-I captive-bred specimens to those coming only from CITES-registered operations. Additional information on CITES-registered operations can be found on the CITES Web site at *http://www.cites.org/eng/resources/registers.shtml.*

We queried the UNEP–WCMC CITES Trade Database for data on exports and imports of this species from 2000 to 2009, and there were very few exports from the Philippines reported as ''wild'' origin. Between 2000 and 2009, CITES Party countries reported to UNEP–WCMC that a total of 91 live Philippine cockatoos were imported (*http://www.unep-wcmc-apps.org/citestrade*) into their countries, at an average of 10 birds per year. The majority of these (78) originated from the Philippines; 77 of these live shipments were reported to be of captive-origin, and only one was indicated to be of wild origin. Additionally, in 2009, the UNEP–WCMC CITES Trade Database indicated that only two live birds were exported from the Philippines. As the Philippine cockatoo is listed as an Appendix-I

species under CITES, legal commercial international trade is very limited. Based on the low numbers of live, wild Philippine cockatoos in international trade since 2000, and because the trade was in parts and products from wild specimens, rather than live birds, we believe that international trade controlled via valid CITES permits is not a threat to the species.

Summary of Factor B

In summary, cockatoos are popular pets, and poaching for the pet trade still occurs, particularly on Pandanan Island (Widmann *et al.* 2010c, p. 13). Although we do not find that international trade controlled via valid CITES permits is a threat to the species, we do find that poaching for the pet trade in the Philippines continues to be a threat to the Philippine cockatoo.

Factor C. Disease or Predation

In the information provided and the literature reviewed, there were suggestions that diseases, particularly a fungal disease, in the wild may be a threat to this species. It was suggested that Viscertropic Velogenic Newcastle Disease, Psittacine Beak and Feather Disease (PBFD), or the psittacid herpes virus (PsHV–1 or PsHV–2) were indicated as possible threats and may have been introduced into the wild population, possibly by the release of captive birds (Lambert 1994 in BLI 2001, p. 1686; BLI 2010b, p. 1). Cockatoo species are widely distributed throughout Australasia, and some avian species have developed resistance to some diseases (Commonwealth of Australia 2006, p. 1). These diseases affect each cockatoo species differently.

Psittacine Beak and Feather Disease

Psittacine Beak and Feather Disease (PBFD) is a viral disease that originated in Australia and affects both wild and captive birds, causing chronic infections resulting in either feather loss or deformities of beak and feathers (Cameron 2007, p. 82). PBFD causes immunodeficiency and affects organs such as the feathers, liver, and brain. Suppression of the immune system can result in secondary infections due to other viruses, bacteria, or fungi. The disease can occur without obvious signs (de Kloet and de Kloet 2004, p. 2394). Birds usually become infected in the nest by ingesting or inhaling viral particles. Infected birds develop immunity, die within a couple of weeks, or become chronically infected. No vaccine exists to immunize populations (Cameron 2007, p. 82). While some cockatoo species are susceptible to this virus, there is no indication that PBFD adversely affects the Philippine cockatoo at the population level in the wild.

Proventricular Dilatation Disease

Another serious disease that has been reported to infect some cockatoos is Proventricular Dilatation Disease (PDD). PDD is a fatal disease that may pose a serious threat to domesticated and wild parrots worldwide, particularly those with very small populations (Waugh 1996, p. 112; Kistler *et al.* 2008, p. 1). This contagious disease causes damage to the nerves of the upper digestive tract, so that food digestion and absorption are negatively affected. The disease has a 100 percent mortality rate in affected birds, although the exact manner of transmission between birds is unclear. Although this is a particularly virulent virus that affects cockatoos in general, we are unaware of any reports that this disease occurs in Philippine cockatoos in the wild.

Avian Influenza

Wild birds, especially waterfowl and shorebirds, are natural reservoirs of avian influenza (also known as ''bird flu''). Most strains of the avian influenza virus have low pathogenicity and cause few clinical signs in infected birds. Pathogenicity is the ability of a pathogen to produce an infectious disease in an organism. However, strains can mutate into highly pathogenic forms, which is what happened in 1997, when the highly pathogenic avian influenza virus (called H5N1) first appeared in Hong Kong (USDA *et al.* 2006, pp. 1–2). H5N1 is mainly propagated by commercial poultry living in close quarters with humans. The effect on migratory birds is less clear (Metz 2006a, p. 24). Scientists increasingly believe that at least some migratory waterfowl carry H5N1, sometimes over long distances, and introduce the virus to poultry flocks (World Health Organization 2006, p. 2). H5N1 has infected and caused death in domestic poultry, people, and some wild birds in Asia, Europe, and Africa. About half of humans infected die from the disease (Service 2006, p. 1). A parrot held in quarantine in the United Kingdom was incorrectly diagnosed with H5N1 is 2005. The original identification of H5N1 was made from a pool of tissues derived from a *Pionus* parrot (from Surinam) and another avian species called a mesia (*Leiothrix* spp.) from Taiwan. The *Department for Environment, Food and Rural Affairs, United Kingdom* (DEFRA) stated that it was not possible to say whether the virus isolated came from the parrot tissue or the mesia tissue or both (DEFRA 2005, p. 34). However, they concluded that the source was more likely the sample from the mesia (DEFRA 2005, p. 34). Later, it was determined that the samples had been mixed, and the parrot did not have the disease (Gauthier-Clerk *et al.* 2007, p. 208). Although in the Philippines, 339 smuggled parrots were euthanized following confiscation even though none were confirmed to have the virus (Metz 2006a, pp. 24–25), we are unaware of any reports that this disease occurs in Philippine cockatoos in the wild.

Aspergillosis

Aspergillosis is an infection or allergic response to the *Aspergillus* fungus. A literature review found that cases of Aspergillosis were being reported in captive-held, wild-origin Philippine cockatoos in the Philippines at the U.S. Air Force Base, Clark Field, Angeles City (Burr 1981, p. 21). In all known cases according to the report, stress, such as enclosure in a small bird cage, was indicated to be a factor prior to death. Observations indicated that free-flying birds in aviaries showed no signs of stress, and there were no deaths recorded in these birds. Natural incidence of Aspergillosis in the wild occurs in the Philippine cockatoo; however, it appears to be more prevalent in captive birds. During one survey, *Aspergillus* spores were found below nest holes in Palawan (Tabaranza 1992; Lambert 1994 in BLI 2001, p. 1686). The Philippine cockatoo is likely a latent carrier of *Aspergillus* (Burr 1981, p. 23); however, based on a review of the best available information, there is no recent information indicating that this disease negatively affects this species at the population level in the wild (Widmann *et al.* 2010c, p. 45).

Lice and Mites

Ectoparasitism by lice and mites was documented as the possible cause of death in some chick mortalities on Rasa Island (Widmann *et al.* 2001, p. 146; Widmann *et al.* 2010a, pp. 6, 38). Mites, a form of arachnid, were found in some monitored nests where chicks had died. Although nests are being routinely monitored on Rasa Island, mites are not commonly found in these nests. Mites have evolved in a symbiotic relationship with avian species. Not all bird-mite relationships are parasitic; some might be benign or beneficial (Proctor and Owens 2000, pp. 358, 362). Many mites are nonparasitic scavengers and use the nest or bird feathers as habitat. Despite the presence of mites found in nests where chick mortalities were observed, there is no evidence that mites

significantly contribute to chick mortalities. We conducted a search of available information, and there is no other information indicating that lice and mites significantly affect the species, although mites may occur more frequently during dryer seasons (Widmann *et al.* 2010a, p. 38; Widmann *et al.* 2010c, pp. 39, 45). It was suggested that unusually high temperature, rather than mites, may have contributed to the lack of nest success in 2001 (Widmann *et al.* 2010c, p. 45); however, the actual reasons for nest failures (mortalities) are unclear.

Summary of Factor C

When conducting a status review, we evaluate the magnitude of each factor that may be affecting a species, and, in this case, we did not find evidence that any disease or predator rises to the level of a threat that is affecting this species in the wild. After conducting a literature search (Johnson *et al.* 1986, pp. 813–815; Latimer *et al.* 1992, pp. 165–168; de Kloet 2004, pp. 2393–2412; Tomaszewski *et al.* 2006, pp. 536–544), we found no indication that disease or predation is a threat to the Philippine cockatoo in the wild. Although individual Philippine cockatoos may be subject to occasional infections or predation, there is no evidence that either of these is occurring at a level that may affect the status of the species as a whole to the extent that it is considered a threat to the species. Therefore, we find that the Philippine cockatoo is not threatened due to disease or predation.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Several regulatory mechanisms are in place at the national and local levels that serve to conserve this species and the habitat on which it depends; however, the mechanisms are ineffective at adequately protecting the Philippine cockatoo. We find that CITES effectively protects the species from unsustainable legal international trade. Factors hampering the regulatory mechanisms in place include remoteness of protected areas, poverty that causes locals to unsustainably use this species' habitat or to poach, and the lack of resources to adequately enforce laws and regulations (Galang 2004, p. 17; Laurance 2007, p. 1544; Palawan Council for Sustainable Development (PCSD) 2007, p. 1–3). These are discussed below.

Domestic Regulatory Mechanisms

In the late 1980s and early 1990s, efforts were already underway to protect the Philippine cockatoo (Boussekey 2000, p. 140; Galang 2004, p. 17). In 1987, the Government of the Philippines established the Protected Areas and Wildlife Bureau (PAWB) through the DENR, under Executive Order 192. Its responsibilities are in part to manage and protect the country's protected areas. In 1992, the National Integrated Protected Areas System Act (NIPAS Act of 1992) was adopted in order to protect and maintain the Philippines' biological diversity. In 1994, the PAWB signed a memorandum of agreement (MOA) regarding the conservation of this species (Boussekey 2000, p. 138, Philippines DENR 2009, pp. 1–2). This MOA has been implemented by a nongovernmental organization, the Katala Foundation, since 2006 through the PCCP. Under this MOA, an intensive species conservation program has been underway to conserve this species and its habitat. The PCCP accomplishes its mission through intense local management of the species. Some aspects of the conservation program are to educate local communities about the benefits of conserving endemic wildlife, protect and restore nesting sites and habitat, conduct research, and reintroduce the species into the wild (Widmann *et al.* 2010, p. 22).

As a protected species (DENR 2010b, p. 2), under the Republic Act No. 9147, certain activities such as capture and trade of live wildlife are prohibited. Republic Act No. 9147 provides for fines and penalties for prohibited acts. However, within the Philippines, the laws are generally ignored and only poorly enforced (Galang 2004, pp. 12–17; Laurance 2007, p. 1544; Rose 2008, p. 232).

Additional protections exist under the Philippines' Executive Order No. 247, which protects the rights of local people with respect to the use of natural resources (*http://www.elaw.gov,* accessed January 4, 2011). This Executive Order mandates that prospecting of biological and genetic resources shall be allowed within the ancestral lands and domains of indigenous cultural communities only with the prior informed consent of such communities. Involving local tribal communities adds an additional conservation measure. For example, the Batak tribe (Boussekey 2000, p. 144) in northern Palawan has shown interest in participating in wildlife conservation. The protection of endemic natural resources has been demonstrated to benefit native tribes and local communities near sites that have unique features (Widmann *et al.* 2010b, p. 36). Locals may be recruited as wardens, or these areas can be developed for ecotourism. However, in this case, it is likely that only around 300 to 400 members of the Batak tribe survive today, so the effectiveness in the long term is unclear (Cultural Survival 2010 and Survival International 2010, both accessed November 18, 2010). These regulatory mechanisms could have a positive effect on the species, but currently it is unclear whether Executive Order No. 247 is benign or actually constructive.

As discussed under Factor B, the Philippine cockatoo is monitored and managed in some, but not all, areas where it exists. Some areas are designated as protected specifically for the Philippine cockatoo and wardens are employed (Widmann *et al.* 2010a, pp. 18–22; and refer to Conservation Status for the Philippine Cockatoo section above). An increase in the population is occurring in some areas where it is protected, such as on Rasa Island, but in other areas where protections are not robust, the population is declining (Widmann *et al.* 2010a, p. 32). Although there are five areas designated as being ''protected,'' under Philippine law, the levels of protection vary. In 2006, Rasa Island, the area containing the densest population of the Philippine cockatoo, was declared a wildlife sanctuary by President Arroyo (Widmann 2006, p. 1). The protected area consists of 1,983 ha (4,900 ac). While this area is fairly well protected and monitored, effective reserve management here is hampered by a shortage of staff, technical expertise, and financial support (Widmann 2010, pers. comm.). In addition, the remoteness of protected areas makes enforcement of activities such as poaching and illegal logging difficult. Overall, the management of protected areas is insufficient. For example, in 2010, despite management of the species, 15 hatchlings died and 17 eggs did not hatch on Rasa Island during an extreme weather event (refer to Factor E discussion) (Widmann *et al.* 2010a, p. 38). Even in areas such as Narra that are monitored by wardens, poaching occurs (Widmann *et al.* 2010a, p. 6). The protections in place for this species are ultimately ineffective at reducing the threats to this species. This species resides in other areas that are not protected; and habitat destruction (see Factor A discussion above) and poaching for the pet trade (see Factor B discussion above) still occur even in protected zones.

The Philippine cockatoo is carefully monitored and managed in some, but not all, areas where it exists. The species exists in five protected areas: (1) Rasa Island Wildlife Sanctuary (Narra, Palawan), (2) Puerto Princesa Subterranean River National Park

(Palawan), (3) Omoi and Manambaling Cockatoo Reserves in Dumaran (Dumaran, Palawan), (4) Mt. Mantalingahan Protected Landscape (CMRPA) in Rizal, Palawan, and (5) Samar Island Natural Park. Each protected area in Palawan has its own unique protections in place and legislation to protect the species and its habitat (Widmann and Widmann 2010, pers. comm.).

Although there are five areas designated as being ''protected,'' the levels of protection vary. An increase in the population is occurring in some areas, but in other areas where protections are not as robust, the population is declining, in part due to poaching. The PCCP, the Philippine government, and individuals concerned with the conservation of this species have actively worked to protect the Philippine cockatoo since 1998. The PCCP is a nonprofit organization dedicated to the conservation of wild Philippine cockatoos. Its goals are to teach the principles and value of conservation, work to rehabilitate Philippine cockatoos back into the wild, and conduct scientific research. As of 2000, the local communities that live within the range of this species have been aware that it is illegal to capture or trade this species (Boussekey 2000, p. 143).

At most sites where a viable population appears to exist, PCCP is actively managing this species to try to increase the populations. For example, artificial nest boxes for the Philippine cockatoo were installed on Rasa Island and the mainland (Palawan) (Widmann and Widmann 2008, p. 27). Recovery of the Philippine cockatoo on Rasa Island has been fairly effective, where nest-guarding by local people has virtually stopped poaching (Boussekey, pers. comm. in Cahill *et al.* 2006, p. 166). Breeding success on Rasa Island has been high (averaging 2.6 hatchlings per nest in 2002, for example). On this island, a population of approximately 20 birds increased four-fold between 1998 and 2003 (Boussekey, pers. comm. in Cahill *et al.* 2006, p. 166; Widmann *et al.* 2010). In Patnanungan, Polillo Islands, the first artificial nest box for the Philippine cockatoo was installed in November 2009 (Widmann *et al.* 2010, p. 13), and reforestation efforts are occurring. These activities are somewhat effective but slow because the protection efforts are not able to completely combat the negative factors such as poaching and selective logging that affect this species in many cases.

Recent efforts are being focused on Pandanan Island (south of Palawan Island), which has excellent habitat for this species, and has recently been targeted by PCCP for protection of the Philippine cockatoo. A grant under the U.S. Fish and Wildlife Service's Wildlife Without Borders, Critically Endangered Species Conservation Fund, for the Pandanan project was approved in September 2009 (Widmann *et al.* 2010, p. 5). This island has the potential for the species to make a good recovery because there is excellent forest cover due in part to the protections provided by the Jewelmer Corporation. This company holds a marine mining concession in the area of Pandanan. Due to this concession, no human inhabitants are legally allowed on Pandanan Island. In January 2010, PCCP obtained formal permission from the Palawan Council for Sustainable Development (PCSD) to conduct conservation efforts on the island (Widmann *et al.* 2010b, p. 5). Poaching still needs to be abated, but PCCP has been working to establish a local warden program (Widmann *et al.* 2010a, p. 50) on the island to address this issue. Security has recently improved in the area where a viable cockatoo population has been confirmed, but the species is still threatened by poaching (Widmann *et al.* 2010a, p. 15). The PCCP indicates that it is likely that with the warden program in place, they can eliminate or reduce poaching.

As resources allow, other protections and conservation actions are in place for this species. On Dumaran, Rizal, and Patnanungan Islands, Philippine cockatoo activity is observed through wardens monitoring, and patrols occur at protected areas and roost sites. Monitoring of the population trend on Rasa and Dumaran Islands is done through counting individuals at traditional roost sites. Due to both a lack of funding and logistics, not all Philippine cockatoo sites are actively monitored and managed. This is primarily because it is more efficient to focus resources in the Palawan Islands Region where the Philippine cockatoo has a viable population.

In summary, while laws to protect this species are in place, enforcement often is severely lacking or difficult, given the many islands that make up the Philippines and considering that illegal activities in many cases remain socially acceptable at the local level. Illegal logging is considered a leading cause of forest degradation in the Philippines (Galang 2004, pp. 12–17; Laurance 2007, p. 1544; Rose 2008, p. 232). Laws and regulations are frequently ignored, which further reduces the effectiveness of regulatory mechanisms (Galang 2004, pp. 12–17), and this species continues to suffer a decline in population numbers. Therefore, we find that, although the Philippines has a good legal framework to manage wildlife and their habitats, actual implementation of its laws and regulatory mechanisms is inadequate to reduce the threats to the Philippine cockatoo.

CITES

The evaluation of the effectiveness of CITES as a regulatory mechanism is cross-referenced under Factor B, as CITES regulates international trade of wildlife. The Treaty requires CITES Parties to have in place adequate legislation for its implementation. Through Resolution Conf. 8.4 (Rev. CoP15), the Parties to CITES adopted a process, termed the National Legislation Project, to evaluate whether Parties have adequate domestic legislation to successfully implement the Treaty. In reviewing a country's national legislation, the CITES Secretariat evaluates factors such as whether a Party's domestic laws designate the responsible Scientific and Management Authorities, prohibit trade contrary to the requirements of the Convention, have penalty provisions in place for illegal trade, and provide for seizure of specimens that are illegally traded or possessed. The Philippines has enacted domestic legislation to implement CITES. That legislation is currently being reviewed by the Secretariat to determine if it meets all the necessary criteria (CITES 2011a).

With respect to international trade, we found CITES to be an adequate existing regulatory mechanism for this species (see our analysis under Factor B for legal trade). See our analysis for the crimson shining parrot for additional discussion on how we made this determination. As discussed under Factor B, very few Philippine cockatoos have been legally exported from the Philippines since 2000. One operation in the Philippines is registered to export captive-bred specimens of this species for commercial purposes and appears to be adequately monitored and regulated. Based on the information available, CITES and the Government of the Philippines have effectively controlled legal international trade of this species.

Summary of Factor D

In summary, we find that the Government of the Philippines appears to have controlled legal international trade through CITES (see discussion under Factor B above). With respect to trade, the existing domestic regulatory mechanisms within the Philippines, as implemented, are inadequate to reduce or remove the current threats to the Philippine cockatoo in the wild based

on reports of poaching. As discussed under Factor B above, uncontrolled illegal domestic trade continues to adversely impact the Philippine cockatoo. Measures in place via the MOA and the PCCP provide some protection to the Philippine cockatoo. Through the MOA, this species is carefully monitored and managed in key areas where the species has a good chance of recovery, particularly in the Rasa Island Wildlife Sanctuary (Narra, Palawan). Despite efforts, management of protected areas encompassing this species' habitat is hindered due to the remoteness of protected areas, staff shortages, lack of technical expertise, and lack of funding; this is acknowledged by the local NGO (Widmann *et al.* 2010a).

Even with government controls, poaching of cockatoos is relatively common in areas that are not protected. In addition, laws and regulations are frequently ignored, in part due to the difficulty in monitoring and enforcement throughout the multitude of islands in the Philippines. As discussed under Factors A and B above, we found that poaching, logging, and conversion of forests to agriculture and plantations are threats to the Philippine cockatoo. Despite regulatory mechanisms in place, illegal logging continues to be a leading cause of forest degradation in the Philippines (Laurance 2007, pp. 1544–1555; Rose 2008, p. 231). There is no information available to suggest these threats will change in the foreseeable future; therefore, we find that the existing regulatory mechanisms, as implemented, are inadequate to reduce or remove the current threats to the Philippine cockatoo.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Various other factors have been cited as being potential threats to this species. In addition to poaching, trapping, and deforestation (Boussekey 2000, p. 138) (refer to the discussions under Factors A and B, above), hunting (to protect crops), harassment by bees, and nest flooding have been observed to affect this species (Widmann *et al.* 2001, pp. 139–140; Widmann *et al.* 2007a, pp. 76–77, 79). Because this species has been viewed as an agricultural pest, it was often killed if it was thought to be consuming crops (Widmann and Widmann 2008, p. 23). However, there is no indication that this practice still occurs. Nest flooding during a thunderstorm was observed to affect clutch survival during the 2000–2001 breeding season on Rasa Island (Widmann *et al.* 2001, pp. 139–140). Although nest flooding may occur occasionally, the PCCP indicates that it is not a common occurrence, and we do not consider this to be a threat to the species.

Bees have been observed to attack cockatoos. In 2005, on Patnanungan Island, bees were documented attacking Philippine cockatoos (Widmann *et al.* 2007a, pp. 76–77, 79). These cockatoos were unable to nest due to the close proximity of a beehive. The extent of competition with bees for nesting sites is not clear. Philippine cockatoos have been monitored for many years, and this is the only known report of nest site competition with bees. Therefore, it does not appear to be a significant factor affecting this species.

Other factors affecting the species include food shortages due to drought and the lack of suitable nesting cavities (Widmann and Widmann 2008, p. 25). The lack of suitable nesting sites in general is addressed under Factor A. In 2005, this species suffered from starvation on Rasa Island due to a food shortage during an El Niño drought year. However, several fledglings were rescued. Of these, 10 developed normally and were subsequently released (Widmann and Widmann 2008, p. 25). Additional factors affecting the species include the lack of suitable nesting cavities (in large, decayed trees) and possibly the lack of adequate food sources (Widmann *et al.* 2010a, p. 6). Because this species has specific nutrition and habitat requirements, it was suggested that Rasa Island may be at carrying capacity due to limited habitat and food availability (Widmann and Widmann 2008, p. 25). Because Rasa Island is very small, with only 1.75 km^2 (0.6 mi^2) of the island being coastal and mangrove forest, its suitable habitat is limited. As of 2009, Rasa Island had 64 nest trees, and as of 2010, there were 280 individual Philippine cockatoos on this island. There was a second starvation event in 2010 (Widmann *et al.* 2010a, p. 6). At this time, we are unable to determine if limited food availability on this island and starvation due to drought are threats; however, the Rasa Island population is carefully monitored by the PCCP, and they intervene and manage the species if needed. Although in some years limited food availability may be a concern, we do not find that this factor rises to the level of a threat to the species. Further, the lack of suitable nesting cavities is being monitored and addressed by the PCCP. At this time, there is no evidence that bees or nest flooding are threats to the species.

Small and Declining Population

The Philippine cockatoo has a contracted geographic range and a small, rapidly declining population, primarily due to poaching. There are between 450 and 1,245 individuals left remaining in the wild, distributed on eight islands (BLI 2011, p. 1). In many cases, the Philippine cockatoo is now geographically isolated from other populations. Additionally, because it is an island species that generally mates for life and is long-lived, it is extremely vulnerable to localized extinctions. Species with small populations are significantly influenced by individual birth and death rates (Gilpin and Soulé 1986, p. 27), immigration and emigration rates, and changes in population sex ratios. Natural variation in survival and reproductive success of individuals and chance disequilibrium of sex ratios may act in concert to negatively affect reproduction (Gilpin and Soulé 1986, p. 27).

Prior to the 1980s, the Philippine cockatoo was common throughout the Philippines (Boussekey 2000, p. 138; Cameron 2007, p. 34). Its existing populations are extremely localized due to habitat loss and its preference for lowland primary and secondary forest, which is also preferred human habitat. PCCP suggests that a rapid population reduction may occur in the future based on low recruitment in recent years, especially for unprotected populations (Widmann 2011a, pers. comm.). In the Rizal (South Palawan) area, which was protected only recently, there are no indications of recovery. Only one breeding pair exists outside of this cockatoo reserve, and this area was poached within the past 2 years. Breeding here did not occur in the 2009–2010 season. Since all nests have been systematically poached in this area over many years, extinction of this population might occur suddenly due to lack of reproduction success. This is partly a consequence of mating characteristics of this species: It is long-lived and generally mates for life. At least two birds persist inside the protected area, but they have not bred in the past 4 years (Widmann 2011a, pers. comm.).

Small, isolated populations of wildlife species such as the Philippine cockatoo that have gone through a reduction in population numbers can be susceptible to demographic and genetic problems (Shaffer 1981, pp. 130–134). Factors that could affect their susceptibility include: Natural variation in survival and reproductive success of individuals; changes in gene frequencies due to genetic drift; diminished genetic

diversity and associated effects due to inbreeding (*i.e.,* inbreeding depression); dispersal of just a few individuals; a few clutch failures; a skewed sex ratio in recruited offspring over just 1 or a few years; and chance mortality of just a few reproductive-age individuals. These small, rapidly declining populations are also susceptible to natural levels of environmental variability and related ''catastrophic'' events (*e.g.,* severe storms, extreme cold spells, wildfire), which we refer to as environmental stochasticity (Dunham *et al.* 1999, p. 9; Mangel and Tier 1994, p. 612; Young 1994, pp. 410–412).

Threats to species typically operate synergistically. Initial effects of one threat factor can later exacerbate the effects of other threat factors (Gilpin and Soulé 1986, pp. 25–26). Any further fragmentation of populations may likely result in the further removal or dispersal of individuals. The lack of a sufficient number of individuals in a local area or a decline in their individual or collective fitness may also cause a decline in the population size, despite the presence of suitable habitat patches.

The combined effects of habitat loss and fragmentation (Factor A) and threats associated with small, declining, and isolated populations (Factor E) on a species' population are referred to as patch dynamics. Patch dynamics can have profound effects on fragmented populations and can potentially reduce a species' effective population by orders of magnitude (Gilpin and Soulé 1986, p. 31). For example, an increase in habitat fragmentation can separate populations to the point where individuals can no longer disperse and breed among habitat patches, causing a shift in the demographic characteristics of a population and a reduction in genetic fitness (Gilpin and Soulé 1986, p. 31). Furthermore, as a species' status continues to decline, often as a result of deterministic forces such as habitat loss or overutilization, it becomes increasingly vulnerable to a broad array of other forces. Despite the mitigation and conservation measures in place, if this trend continues, its ultimate extinction due to one or more stochastic events becomes more likely. Given the species' dispersed nature, the fact that it is a long-lived species that generally mates for life, and that the largest population is approximately 280 individuals, we find that this factor threatens the continued existence of this species. Based on the best scientific and commercial information available, we conclude that based on its small, rapidly declining population, the Philippine cockatoo is at risk of extinction, particularly when combined with the other threats.

Summary of Factor E

Several other factors were identified as affecting the success of this species such as harassment by bees, nest flooding, and starvation. These factors are a normal occurrence in the ecology of this species, and we do not find that these factors significantly affect this species such that they rise to the level of a threat. However, we find that its small, rapidly declining population, when combined with the other threats of habitat loss and poaching, is a threat to the species throughout its range.

Finding for the Philippine Cockatoo

We considered the five factors in assessing whether the Philippine cockatoo is endangered or threatened throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Philippine cockatoo. We reviewed the petition, information available in our files, and other available published and unpublished information, and we consulted with recognized Philippine cockatoo experts and local and international NGOs.

The primary factors affecting the Philippine cockatoo include habitat loss and habitat degradation and poaching for the pet trade. Habitat loss associated with logging, an expanding human population and associated development, conversion of lowland forests to agriculture are the some of the greatest threats to the continued survival of this species (BLI 2001, p. 1685; Galang 2004, pp. 5–22; Posa *et al.* 2008, pp. 231–236; Widmann and Widmann 2008, p. 23; Widmann *et al.* 2010, p. 14). Habitat loss due to the above activities continues to occur; this species' population is declining range wide as a result.

Based on the best available information, poaching is still occurring, despite education and public awareness campaigns and protections in place at the national level (Widmann *et al.* 2010c., p. 13). Awareness campaigns have been conducted on Mindanao, Palawan, and Polillo Islands (Widmann 2010, pers. comm.). On Dumaran Island, the Katala Pride Campaign has focused on raising awareness among students and farmers. Trilingual conservation posters have been distributed throughout the Philippines, and in 1992, a captive-breeding program was initiated. This species is being intensely managed in some areas, but the management and protection of the species is hampered by the lack of resources, its remote island habitat, and by the nature of this species' life-history characteristics (such as the tendency to mate for life and they do not reproduce until a late age). Efforts to improve the habitat of this species (*e.g.,* reforestation, building of nest boxes) are continuing and may improve its habitat and population numbers. In Polillo, Dumaran, and Rasa, the species may slowly increase in population numbers, but in other areas, the species' population continues to decline. The best population estimates of this species were compiled in the early 1990s, at which time the population was estimated to be between 1,000 and 4,000 individuals (Snyder *et al.* 2000). Experts believe the population is now between 450 and 1,245 individuals, and most populations are fairly well monitored (Widmann *et al.* 2010); however, poaching for the domestic pet trade continues to be a threat to the species. It is unlikely that this species' rapidly declining and small population can withstand this level of poaching. Therefore, we find overutilization for commercial, recreational, scientific, or educational purposes (Factor B) is a threat to the Philippine cockatoo.

We found no evidence that diseases significantly affect the wild Philippine cockatoo population. Other avian species, particularly cockatoo species, are susceptible to avian diseases, but there was no evidence that disease occurs in the wild to an extent that it is a threat to this species. Predation was not found to affect Philippine cockatoo populations. Based on the best available information, we conclude that disease and predation (Factor C) are not threats to the species.

The Philippine cockatoo is classified as a protected species by the Philippine government. The current range of the Philippine cockatoo is much smaller than its historical range (BLI 2010b). However, as a result of conservation efforts by the various entities working to ensure long-term conservation of the Philippine cockatoo, its range may slowly increase, but current efforts are indicating mixed levels of success. Despite conservation efforts of various entities, we have determined that existing regulatory mechanisms continue to be inadequate because habitat loss and poaching are still occurring (Factor D). In summary, we conclude that inadequate regulatory mechanisms are a threat to the Philippine cockatoo.

This species has a small and rapidly declining population. This species no longer exists in many of the areas where it occurred historically. This species is in competition with humans for habitat;

development and related infrastructure take the place of its habitat. Within its current range, where there are few viable populations remaining, the PCCP is managing the species to the best of its ability; however, the PCCP acknowledges that this species still faces a rapid population reduction in the future based on low recruitment in recent years, especially for unprotected populations. When combined with other threats, and when considering its fragmented population, we conclude that its small, rapidly declining population is a threat to the species (Factor E). Due to this species' extremely small, declining, and fragmented population and due to the existing threats (Factors A, B, D, and E), it is currently in danger of extinction.

Despite the conservation measures in place, this species faces severe threats, and the population trend for this species continues to decline. Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that the Philippine cockatoo is in danger of extinction (endangered) throughout all of its range. We do not find that the effects of current threats acting on the species are likely to be sufficiently ameliorated in the foreseeable future. These threats are consistent throughout its range. Therefore, we find that listing the Philippine cockatoo as endangered is warranted throughout its range, and we propose to list the Philippine cockatoo as endangered under the ESA.

Species Information

C. White cockatoo (*Cacatua alba*)

Taxonomy and Species Description

The white cockatoo is also known as the umbrella cockatoo. ITIS, CITES, and BirdLife International recognize the species as *Cacatua alba* (BLI 2010). Therefore, we accept the species as *C. alba.* The white cockatoo is completely white except for the underside of its wings and tail, which are pale yellow. It has a long, backward-curving white crest on its head. Its bill is grey-black, and it has a white bare eye-ring. The bird has either yellowish-white or slightly grey-blue legs.

Population Estimates

Population estimates for the white cockatoo vary, in part due to the remoteness of the islands where this species exists. Population estimates prior to 2000 indicated that the Lalobata protected area on Halmahera Island contained between 28,500 and 42,900 white cockatoos (MacKinnon *et al.* 1995; Snyder *et al.* 2000, p. 67), although they did not survey lowland forest, which they thought may contain more white cockatoos. The white cockatoo was described as being common in the early 1990s. Survey work carried out in 1991 and 1992 suggested a population estimate of between 49,765 and 212,430 birds (Lambert 1993a; Snyder *et al.* 2000, p. 671; BLI 2010c, p. 1). BLI reported that the total population is between 43,000 and 183,000 mature individuals; however, this population estimate is based on 1993 data (Lambert 1993 in BLI 2010). Burung Indonesia estimated that based on surveys conducted in 2008 and 2009, there are between 8,629 and 48,393 white cockatoos remaining in the wild (Burung Indonesia 2010, pers. comm.) on Halmahera Island.

Distribution, Habitat, Biology

While the exact life span is unknown, reports of the white cockatoo's lifespan vary between 20 and 50 years in captivity (Lambert 1993, p. 147; Jordan 2010, pers. comm.). Wild-caught birds have been reported not to breed until they are 6 years old. The highest productive period for the white cockatoo is between 6 and 20 years (Jordan 2010, pers. comm.). However, some pairs have been recorded to breed well into their thirties, and a few exceptions have been reported with pairs or individuals that have reproduced into their forties or fifties (Lambert 1993, p. 147). Clutch-size of white cockatoos in captivity is reported to be 2 to 3 eggs per season, and incubation takes 25 to 28 days; nestlings reside in the nest approximately 90 days before fledging (Cameron 2007, p. 140). Both parents share responsibility for raising chicks, and the species is thought to be monogamous for life.

The white cockatoo is endemic to a few islands in North Maluku, Indonesia, and it inhabits primary, logged, and secondary forests possibly up to 900 m (2,953 ft) (IUCN 2008h). It is not thought to inhabit forests on ultra basic rock (BLI 2001, p. 1674). This species is believed to occur in three protected areas: Gunung Sibela Strict Nature Reserve on Bacan Island (although this site is threatened by agricultural encroachment and gold prospecting), and Aketajawe Nature Reserve and the Lalobata Protected Forest (ALNP), both on Halmahera Island (BLI 2010). Historically, its range has been the islands of Halmahera, Bacan, Ternate, Tidore, Kasiruta and Mandiole in North Maluku (Snyder *et al.* 2000, p. 67; BLI 2010c). ALNP consists of approximately 167,300 hectares (413,407 acres) of primary and secondary forest. This total area represents 7.5 percent of Halmahera Island (Burung International 2010, pers. comm). Now the white cockatoo is thought to only inhabit Halmahera and Bacan Islands (Wildlife Conservation Society (WCS) 2010, pers. comm.). The Bacan Island group, also known as Palau Batjan, is about 16 km (10 mi) southwest of Halmahera Island. Little is known about the status of the species other than on Halmahera Island. Due to the lack of information, this status review only addresses its status on Halmahera Island unless otherwise specified.

The Maluku Islands are also known as the Moluccas or the Spice Islands, and they are between Sulawesi and New Guinea, below the Philippines. The white cockatoo, like most cockatoos, is a resident (nonmigratory) species, but cockatoos are strong fliers, and they will likely travel to nearby islands in search of habitat or food, if it is not readily available. The highest densities of this species occur in primary (old-growth) forest (BLI 2009; Burung International 2011), but the species seems to tolerate some habitat modification. White cockatoos inhabit mangroves, plantations (including coconut), and agricultural land (BLI 2010c). This species requires large trees for nesting and roosting, is often observed feeding in large flocks, and eats seeds, fruit, and insects. Their preferred nesting holes were observed to be situated at points where large branches had broken off the main trunk (Lambert 1993, p. 146).

Halmahera (also known as Jilolo or Gilolo Island) is the largest island in the North Maluku province, and is 17,780 km^2 (6,865 mi^2) in size. Its annual precipitation is 2,000 to 3,000 mm (79 to 118 in). Halmahera, a four-pronged island, is considered to be a biodiversity hotspot (Myers *et al.* 2000 in Setiadi *et al.* 2010, p. 560). North Maluku province consists of eight provincial districts: North Halmahera, West Halmahera, East Halmahera, Central Halmahera, South Halmahera, Ternate Municipality, Tidore City and Islands, and Sula Islands. In North Halmahera, the number of districts on the island has recently increased to 22, and the number of villages has increased from 174 to 260. The human population in Maluku Province in 2010 was estimated to be 1,531,402 (Badan Pusat Statistik Provinsi Maluku 2010). Aketajawe-Lolobata National Park, established in 2004, was the first national park established in North Maluku (Keputusan Menteri Kehutanan No. SK.397/MenHut-II/2004), and is described as being one of the most pristine and unvisited areas in all of Indonesia.

Bacan, a smaller island to the southwest of Halmahera, is also

inhabited by the white cockatoo, although very little is known about the status of the species here. This remote, sparsely populated island is not well known. It is 1,900 km² (733 mi²) in area and still contains relatively undisturbed forests. A recent human population estimate is between 13,000 and 59,000 individuals, and the majority resides on the west side of the island, in the capital (Labuha) and nearby villages. The current number of white cockatoos on the island is unknown. Reports from locals indicated that the species had declined on Bacan due to trapping between the 1970s and 1980s (Lambert 1993, p. 146). Surveys conducted here in 1985 found only 76 white cockatoos. In 1991, the population on Bacan and its satellite islands was estimated to be 7,220 to 29,300 white cockatoos (Lambert 1993a, b), but this may be an overestimate of the population size based on the survey methods used (Gilardi 2011, pers. comm.).

Accuracy of survey methodologies varies (Thomas 1996, pp. 49–58; Pollack 2006, p. 882; Thomas *et al.* 2009, pp. 5–14), and there are limits to how much confidence we can place in various population surveys (Royle and Nichols 2003). One researcher pointed out that differing methodologies can result in differences in at least an order of magnitude. In situations where species are rare or have small populations, the number of observations made per survey may be very small and the number of sites limited, and, therefore, estimates and projections may not be accurate (Marsden 1999, pp. 377–390; Pollack 2006, p. 891). In some areas, suitable habitat may have been recently disturbed due to habitat modification and infrastructure development. As a result, species' breeding, nesting, and forage habitat have subsequently been destroyed, and the birds are dispersing. It may appear as though the population is larger than it actually is due to sightings in new locations or the perception that the species is more common because it has been displaced from its original habitat.

In the case of white cockatoos, the population estimate may not be accurate based on the survey methodology used and the inferences made. A recent survey indicated that the population density estimation for this species in the Aketajawe block was between 1.6 and 8.9 individuals per km² (Burung 2011, pp. 1–5). From this survey, a projection was made to the surrounding area of 5,462 km² (2,109 mi²) of the remaining natural forest area in the vicinity of the national park. Based on this projection, Burung estimated the population in the western Halmahera natural forests was 8,630 to 48,393 individuals. This estimate may be optimistic based, in part, on the studies described above (Marsden 1999, pp. 377–390; Royle and Nichols 2003, p. 777; Pollock 2006, p. 882). In addition, because the survey extrapolated the population density for the surrounding area outside of the Aketajawe block (which contains less suitable habitat for the species and is more accessible to poachers) from the estimated density within the Aketajawe Nature Reserve (which contains the preferred habitat for the species and is less accessible to poachers), the density levels outside of the Aketajawe Nature Reserve may be an overestimate. Assuming that there were anywhere between 8,629 and 48,393 individuals on Halmahera in 2009 and there was an estimated 49,765 to 212,430 individuals in 1992, this trend in population estimates indicates a decrease in the population. This decrease is extremely likely based on the negative effects of habitat loss and poaching that are commonly known to occur on this island.

Recent local anecdotal accounts of this species' population also vary. One recent observation was that the population of white cockatoos was thought to be ''very sparse'' (WCS 2010, pers. comm.) and rapidly declining (BLI 2010c, p. 1). Populations were conversely described as still being relatively widespread across Halmahera Island, and birds were occasionally observed in flocks (WCS 2010, pers. comm.). In November 2010, this species was observed daily, with flocks up to 23 birds observed during a recent 5-day trip to Halmahera (WCS 2010, pers. comm.). However, local people consider them to have declined from former population levels.

We have no recent estimate of the population on Bacan Island. Although the last estimate, in 1993, was between 7,220 to 29,300 individuals on Bacan Island, a 1985 survey only found 76 cockatoos. We are unsure of the population trend. Further, in 1993, there were reported to be over 100 people who regularly trapped parrots on Bacan, and this practice was a major source of income (Lambert 1993, p. 155). Poaching is a common practice in Indonesia, and it likely still occurs with regularity on Bacan Island.

Conservation Status for the White Cockatoo

The white cockatoo has been listed in Appendix II of CITES since 1981. It is listed on the 2010 IUCN Red list as vulnerable. It is also protected in the U.S. by the WBCA (refer to discussion under the Crimson Shining Parrot, factor D). The purpose of the WBCA is to promote the conservation of exotic birds and to ensure that international trade involving the United States does not harm exotic birds. Although there is a national ban against harvest for the white cockatoo, the quota is not effective at eliminating poaching in the wild. Cockatoos are still poached and smuggled into local markets illegally (ProFauna Indonesia 2008, pp. 1–9; ProFauna 2010). The white cockatoo is not listed as a protected species by the Indonesian Republic Forestry Ministry (WCS 2010, pers. comm.).

Information available suggests that a few local protections are in fairly preliminary stages but occurring. Existence of the Aketajawe-Lolobata National Park on Halmahera may serve to reduce hunting pressure and habitat loss if game wardens are monitoring the park. Also on Halmahera, some of the foreign-owned mining operations are considering their environmental impact (see Factor A discussion on mining). Very few private or nongovernmental organizations (NGOs) operate in the area, in part due to the lack of funding available. Burung Indonesia (*http://www.burung.org*) does some work in this area, mostly in relation to the national park, and there is another local NGO, Konservasi Alam Maluku Utara (KAMU), that is working to try to protect this species (Wildlife Conservation Society (WCS) 2010, pers. comm.). There may be carbon-funded forest protection projects starting in the area that also may convey protection measures, but none is operating yet.

Evaluation of Factors Affecting the White Cockatoo

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

It is commonly accepted that deforestation and habitat loss is a significant problem in Indonesia (Galang 2004, p. 14; Laurance 2007, p. 1544; BLI 2010k, p. 1). Indonesia consists of 17,508 islands and 33 provinces. It is a rapidly developing country, with a population of 230 million (United Nations 2009, p. 11). It is the world's fourth most populous country (United Nations 2009, p. 11). Countries with the highest human population growth rates tend to have the highest rates of deforestation as well (Laurance 2007, p. 1545). As available land becomes more scarce, companies and humans move towards more remote areas in search of resources (BLI 2008, p. 100). Human settlements and plantations are typically located in

lowland coastal areas, which is the white cockatoo's preferred habitat (Smiet 1985, pp. 181, 183). The habitat required by the white cockatoo has been impacted by activities such as conversion of its habitat to uses such as development of towns, mining, and logging (particularly illegal logging, which generally fails to use sustainable logging practices) (Lambert 1993, p. 146). Pressure on the islands' resources is increasing (*http://www.indonesia-tourism.com/north-maluku/halmahera_history.html*), in part from the increase in human population on the island, a demand for more resources such as biofuel and agriculture, and to a lesser extent, an increase in ecotourism. Historically, 75 percent of the population on Halmahera has depended on farming or fishing for their livelihood, but this is changing as investors and human development move to the island.

Part of the Indonesian government's long-term planning strategy is to develop more efficient agriculture to help alleviate poverty. For example, the government of Indonesia has sold land to a company called the Sustainable Pacific Corporation (SPC), which purchased 300,000 ha (750,000 ac) of land to be used for organic agriculture and livestock breeding, agricultural packing houses, warehouses, tourism, and a sea port (*http://www.associatedcontent.com/article/2412420/halmahera_a_world_sustainable_development.html?cat=3* and *http://worldteakplantation.itrademarket.com/profile/sustainable-pacific-corp.htm,* accessed February 23, 2011). An essential part of this process is infrastructure development, primarily the improvement of roads, which can lead to further illegal logging and land clearance, and also facilitates bird trapping (poaching). This initiative will likely convert land that is currently suitable white cockatoo habitat into land for other uses that are no longer suitable for this species, such as *Jatropha curcas* plantations, which are discussed below.

Logging

Illegal logging is considered to be a leading cause of forest degradation in Indonesia (Rhee *et al.* 2004, chap. 6, p. 7). Between 2000 and 2005, Indonesia's forest cover declined by more than 90,000 km² (34,740 mi²). Unsustainable logging practices that destroy the forest canopy also reduce habitat available to the white cockatoo (Lusli 2008, p. 22). Logging creates a network of roads, which can lead to secondary problems (BLI 2008k, p. 6), such as providing access for poachers. The Center for International Forestry Research estimated that between 55 and 75 percent of logging in Indonesia is illegal (*http://www.cifor.cgiar.org,* accessed December 10, 2010). Jepson and Ladle (2005, pp. 442–448) concluded that illegal logging was becoming semi-legal and the *de facto* arrangement for governing Indonesia's forests. Illegal logging is pervasive, and the Indonesian government has been unable to enforce protected forest boundaries (Barr 2001, p. 40; Laurance 2007, pp. 1544–1547). Illegal logging activities include: Overharvesting beyond legal and sustainable quotas, harvesting trees from steep slopes and riparian habitat, illegal timber harvest and land encroachment in conservation areas and protected forests, and falsification of documents. Overexploitation of the forests and illegal logging are driven by the wood-processing industry, which is reported to consume at least six times the officially allowed harvest (Rhee *et al.* 2004, p. xvii, chap. 6, p. 8). Illegal logging in national parks is reported with regularity, and the people involved have in the past been armed and described as being ruthless (Whitten *et al.* 2001, p. 2).

Selective logging is the primary legal method used for the extraction of timber in Indonesia (BLI 2008k, p. 6). In selective logging, the most valuable trees from a forest are commercially extracted (Johns 1988, p. 31), and the forest is left to regenerate naturally or with some management until being subsequently logged again. Johns (1988, p. 31), studying a West Malaysian dipterocarp forest, found that mechanized selective logging in tropical rain forests, which usually removes a small percentage of timber trees, caused severe incidental damage. The extraction of 3 percent of trees destroyed 51 percent of the forest. He concluded that this type of logging reduced the availability of food sources for frugivores (fruit-eaters). Loggers occasionally find parrots, including *Cacatua alba,* in commercially valuable trees that they fell, such as *Anisoptera* (locally known as mersawa) in the Dipterocarpaceae family. The white cockatoo has been observed in commercially valuable trees such as *Anisoptera* and *Canarium* species (kenari or kiharpan) (Lambert 1993, p. 146). The most recent BLI assessment stated that much of the habitat for the species was still intact, and even where degraded, the species used degraded areas. This was confirmed by WCS, which indicated that the islands of Halmahera and Bacan still have extensive forest cover; however, as selective logging targets mature trees, it can have a disproportionate impact on hole-nesters, such as cockatoos, because fewer nest sites remain (BLI 2008k, p. 6).

Although almost 80 percent of its original forest is still intact, the Halmahera Rain Forests ecoregion (including Bacan Island) still faces habitat deforestation threats. As the forests are lost on other Indonesian islands, there is an increasing potential for forestry operations to move to Halmahera and other islands with large, desirable trees. Despite Presidential Instruction No. 4/2005 to eradicate illegal logging in forest areas and distribution of illegally cut timber throughout Indonesia (FAOLEX 2009, p. 1), illegal logging continues (refer to Factor D discussion). Contributing factors include poor forest management practices, rapid decentralization of government, abuse of local political powers, complicity of the military and police in some areas of the country, inconsistent law enforcement, and dwindling power of the central government (USAID 2004, pp. 3, 9; Laurence 2007, p. 1544).

Although illegal logging still occurs, the Indonesian government is actively working to conserve its resources. The year 2011 was declared the International Year of Forests. Many countries, including Indonesia, are working towards reducing emissions from deforestation and forest degradation (termed REDD) (Ministry of Forestry of the Republic of Indonesia 2008, 185 pp.). Despite these efforts, illegal logging still occurs within this species' range.

Mining

Mining and its associated impacts is a fairly new factor affecting this species. Several companies have mining rights in the Maluku area, particularly on Halmahera (WCS 2010, pers. comm.). PT Antam, the largest mining company in Indonesia, currently operates three nickel mines on the northeast prong of Halmahera (PT Antam 2009). Another mining company, PT Nusa Halmahera Mineral (NHM), is a joint venture company between Newcrest Mining of Australia and PT Antam Tbk, an Indonesian-owned company. They have an exploration license for Bacan and nearby islands to look for gold and other minerals. A third mining company has a license to mine nickel near Ake Tajawi on Halmahera (WWF 2010a).

Two gold mines have been in operation on Halmahera (Newcrest Mining 2010, p. 1). The Gosowong mine was an open-pit, cyanide-leach mine that operated from 1999 to 2002, and is now closed. The Toguraci mine began

operation in 2004. Toguraci is located 2 km (1.2 mi) southwest of the original Gosowong pit mine. This mining operation is operated by a joint venture company, Pt Nusa Halmahera Minerals (PTNHM) and PT Aneka Tambang. Development of this mine began in July 2003, after approval of a feasibility study and environmental impact statement by the Indonesian Minister of Mines. Actual mining of ore and the first gold production began in February 2004. This mine has been the subject of conflict between local residents and the mining company. Between October and December 2003, several illegal miners occupied the Toguraci mine site. Additionally, the mine is located in a forested area that, according to local residents, is protected under Indonesian law, and, therefore, mining operations should not be allowed. The current operating status of the Toguraci mine is unclear; however, local NGOs indicate that mining on Halmahera does affect the white cockatoo (Vetter 2009, pp. 2, 14, 15; WCS 2010, pers. comm.). Mining activities can affect the white cockatoo's habitat either directly or indirectly, through pressures such as illegal poaching or human encroachment and habitat disturbance.

Yet another mining company, PT Weda Bay Nickel, proposed a nickel and cobalt mining project in 2009 on the island and has submitted an environmental monitoring plan (PT Weda Bay Nickel 2009, 204 pp.; Cardiff 2010, pp. 1–14). The footprint of the mining operation appears to be within the boundaries of Aketajawe-Lolobata National Park (Vetter 2009, p. 19; Cardiff 2010, p. 1), which could have significant detrimental effects on Halmahera's wildlife, including the white cockatoo. A review of the proposed mining project indicated that it would likely destroy between 4,000 and 11,000 hectares (9,884 and 27,182 acres) of tropical forest, and between 2,000 and 6,000 ha (4,942 and 14,826 ac) of protected forested area (Cardiff 2010, pp. 6, 9, 12). The review indicated that mining activities are extremely destructive to this habitat. Based on deforestation projections, the population of the white cockatoo is projected to decline more than 65 percent over three generations due to deforestation (Vetter 2009, pp. 25, 26, 51). It is unclear whether this mining operation will be approved, or if there will be mitigation measures required; however, it is clear that the extractable resources on Halmahera are desirable, and mining will very likely have a significant negative impact on this species and its habitat.

Biofuel Production

Indonesia is investing in the planting of *Jatropha curcas* trees and palm oil (*Elaeis guineesis*) (Department for Environment, Food and Rural Affairs, United Kingdom 2008, pp. xvii, 47, 64, 65). Rapid expansion of biofuel plantations has led to intense international concern about wide-scale environmental impacts. On Halmahera, at least 500 hectares (3,750 acres) have been allotted for cultivating the Jatropha tree (Consulate General of the Republic of Indonesia 2006, pp. 5–6). Many industries, such as the air transportation industry, are considering the use of fuel from Jatropha as a biofuel source, and it is also being encouraged as a mechanism for carbon credits (*http://www.jatrophabiodiesel.org, http://www.jatrophaworld.org, http://www.jatropha-alliance.org*). This oil has been reported to produce energy similar to diesel fuel. Although this species may yield 4 times as much fuel per hectare as soybeans, and possibly 10 times that of corn, it requires 5 times more water to produce than corn. It is also reported to be desirable to developing countries because its carbon emissions footprint is thought to be relatively small when burned.

Conversion of land to monocultures destroys white cockatoo habitat. Monocultures are generally not suitable habitat for wildlife. White cockatoos require large trees, which provide large enough nesting cavity sites, and *Jatropha curcas* trees require many years to reach a size that would be suitable for nesting. This will likely also have a negative impact on this species' suitable habitat due to road building, infrastructure development, other construction (Vetter 2009, pp. 1–10). Additionally, because there is currently no effective enforcement body to monitor sustainable land development (also refer to Factor D discussion) on Halmahera, these activities threaten white cockatoo habitat. Therefore, we find that conversion of forests to monocultures for biofuel, particularly Jatropha, is a threat to the white cockatoo.

Summary of Factor A

Deforestation affects endemic bird species restricted to single islands more severely than it affects other species (Brooks *et al.* 1997, p. 392). Monocultures such as exotic tree plantations, agriculture, conversion to human habitat, resource extraction, agriculture, and logging are forms of deforestation and habitat loss affecting endemic island species such as the white cockatoo in Indonesia (Laurance 2007, p. 1544). Lowland areas that offer vital habitat for Indonesia's cockatoos have been the most severely impacted (Cameron 2007, p. 177; Vetter 2009, p. 4). As islands become more inhabited and deforested, humans move to other islands that contain available resources (Laurance 2007, p. 1544).

Cockatoos are highly impacted by selective logging of primary forests. Selective logging, which targets mature trees, has a negative impact on cavity-nesters such as the white cockatoo. Research found that the abundance of cockatoos is positively related to the density of its favored nesting trees (large trees that would be impacted by logging), especially since reduced-impact logging techniques are rarely applied. Once the primary forest is logged, experience on other nearby Indonesian islands shows that the secondary forest is generally converted to other uses or logged again rather than being allowed to return to primary forest. Although cockatoos may continue to inhabit secondary forests, the population will be at a substantially lower number. Additionally, species are often found in secondary forest or recently altered forest habitat; however, this habitat tends to be marginal, and the effects on the species' population may not be evident. The trend of high loss of primary forests and degradation of secondary forests is a concern, in part because little is known about the reproductive ecology of white cockatoos in the wild, including breeding success in mature forests versus secondary forests, and whether this species of cockatoo will survive in degraded forests in the long term.

In summary, habitat modification and deforestation activities, such as conversion of primary or secondary forests to exotic tree plantations for biofuel production, agriculture, and human habitat, combined with selective logging and resource extraction (mining), are likely to destroy much of the white cockatoo's habitat (the lowland rain forests of Halmahera) in the near future. While this species may be tolerant of secondary-growth forests or other disturbed sites, these areas do not represent optimal conditions for the species. Based on these factors, we find that the present and threatened destruction, modification, or curtailment of its habitat is a threat to the continued existence of the white cockatoo throughout all of its range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The primary threat to white cockatoos is poaching from the wild to meet the

demand for the pet trade (Jepson and Ladle 2005, p. 442; Defenders 2007, p. 7; ProFauna 2008; BLI 2010c). It is well established that illegal collection for the pet trade is a major problem for wild birds in Indonesia and is the primary threat to this species (BLI 2003, pp. 1–2; ProFauna 2008, pp. 1–9; ProFauna Indonesia 2010, pers. comm.). Bird-keeping is a popular pastime in Indonesia, with deep cultural roots (Jepson and Ladle 2005, p. 442). Parrots have been traded for hundreds of years by people living in the Moluccas. One report indicated that 17 percent of the global population was captured for trade in 1991 alone (Lambert 1993, p. 160). As of 1999, there appeared to be no enforcement of the zero export quota; cockatoos were widely available in local markets.

In 2002, an investigation found 500 white cockatoos were caught to supply the pet trade (ProFauna Indonesia 2010, pers. comm.). In addition, parrots are an important part of the Indonesian culture, which creates significant demand for parrots domestically (BLI 2008k, p. 10). In a survey on bird-keeping among households in five major Indonesian cities, Jepson and Ladle (2005, pp. 442–448) found that as many as 2.5 million birds are kept in the five cities. Of these, 60,230 wild-caught, native parrots were kept by 51,000 households, and 50,590 wild-caught, native parrots were acquired each year (changed hands, not an indication of birds taken from the wild each year). The study recommended a conservation intervention based on the level of bird-keeping among urban Indonesians. As of 2006, an average of 100 white cockatoos were found for sale in bird markets in Java annually (ProFauna Indonesia 2010, pers. comm.). The sale of live parrots can be a significant source of income. Parrots can sell for 75,000 to 500,000 Indonesian Ruphiahs (IDR or Rp) each, which equates to between $7.50 and $50 U.S. dollars. A young cockatoo can sell for $20 to $25 USD (ProFauna 2008, p. 3; Sasaoka 2009, pers. comm., pp. 1–2; ProFauna Indonesia 2010, pers. comm.). In 1993, cockatoos were described as generally rare in the Java and Bali markets; only two white cockatoos, or 1.2 percent of parrots for sale, were seen in these markets visited (Lambert 1993, p. 158). However, of 381 parrots of 19 species observed at markets in Indonesia, white cockatoo was represented by 11 pets (9.7 percent) and 44 individuals (11.5 percent) in the market sample.

Between 1993 and 2002, although Indonesia had reported the export of 712 wild-caught birds, import records from other CITES countries recorded 1,646 (Cahill *et al.* 2006, p. 162; UNEP–WCMC 2010). Discrepancies in the UNEP–WCMC Trade Database are common. For example, the Service found a report in 2009 of one shipment of white cockatoo to the United Arab Emirates (UAE) from South Africa that was reported as 965 by the UAE; however, there was no corresponding export entry from South Africa (UNEP–WCMC 2010). The largest shipment from South Africa in 2009 to the UAE was 614, so we believe it to be a reporting error.

Even with government controls, the commercial hunting of cockatoos (*i.e.,* hunting by people to gain at least a temporary living from the activity) is relatively common. There is still a demand for this species as pets, and wild-origin birds are less expensive to obtain than captive-bred birds (Reynolds 2010, pers. comm.; Horsfield 2010, pers. comm.). Field research conducted in 2003 through 2005 in a small village (320 people, 60 households) located in the Manusela Valley, Seram, led to the conclusion that collecting wild parrots, including cockatoos, is a way for villagers to supplement their income during times of hardship (Sasaoka 2009, pers. comm., p. 1; Sasaoka 2008, p. 158). In 2003, 21 cockatoos were trapped in the research site by 3 households; in 2004, 25 cockatoos by 5 households; and in 2005, 26 cockatoos by 10 households. These researchers found that villagers sometimes kept the cockatoos for several months while waiting for the best price, but normally did not keep them as pets.

Exploitation for commercial purposes prior to 1992 is widely accepted as the primary cause of drastic, rangewide population decline of many parrot species. The commercial market for pet cockatoos is highly lucrative (Cantú-Guzmán *et al.* 2007, 121 pp.). Prior to 1992, when the U.S. Wild Bird Conservation Act was enacted, critical scientific studies to address issues of detriment to populations, appropriate management of species, and sustainable levels of trade had not been undertaken for most CITES Appendix-II bird species in trade. Even in 1992, there was serious concern that the international commercial trade in wild-caught birds was contributing to the decline in the wild of some species of birds listed in CITES Appendix II.

Poaching poses a serious threat to the species. The scope of the illegal trade in white cockatoos is unknown. ProFauna's investigation in 2008 found that this species is regularly poached from the wild and shipped to the Philippines. (After reaching the Philippines, it is unclear what occurs to the birds.) Based on ProFauna's investigation, it appears that many of the birds being poached from the wild may be, ''laundered with wild cockatoos possibly being described as being of captive-origin.'' In general, it is difficult, if not impossible, to determine the source of cockatoos (BLI 2003, p. 1).

ProFauna found that around 9,800 individual parrots, including white cockatoos, are poached every year (ProFauna 2008, p. 3). An investigation completed in 2008 found that the white cockatoo is poached from Maluku and smuggled into the Philippines (ProFauna 2008; ProFauna Indonesia 2010, pers. comm.). Parrot poaching took place most frequently in the central part of Halmahera, as well as Bacan, Obi, and Mandioli (2008, p. 7). The investigation indicated that approximately 10 percent of the 4,000 parrots smuggled annually were white cockatoos. In their investigation, they found bird poachers in Togawa, for example, were able to catch 15 individuals of white cockatoo in a week (ProFauna 2008, p. 3).

During the illegal trade process, many birds die prior to being exported (Lambert 1993, p. 157; Cameron 2007, p. 163; Cantú-Guzmán *et al.* 2007, p. 60). Methods used for poaching lead to significant mortality. In some cases, white cockatoos in the past have been caught with gum or glue, which would stick to their feathers (Lambert 1993, p. 155; ProFauna 2008, p. 2). Some trappers reported mortality rates between 77 and 80 percent before parrots reach customers, and nestlings experience a higher mortality rate (Cantú-Guzmán *et al.* 2007, p. 60). ProFauna Indonesia estimated that parrot smuggling in North Maluku, Indonesia, results in approximately 40 percent mortality (5 percent during glue trapping, 10 percent during transportation, and 25 percent during holding to sell in bird markets (due to malnutrition, disease, and stress) (2008, p. 5)). The estimates do not always include deaths of birds before export, smuggled birds, and birds domestically traded. Others estimate that as few as one-fourth of those poached survive the process of removal from their native, wild habitat to captivity.

Undocumented illegal trade (international and domestic) is difficult to quantify (Thomsen *et al.* 1992, p. 3; Pain *et al.* 2006, p. 322), and a listing in Appendix I of CITES does not completely stop illegal trade (Pain *et al.* 2006, p. 328). Seizures reported to the CITES Secretariat since 1990, however, are small—1 live bird seized in Austria in 1997; 25 live birds seized in the

United Arab Emirates in 1998; and 4 live birds seized in Indonesia in 1999 (Sellar 2009, pers. comm., p. 2). Since 2000, the United States refused import clearance for three birds reported as *Cacatua* species. One bird was described as *C. alba* in 2010; the other two birds were unknown *Cacatua* species. All three birds were re-exported.

Illegal trade of parrot species occurs quite frequently; in fact, an investigative report recently conducted of the illegal parrot trade in Mexico demonstrates this (Cantú-Guzmán *et al.* 2007, 121 pp.). The investigation found that documents are frequently forged to smuggle desirable and increasingly rare parrot species (p. 38). The organization that seizes parrots in Mexico, the Federal Attorney for the Protection of the Environment (PROFEPA), indicated that their most serious problem is combating the illegal bird trade (p. 45). Although this investigation was done in Mexico, it reflects a problem that occurs within many countries with endemic parrots.

Locally, a high level of parrot poaching in north Halmahera is due in part to the lack of supervision by Natural Resources Conservation (KSDA) officers in the Forestry Department (ProFauna 2008, p. 3). There is no regular enforcement or patrol by the KSDA officers. An NGO working with this species indicated that they had recently received several white cockatoos from Indonesian authorities who had confiscated them from poachers (Metz 2010, pers. comm.). Most of the Indonesian parrots come from Halmahera Island and are shipped to the Philippines. According to a recent investigation, 40 percent of parrots were smuggled to the Philippines from the port in Pelita Village, Galela District in northern Halmahera (ProFauna 2008, p. 5). The birds are apparently smuggled to Balut Island or to General Santos in the Philippines. The journey to smuggle parrots from Halmahera, Indonesia, to General Santos, the Philippines, takes over 9 hours, not including the time it takes to transport birds from the forest, to villages, and then to the port. The transactions are done offshore or in the sea, where the Philippine dealers collect the parrots from Indonesian ships. Upon arrival at General Santos, the birds are sent to Cartimar market in Manila, the capital of the Philippines (ProFauna 2008, p. 4). Since there is little disincentive for locals, it is a low-risk and lucrative source of income. Despite the existence of legislation, this illegal trade of protected parrots continues. Law No. 5, 1990, governing the conservation of biological resources and their ecosystems, was enacted to protect natural resources and the ecosystems (Yeager 2008, pp. 3–4); however, poaching and illegal trade continue to occur (also see discussion under Factor D).

The presence of recent and upcoming mining projects in Halmahera is also likely to increase demand locally for birds (see to Factor A discussion above). Temporary workers are known to buy these birds as gifts. It is apparently a problem even among police and military personnel posted to the area (WCS 2010, pers. comm.). ProFauna has encouraged the Navy of Indonesian Armed Force (TNI) and the Indonesian Marine Police to improve the patrol of marine boundaries between Indonesia and the Philippines in order to decrease this illegal trade. NGOs are encouraging both Indonesian and the Philippines governments to implement and enforce their wildlife laws and encouraging Indonesia to list *Cacatua alba* as a protected species (ProFauna 2008, pp. 8–9); however, poaching continues.

Stopping illegal trade is further complicated by the vast size of Indonesia's coastline, and government officials have limited resources and knowledge to deal with the illegal pet trade (Metz 2007c, p. 2; Laurence 2007, p. 1544). To combat illegal wildlife trade, Southeast Asian countries, including Indonesia, formed the Association of South East Asian Nations–Wildlife Enforcement Network (ASEAN–WEN) in 2005 to protect the region's biodiversity (*http://www.asean.org,* accessed March 3, 2011). ASEAN–WEN uses a cooperative approach to law enforcement (Cameron 2007, p. 164). It focuses on the gathering and sharing of intelligence, capacity building, and better cooperation in anti-smuggling and Customs controls across Southeast Asia (Lin 2005, p. 192). For example in 2008, Indonesian police officers and forestry and Customs officers participated in an intensive Wildlife Crime Investigation Course presented by the U.S. Fish and Wildlife Service to help the government tackle poaching and smuggling (Wildlife Alliance 2008, p. 2). Despite these efforts, illegal trade of white cockatoo still occurs within Indonesia.

Summary of Factor B

In summary, overutilization of the white cockatoo for the pet trade is a significant threat to the species, and this species is undergoing a rapid population decline. Poaching and illegal trade is difficult to control, in part because Indonesia has a vast coastline, and because income derived from poaching can be a significant source of income. Birds are clearly being poached and shipped to the Philippines, and there is strong demand for this species within Indonesia. Additionally, having a parrot as a household pet is a common part of Indonesian culture. Government officials have limited resources to deal with the illegal pet trade. Indonesia is a founding member of ASEAN–WEN and has made an effort to train its police, forestry, and Customs officers in methods to tackle poaching and smuggling. However, the wildlife protection laws are not vigorously enforced at local levels for this species.

Despite ProFauna Indonesia and the Indonesian Institute of Sciences having requested that the Forestry Department of Indonesia list white cockatoo as a protected species, and the Sultan of Ternate Palace having forbidden the poaching of this species (ProFauna Indonesia 2010, pers. comm.), poaching and illegal cross-border trade still occur. The ProFauna investigation in 2008 found that enforcement in both Indonesia and the Philippines is lacking. In part because this species does not begin to reproduce until approximately 6 years of age, and because this species is thought to be monogamous and usually mates for life, this level of poaching for the pet trade is a considerable threat to the species in its ability to maintain its population. Based on the best available information, we find that overutilization is a threat to the continued existence of this species.

Factor C. Disease or Predation

There is no evidence that either disease or predation is a threat to the white cockatoo in the wild. We are unaware of any reports of diseases negatively affecting white cockatoos in the wild. Since disease and predation associated with this species in the wild are not well documented, we extrapolate from what is known about cockatoos in general (see analysis under Factor C for the Philippine cockatoo). Although some serious diseases such as beak and feather disease and PDD occur in cockatoos in the wild, we found no information that these diseases occur in cockatoos in the wild in Indonesia. Cases of avian influenza (H5N1) do occur in Indonesia, but parrots, particularly cockatoos, are not considered to be natural reservoirs of this disease (IPP 2006). With respect to predation, the white cockatoo has natural predators, but we were unable to find information that these natural predators are having a negative impact on the productivity of this species. Therefore, we find that the white cockatoo is not threatened due to disease or predation.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Domestic Regulatory Mechanisms

Indonesia has laws and regulations in place to conserve biodiversity, manage forests, regulate trade, provide species protection, and develop and manage protected areas. However, these laws and regulations are frequently ignored (BLI 2008k, p. 7; Laurance 2007, p. 1544), and the country is unable to monitor its vast area, which consists of 17,508 islands. The Indonesian economic crisis that led to the downfall of the Suharto regime resulted in the government instituting a decentralization that gave local governments greater autonomy (Vetter 2009, p. 15). However, this decentralization resulted in confusion of roles and responsibilities, and implementation of decentralization has been slow and uncertain. Conflicting interpretation of policies and priorities and the lack of capacity or experience of local governments have occurred (Rhee *et al.* 2004, chap. 2, p. 20).

According to ProFauna, the high level of parrot poaching in north Halmahera is in part due to the lack of monitoring by Natural Resources Conservation (KSDA) officers in the Forestry Department (ProFauna 2008, p. 3). There is no regular enforcement or patrol by the KSDA officers (ProFauna 2008, p. 3). The North Maluku government and ProFauna Indonesia have proposed to the Forestry Ministry that the species be classified as a protected species (BLI 2010c; ProFauna 2010, pers. comm.).

In general, the export of wild-caught parrots is subject to harvest and export quotas in Indonesia. However, because the white cockatoo is not on the Indonesian Government's list of protected species (Law No. 5 1990, pp. 1–44; Rhee *et al.* 2004, chap. 5, p. 2, App. VIII; ProFauna 2010a, pers. comm.), Indonesia has no legal export quota for wild-caught specimens of this species (IPP 2010). In 1988, the Indonesian government began issuing quotas on trapping for the white cockatoo; however, these trapping quotas were poorly enforced. In 1999, no quota was issued, and all capture was reported to be illegal since 1999 (BLI 2010c). However, an NGO reported that there was a catch quota of the white cockatoo for 2007. It was issued by the General Director of Perlindungan Hutan dan Konservasi Alam (PHKA), which translates to the Forest Protection and Nature Conservation under the Indonesian Ministry of Forestry, and the catch quota was for 10 pairs that were to be used only for breeding (ProFauna 2008, p. 3). However, that quota was exceeded (ProFauna 2010, pers. comm.). Recent information indicates that there is no longer a catch quota (ProFauna 2010, pers. comm.), but that restriction may apply to commercial purposes, rather than breeding. According to WCS (2010, pers. comm.), this species is trapped and sold, and this can include trapping on a ''commercial'' scale by professionals, or farmers trapping occasional birds and then selling them to wholesalers. In 2007, at least 200 white cockatoos were caught from the wild in North Halmahera, which far exceeded the quota of 10 pairs (ProFauna 2008, p. 3; *http://www.thegabrielfoundation.org/indonesianparrots.html*).

Additionally, in 2010, the Sultan of Ternate Palace issued a fatwa (order) forbidding the poaching of cockatoos in the wild. However, as stated before, enforcement often is severely lacking (Shepherd *et al.* 2004, p. 4) or difficult, and illegal activities remain socially acceptable at the local level. Illegal trade has been reported to the Natural Resource Conservation Agency, which is responsible for enforcing the law, but to date enforcement efforts remain ineffective (ProFauna Indonesia 2004, p. 8). To further complicate enforcement efforts, some bird dealers claim that members of the Department of Forest Protection and Nature Conservation are involved in the illegal trade of this species (Shepherd *et al.* 2004, p. 4).

Existing regulatory mechanisms within Indonesia, as implemented, are inadequate to reduce or remove the current threats to the white cockatoo. Even with government controls, poaching of cockatoos is relatively common (WCS 2010, pers. comm.). As discussed under Factor B, we found that poaching is the primary threat to the white cockatoo. There is some evidence that the actions of Indonesian government agencies and the military are changing; however, if penalties are not enforced for illegal trade, trapping from the wild will continue (ProFauna Indonesia 2004, pp. 9–11). In conclusion, we find that the existing regulatory mechanisms are inadequate to reduce or remove the current threats to the white cockatoo. There is no information available to suggest that these regulatory mechanisms will improve in the foreseeable future.

CITES

Indonesia has been a member of CITES since December 28, 1978. It has designated Management, Scientific, and Enforcement authorities to implement the Treaty (CITES 2008b, p. 1) and has played an active role in CITES meetings. Because this species is not listed in Appendix I, which would mean that commercial trade would be prohibited except under certain circumstances, legal international trade is still occurring for this species.

Since 2000, there has generally been a downward trend in exports of the white cockatoo (UNEP–WCMC CITES Trade Database, accessed January 4, 2011). According to the CITES UNEP–WCMC Trade Database, there were 653 live exports of the white cockatoo in 2000, 269 in 2008, and 1,104 in 2009 (2009 may have been an anomaly). Between 2000 and 2009, 8,505 specimens of live white cockatoos were reported to have been exported. The bulk of these exports was exported from South Africa and was reported as captive-origin. Between 2000 and 2009, of the live shipments, there were 28 white cockatoos reported as wild origin. None of these live specimens reported as wild origin was exported directly from Indonesia. Of the live shipments, 8,435 specimens were described as captive origin, 19 were described as ''unknown'' origin, and 20 were described as pre-Convention, seized, or confiscated. Of the countries that reported the most exports of live white cockatoos, 273 specimens were exported from Indonesia, 4,444 specimens were exported from South Africa, and 384 specimens were exported from the Philippines. Note that countries that are not Parties to CITES do not submit annual report trade data to UNEP–WCMC (also refer to the CITES discussion for the crimson shining parrot). However, Parties, in their annual reports, do include data on their trade with non-parties, and these data are recorded in the UNEP–WCMC Trade Database. Also, while the Database does not include CITES annual report trade data from CITES Parties that did not submit annual reports, it does include CITES trade data from Parties that submitted their annual reports and engaged in CITES trade with those non-submitting Parties.

The purpose of CITES is to ensure that international trade in animal and plant species is not detrimental to the survival of wild populations by regulating the import, export, and re-export of CITES-listed animal and plant species. The best available data indicate that the current threat to this species of cockatoo stems from illegal trade in the domestic markets of Indonesia and international surrounding countries. As discussed under Factor B above, uncontrolled illegal poaching for the pet trade continues to adversely impact white cockatoos. Despite illegal trade,

CITES is adequately regulating legal international trade.

Summary of Factor D

In summary, we find that the existing regulatory mechanisms within Indonesia, as implemented, are inadequate to reduce or remove the current threats to white cockatoos. Local protections in place provide some protection to white cockatoos. While Indonesia has a good legal framework to manage wildlife and their habitats, implementation of its laws and regulatory mechanisms has been inadequate to reduce the threats to white cockatoos. The national parks on Halmahera may provide some protection to white cockatoos; however, management of protected areas is hampered by staff shortages and lack of expertise and money. As discussed under Factors A and B above, we found that habitat destruction and poaching are threats to white cockatoos. Deforestation and illegal activities are still rampant in Indonesia (Laurance 2007, pp. 1–7). The national and local regulations and management of this species' habitat are ineffective at reducing the threats of habitat destruction (see Factor A) and poaching for the pet trade (see Factor B). The white cockatoo is listed in Appendix II of CITES (see discussion under Conservation Status for the White Cockatoo above), and CITES appears to be an adequate regulatory mechanism to address legal international trade.

Even with government restrictions, poaching of cockatoos (*i.e.,* hunting by people to gain at least a temporary living from the activity) is still relatively common in Indonesia. Nestlings are more desirable as pets, yet their mortality rate when taken from the wild is greater than that of adults (ProFauna 2008). Laws and regulations are frequently ignored, and this adds to the inability to enforce them due to the remoteness of the areas where this species is located. There is no information available to suggest regulatory mechanisms within Indonesia will be adequate to protect this species in the foreseeable future; therefore, we find that the inadequacy of regulatory mechanisms is a threat to the white cockatoo throughout its range.

Factor E. Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Ecotourism

The Halmahera region is an emerging diving destination (WWF 2010a, p. 2). An Internet search found several Web sites offered diving trips that are in the Halmahera region, and there was even a video available online (*http://www.youtube.com/watch?v=PEmEB-Zj_L4*), entitled ''Diving travel: The North Halmahera Experience.'' Although the Halmahera region is remote and few diving operations exist, there is the potential for the diving industry to expand and exert more of an effect on the islands in this area. However, at this time, the best available information does not indicate that diving-related activities on or near Halmahera negatively affect the white cockatoo. We are not aware of any tourist activities occurring on Bacan Island. We found no other natural or manmade factors affecting the continued existence of the white cockatoo. Therefore, we find there are no threats to this species under this factor.

Finding for the White Cockatoo

As required by the ESA, we considered the five factors in assessing whether the white cockatoo is endangered or threatened throughout all or a significant portion of its range. We analyzed the potential threats to the white cockatoo including: Habitat loss and degradation, poaching for the pet trade, disease and predation, the inadequacy of regulatory controls, and other natural or manmade factors, such as the conversion of habitat to monocultures for biofuel, and ecotourism activities such as diving. We found that habitat loss, particularly due to selective logging, and conversion of forests to agriculture, mining, or biofuels, is a threat to the white cockatoo; the population is declining rangewide (see Factor A discussion). Halmahera is becoming increasingly more desirable to developers and investors as natural resources become more scarce.

We found that poaching for the pet trade is the most significant threat to the species, despite local public awareness campaigns. It is estimated that there are between 8,629 and 48,393 individuals of this species remaining in the wild on Halmahera; the number of white cockatoos remaining on Bacan Island is unknown, though poaching of wild birds on this island is believed to be occurring. Pet birds are an important part of not only Indonesian culture, but also Asian culture, with large numbers of wild-caught parrots traded domestically and internationally (Baula *et al.* 2003, pp. 1–12; BLI 2004, pp. 1–2, ProFauna 2008, pp. 3–4). Trappers reportedly remain quite active. Wild-caught birds are openly sold in Asian markets, particularly in the nearby Philippines (ProFauna 2008, pp. 3–4; BLI 2003, pp. 1–2). An investigation conducted by NGOs in Indonesia in 2002 and 2003 found evidence of wild birds in local markets, and sellers reported that they were destined to go to countries such as Europe (BLI 2004, pp. 1–2). Ending illegal trade is hampered by Indonesia's large coastline and officials with limited resources and knowledge.

Unsustainable poaching is particularly detrimental to the white cockatoo because of its estimated small and rapidly declining population. Excessive removal of individuals from the wild for illegal trade is particularly harmful to species such as the white cockatoo, which are monogamous, long-lived species that do not begin breeding until they are 6 years of age. Additionally, because this species has a high monetary value (Basile personal communication 2010, pp. 6–7) and there is little risk in poaching, poaching is financially lucrative. The Act describes a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The best available information indicates that poaching and trade are not at a level to consider the species to be in danger of extinction at this time. However, based on the analysis of the five factors discussed above, we determine that the white cockatoo is likely to become an endangered species within the foreseeable future. Therefore, we find overutilization for commercial, recreational, scientific, or educational purposes (Factor B), specifically poaching for the pet trade, is a threat to the white cockatoo throughout its range.

We found no evidence that disease or predation significantly affect the wild white cockatoo population throughout its range.

The white cockatoo is not currently classified as a protected species by the Indonesian government. Although Indonesia has a good legal framework to manage wildlife and their habitats, implementation of its laws and regulatory mechanisms has been inadequate to address the threats to the white cockatoo, in part due to the remoteness of the white cockatoo's habitat. Logging laws and policies are frequently ignored and rarely enforced, and illegal logging is rampant, even occurring in national parks and nature reserves. Current concession policies and logging practices hamper sustainable forestry. Threats to the species have not decreased; local NGOs indicate the population trend is declining.

Although diving activities are increasing near islands containing white cockatoo habitat, there is no evidence that ecotourism is a threat to this species now or in the foreseeable future. Therefore, we conclude that there are no other natural or manmade factors that are threats to the species throughout its range (Factor E).

Under the ESA, an ''endangered species'' is defined as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' The ESA defines a ''threatened species'' as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Based on our review of the best available scientific and commercial information pertaining to the above five factors, we find that the white cockatoo meets the definition of a ''threatened species'' under the ESA, and we are proposing to list the white cockatoo as a threatened species throughout its range. Although the species is not currently in danger of extinction and, thus, does not qualify as an ''endangered species'' under the ESA, we conclude that the species qualifies as a threatened species. The current distribution of white cockatoos within its range and its disbursed distribution on two islands provides resiliency to the population against the threats such that the species is not currently in danger of extinction, but may become so in the foreseeable future.

Significant Portion of the Range

Having determined that the white cockatoo meets the definition of threatened throughout its range, we must next consider whether there are any significant portions of its range that meet the definition of endangered. See our discussion under the crimson shining parrot for how we make this determination. For the purpose of this analysis, we consider a portion of the white cockatoo's range to be significant if it is important to the conservation of its range because it contributes meaningfully to the representation, resiliency, or redundancy of its range (see Redford *et al.* 2011). The best available information indicates that threats to the species occur throughout its range. Although declines on Halmahera have been quantified to some extent, the lack of any information, including quantitative population trend information for Bacan Island, precludes a comparison of the declines in these two portions of its range. Further, we found no information indicating that the threats are of greater magnitude or extent in any portion of its range on Halmahera Island. The limited information available for the white cockatoo does not allow us to determine what portion of the range if any, would be impacted to a significant degree more than any other. Therefore, we conclude that the threats to the species are uniform throughout its range, and no portion of its range is currently in danger of extinction.

Species Information

D. Yellow-Crested Cockatoo (*Cacatua sulphurea*)

Taxonomy and Description

There are four recognized subspecies of the yellow-crested cockatoo: *Cacatua sulphurea abbotti (*Oberholser, 1917)*, C. s. citrinocristata (*Fraser, 1844)*, C. s. sulphurea (*Bonaparte, 1850), and *C. s. parvula (*Gmelin, 1788). IUCN and BLI recognize *C. sulphurea* at the species level only. All four subspecies are recognized by ITIS (*http://www.itis.gov*). These four subspecies are endemic to Timor-Leste (an independent state which is adjacent to West Timor, a part of Indonesia) and Indonesia. The yellow-crested cockatoo inhabits forest, forest edge, scrub, and agricultural land (IUCN 2008j; BLI 2010d, p. 1), but prefers primary lowland forest. Historically, it was found throughout the Lesser Sundas, on Sulawesi and its satellite islands, on Nusa Penida (off Bali), and the Masalembu Islands (in the Java Sea). These subspecies (hereafter collectively referred to as the species) are found in forested habitat in the lowlands up to 500 m (1,640 ft) on Sulawesi and up to 800 m (2,625 ft), and sometimes 1,200 m (ft), in the Lesser Sundas (Collar 1994; Jones *et al.* 1995; Snyder 2000, p. 69). They prefer large, mature trees with nesting areas higher in the canopy, and they prefer internal forested areas to forest edges (Jones *et al.* 1995, pp. 27–28, 39).

There is substantial discussion in scientific literature that debates the classification of island species and whether they deserve species status rather than subspecies status (Phillimore 2010, pp. 42–53; James 2010, pp. 1–5; Pratt 2010 pp. 79–89). This is sometimes significant with respect to conservation measures, particularly when considering the criteria used by organizations such as the IUCN. Assessments of subspecies are only accepted by IUCN provided there is a global assessment of the species as a whole. These four subspecies may all be in fact species, but for the purpose of this proposed rule and 12-month finding, these four subspecies essentially face the same threats, are all generally in the same region of Indonesia, and all have quite small populations. Absent peer-reviewed information to the contrary and based on the best available information, we recognize all four subspecies as being valid. For the purpose of this rule, it is prudent to propose listing *C. sulphurea,* which includes all subspecies.

Use of Scientific Names in This Section

It is generally our practice to use the scientific name of the species in the beginning of the document for avian species, and, subsequently, refer to each species by their common name; however, in this section, we will generally refer to the species by their scientific names. There are many similar cockatoo species, some of which have similar sounding common names and may be confused. For example, the yellow-crested cockatoo is also referred to as the lesser sulphur-crested cockatoo, which is *Cacatua sulphurea,* but there is also the sulphur-crested cockatoo, which is *C. galerita.* Additionally, because there are four recognized subspecies of *C. sulphurea,* using their scientific names is more precise and clear. Finally, because there are various local common names, it is more effective to refer to these species by their scientific names.

General Biology

Nest holes have been observed to be 6 to 18 m (20 to 60 ft) above ground (Setiawan 1996 in Prijono 2008, p. 3). Two tree species used by *Cacatua sulphurea* for nesting include *Sterculia foetida* (wild almond tree) and *Tetrameles nudiflora* (Binong) (Widodo 2009, p. 85). There does not appear to be a set or restricted breeding season (Prijono 2008, p. 3); the breeding season may coincide with the availability of nutrients in food sources. Incubation is shared by both parents. Incubation lasts 28 days, and the nestling period is 65 days until fledging (Cameron 2007, p. 140).

Their diet includes *Mangifera indica* (mango); *Carica papaya* (papaya); *Ficus* spp. (fig); *Psidium guajava* (guava); *Eugenia malaccensis* (jambu bol); *Opuntia elation* (prickly pear); *Annona squamosa* (srikaya); flowers of *Cocos nucifer* (coconut); *Tamarindus indica* (tamarind); flowers and fruit of *Avicennia* (mangrove); fruit of *Dehaasia* (marangtaipa) and young leaves of *Sonneratia* (mangrove); and ninifo, thought to be within the *Canarium* genus (Nandika 2006, p. 10).

Feral Populations

Feral populations of released or escaped captive-held yellow-crested

cockatoos have established themselves outside of their native range; however, they exist in low numbers (Ling and Lee 2006, p. 188). Between 1986 and 2000, 11 feral yellow-crested cockatoos were observed in Taiwan (Ling and Lee 2006, p. 190). *Cacatua sulphurea* has also become feral in places such as Singapore, Hong Kong, New Zealand, and Western Australia. In 1998, the species was described as being locally common in south and east Singapore, including the islets of St. John's and Sentosa, and reportedly breeding in gardens and parks, with possibly between 30 and 50 birds existing there (PHPA/LIPI/BirdLife International-IP 1998 in BLI 2001, p. 1652).

Population Estimates

This species was formerly locally common throughout much of its range. There is evidence of substantial population declines on Sulawesi, where it may already be beyond recovery (Andrew and Holmes 1990; Cahyadin and Arif 1994; Gilardi 2011, pers. comm.), and the Lesser Sundas, where it is believed to be close to extinction on Sumbawa and Flores. It is still fairly common in the Komodo National Park (Butchart *et al.* 1993; Holmes in litt. 1994; Prijono *et al.* 2008, p. 7). As of 2001, *Cacatua sulphurea sulphurea* only existed in tiny remnant numbers, except perhaps for a small population in Rawa Aopa Watumohai National Park (BLI 2001, p. 1648). *C. sulphurea* is extinct on Lombok (BirdLife-IP in litt. 1997). *C. s. abbotti* is at a critically +low population level; *C. s. parvula* is doing fairly well on Komodo in Komodo National Park; and *C. s. citrinocristata* persists but was steadily declining on Sumba (BLI 2001, p. 1648). On Nusa Penida, this subspecies was last recorded in 1986 (van Helvoort in van Balen 1994).

Population estimates for each subspecies vary in part due to the remoteness of the islands where they exist. The BLI 2010 Web site reported that there are between 2,500 and 9,999 mature individuals collectively remaining in the wild; however, these data have not been updated based on recent information reported from a local organization in Indonesia. Population estimates for each subspecies are as follows: *Cacatua sulphurea abbotti,* 40; *C. s. citrinocristata,* 100 to 2,000; *C. s. parvula,* 800 to 1500; *C. s. sulphurea,* 100 to 150. The population estimates and a discussion of the subspecies' status are presented in more detail below.

Cacatua sulphurea abbotti

Abbott's cockatoo, the largest of the yellow-crested cockatoos, is only known from a single island, Solombo kecil (or Masalembu kecil pulau), which is 500 ha (1,235 ac) and in the Masalembu Archipelago in the Sulawesi Strait. This island is in the Java Sea, north of the cities of Surabaya and Bali, and east of southern Sumatra. The subspecies is considered to be extirpated from Masalembu Island (also known as Salembo Besar) (Indonesian Parrot Project 2010). *C. s. abbotti* has a mostly white body with a brilliant yellow, forward-curving crest, and slight yellow on its ear covert feathers. The species prefers very large trees within the *Datiscaceae* family for nesting (Snyder 2000, p. 69). When Abbott first found the endemic form *abbotti* in 1907, he ''reported it in hundreds'' on Masalembu (Oberholser 1917 in BLI 2001, p. 1651). Only between 8 and 10 individuals of the subspecies *abbotti* were located in 1993 on the Masalembu Islands (Jones *et al.* in prep. in Cahyadin and Arif 1994), and 6 to 8 birds were found in 1998. In 2008, a few individuals were found on Solombo kecil Island. In IPP's last population survey, they found that on Solombo kecil, only about 30 individuals remain (Metz 2010, pers. comm.). The population of this subspecies as a whole has declined over 80 percent within three generations (45 years). Although the Indonesian Parrot Project has started a conservation program for this subspecies, it is too early to report on progress of the conservation program.

Cacatua sulphurea citrinocristata

The subspecies *citrinocristata* is found on Sumba, where the 2002 estimate of the population was between 565 and 2,054 individuals (Cahill *et al.* 2006, p. 265; Persulessy *et al.* 2003 in Prijono 2008, p. 5). Another 2002 survey by WCS found a density of 4.3 birds per km² within the two national parks, Manupeu-Tanadaru and Laiwangi-Wanggameti (Kinnaird 2003 in Prijono 2008, p. 5). On Sumba. *C. s. citrinocristata's* population in 1995 was estimated to be just over 3,000 (Jones *et al.* 1995, p. 39). Earlier surveys in 1989 and 1992 (Marsden 1995 in Prijono 2008, p. 5) estimated the total population of *C. s. citrinocristata* was between 1,150 and 2,644 birds. On Sumba, *C. s. citrinocristata* populations increased between 1992 and 2002, likely due to moratoria on international trade and local protections (Cahill *et al.* 2006, p. 162). The most recent survey is not publicly available, but the population on Sumba is now thought to be roughly 100 birds (Gilardi 2011a, pers. comm.). The earlier population estimates may have been overly optimistic based on surveying techniques, or the population has rapidly declined.

Sumba Island is located in the Lesser Sundas in southeastern Indonesia. The island is 12,000 km² (4,633 mi²), 210 km (130 mi) in length, and 50 km (31 mi) south of Flores Island. Its highest point is Gunung Wanggameti at 1,225 m (4,019 ft). Precipitation is between 500 and 2,000 mm annually (20 to 79 inches). As of 1995, forest covered less than 11 percent of the island (McKnight *et al.* in prep in Jones *et al.* 1995, p. 22) and was confined to relatively small and fragmented pockets.

The two national parks, covering 1,350 km² (521 mi²), were established on Sumba through Ministerial Decree No. 576/Kpts-II in 1998. Manupeu-Tanadaru (280 km² or 108 mi²) seems to have the healthiest population of cockatoos. It had the highest density of cockatoos when surveyed both in 1992 and 2002 (Cahill *et al.* 2006, p. 164). However, of 33 forest patches surveyed, cockatoos were recorded in only 17 (O'Brien *et al.* 1997 in Cahill *et al.* 2006, p. 166).

Cacatua sulphurea parvula

Historically, *C. s. parvula* was found on most of the Lesser Sunda Islands (also known as Nusa Tenggara) including Penida, Lombok, Sumbawa, Moyo, Komodo, Flores, Pantar, Alor, Timor, and Semau Islands. Now this subspecies is found on Alor, Pantar, Komodo, and Sumbawa Islands. In the past 10 years, populations of more than 10 cockatoos have been found at only two locations (Setiawan *et al.* 2000; Prijono 2008, p. 6). In 1994, on Sumbawa, this subspecies was observed at three sites and reported by islanders to occur at 14 more, although in very low numbers (Setiawan *et al.* 2000; Widodo 2009, p. 84). In 2000, 80 individuals were observed on Alor Island; the population estimate was 678 to 784 individuals.

As of 2001, it was thought that West Timor and other small islands in the Lesser Sundas could only support a few individuals (PHKA/LIPI/BirdLife International-IP 1998; Setiawan *et al.* 2000; Agista & Rubyanto 2001). The most recent population estimate on Timor-Leste (East Timor) is between 500 and 1,000 individuals (Trainor *et al. in litt.* 2004). On Timor-Leste, *C. s. parvula* was recorded in six locations (Tilomar, Fatumasin, Sungai Clere, Lore, Monte Paitchau–Iralalora, Mount Diatuto) (Trainor 2002, pp. 93–99). Below is a summary of recent observations and population estimates for this subspecies.

• Alor Island: 80 individuals observed; population estimate was 678 to 784 individuals (Setiawan *et al.* 2000 in Widodo 2009, p. 84).
• Flores Island: 14 individuals observed (Ria; Watubuku forest, part of Lewotobi area, see Butchart *et al.* 1996 in Widodo 2009, p. 84).
• Komodo Island: 137 individuals observed; population estimate was 150 (Imansyah *et al.* 2005).
• Moyo Island: 10 individuals observed (Setiawan *et al.* 2000).
• Pantar Island: 29 individuals observed; population estimate was 444 to 534 individuals (Setiawan *et al.* 2000).
• Sumbawa Island: 14 individuals observed in 1996; subspecies observed at three sites and reported by islanders to occur at 14 more, although in very low numbers (Setiawan *et al.* 2000).
• East Timor (Timor-Leste): Population estimate was 500 to 1,000 individuals in 2004 (Trainor *et al.* 2005, pp. 121–130).
• West Timor: 8 individuals observed (Setiawan *et al.* 2000).

The largest known population, which is on Komodo Island (311 km^2 (120 mi^2) in size) in Komodo National Park, was previously thought to be doing well, but the subspecies' population is declining even here although the exact reasons are unclear (Imansyah *et al.* 2005, 2 pp.). Cockatoo poaching is believed to be effectively eliminated due to surveillance and enforcement, and there is negligible loss of mature trees or forest loss due to illegal logging (Ciofi & de Boer 2004 in Prijono 2008, p. 8). Flocks of 20 to 30 birds were seen during observations between 1989 and 1995, and, in 1999, an estimated 100 birds were observed (Agista & Rubyanto 2001 and BirdLife 2001 in Prijono 2008, p. 8). In Komodo National Park, *C. s. parvula* was still relatively common prior to 2001, and was most frequently recorded in dry tropical forest (from sea level to 350 m (1,148 ft)) dominated by *T. indicus* (common name: date or tamarind) and *Sterculia foetida* (Java-olive, poon tree, or skunk tree) (Agista & Rubyanto 2001). The total population size in Komodo National Park, which spans several islands, is estimated to be approximately 150 individuals on Komodo Island (Imansyah *et al.* 2005, p. 2) and about 100 individuals on Rinca Island (BLI 2010f).

Cacatua sulphurea sulphurea

The most recent information from local NGOs suggests that only about 100 to 150 individuals of this subspecies remain in the wild, and they are likely only on Sulawesi Island. *C. s. sulphurea* was formerly widely distributed in Sulawesi (formerly called Celebes); however, since the early 1980s, this subspecies has become very rare (Prijono 2008, pp. 2–3). This was due to high rates of poaching (CITES 2004a, p. 2). In 2001, between 7 and 15 individuals were observed on Pasoso Island; however, the south and central parts of the island have limited suitable habitat consisting of mixed secondary forest, scrub, and dryland agricultural plots (Agista *et al.* 2001 in Prijono 2008, p. 5).

Now, the subspecies is believed to occur only in a small region of Sulawesi (Metz 2010, pers. comm.). Approximately 10 years ago, it was documented in Rawa Aopa Watumohai National Park (RAWNP) (Agista *et al.* 2001 in Prijono 2008, p. 5). Older studies suggested that although some small populations of this subspecies may exist elsewhere, the remaining cockatoos were likely confined to two locations in southern Sulawesi: RAWNP and Buton Island and in central Sulawesi on Pasoso Island. Of these, RAWNP is clearly the most significant site. RAWNP is unique because it has seven ecosystem types: tidal mudflats, mangrove forest, wooded savannas, hill forest, swamp forest, peat swamp, and cultivation. Therefore this is a significant site to concentrate conservation efforts. However, it is unlikely that this species occurs here currently, although a separate species, *C. galerita,* is believed to occur in this park.

Conservation Status for the Yellow-Crested Cockatoo

In 1981, *Cacatua sulphurea* (and all of its subspecies) was listed in CITES Appendix II. In 2005, it was uplisted to Appendix I, thus commercial trade is generally prohibited (see above discussion with respect to CITES for additional information). *C. sulphurea* is listed on the IUCN Redlist as Critically Endangered. It is also protected in the U.S. by the WBCA (refer to discussion under the Crimson Shining Parrot, factor D).

It is against Indonesian law to capture *Cacatua sulphurea* for the export trade. *C. sulphurea* is protected by the Act on the Conservation of Biological Resources and their Ecosystems (Act No. 5 of 1990), and there has been no catch quota for this species since 1994. Violation of this law by capture, possession, or trade in this species could result in up to 5 years in prison and a fine of up to 200 million rupiahs ($22,870 USD; Prijono 2008, p. 13). In 1997, *C. sulphurea* was protected within Indonesia by Forestry Ministerial Decrees No. 350/Kpts-II/1997 and No. 522/Kpts-II/1997. Although a cooperative recovery plan has been developed and put into place for *C. sulphurea,* it is unclear how effective it is; there are no clear indications that the species' situation is improving. Protections exist in several areas such as the Rawa Aopa Watumohai and Caraente National Parks (on Sulawesi), which may support approximately 100 individuals (Nandika 2006, pp. 10–11); Suaka Margasatwa Nature Reserve on Pulau Moyo; Komodo National Park; and two national parks on Sumba, Manupeu-Tanahdaru and Laiwangi-Wanggameti. The Nini Konis Santana National Park in Timor also may have a population of approximately 100 birds (Trainor 2002 in Prijono 2008, p. 9). In Timor-Leste, BirdLife International identified 16 Important Bird Areas (IBAs). Although this designation does not confer any measure of protection, some of these IBAs may be vital to this species, particularly since the majority of the IBAs are located in coastal areas (BirdLife International 2007).

For *Cacatua sulphurea abbotti,* the Indonesian Parrot Project (IPP) initiated an intensive conservation program on Solombo kecil Island. Visits were made to junior and senior high schools to teach students about the principles of conservation, increase their awareness of the plight of this species, and foster pride in this species, emphasizing that it is their rare and unique bird. Laws to protect these birds have been passed but only in the distant ''kabupatan'' (district) of Madura. These decrees are out of date, but there are plans to update them and extend them locally to the islands of the Masalembu Archipelago themselves, where they are more likely to be enacted. Officers from the local armed forces and police were taught about the protections already in place nationally and internationally, and were encouraged to conserve the birds (IPP 2008, pp. 3–4). Nest boxes and use of wardens are other conservation methods used. Konservasi Kakatua Indonesia (KKI, also known as Cockatoo Conservation Indonesia) is another NGO working to protect this species.

There are only about 100 to 150 *Cacatua sulphurea sulphurea* left in the wild, solely on Sulawesi Island. IPP recently instituted a conservation program for this subspecies; however, it is still in its preliminary stages.

Evaluation of Factors Affecting the Yellow-Crested Cockatoo

We examine the effects on the species based on each of the 5 factors listed under the section 4(a)(1) of the ESA. Under the ESA and our implementing regulations, a species may warrant

listing if it is endangered or threatened throughout all or a significant portion of its range. The yellow-crested cockatoo is highly restricted in its range and the threats to it occur throughout its range. Therefore, we assessed the status of the species throughout its entire range. The threats to the survival of this species occur throughout the species' range and are not restricted to any particular portion of its range. Accordingly, our assessment and proposed determination applies to the species throughout its entire range. Unless our status review finds that there is a unique threat to a particular subspecies, we will consider all of the subspecies to be facing equivalent threats, as their habitats are very similar and they are all island endemics in the same region. Like the white cockatoo, the greatest threats to cockatoos in Indonesia and other range countries is poaching from the wild for the illegal pet trade (usually nestlings are taken), logging, and other forms of deforestation and habitat destruction. In order to be efficient, if the threats are the same threats affecting a species discussed above, we will summarize these threats and refer to a discussion in the document above if it is not unique to this species or subspecies.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

Habitat destruction such as that described above for white cockatoos also threatens *Cacatua sulphurea.* Deforestation is pervasive throughout Indonesia and Timor-Leste (Costin and Powell 2006, p. 2; Laurance 2007, p. 1,544). For example, on Solombo kecil Island, trees that have suitable habitat to provide food and nest holes for *C. s. abbotti* are logged. Their habitat on this island has been essentially destroyed and replaced with coconut palms. Almost total destruction of habitat flora, such as kapuk trees (*Ceiba pentandra*) and mangrove (*Avicennia apiculata)* which are preferred by the species, has occurred (IPP 2008, p. 3). Cockatoos consume fruit of tall timber trees such as ''kayu besi'' (*Intsia bijuga),* the source of ''ironwood'' for building, and tangkalase (scientific name unknown), a deciduous hardwood tree (Nandika 2006, p. 10). These trees are disappearing or gone from the island. In the past, cockatoo nests seemed to be safe from trappers if they were sufficiently high. The decrease in such trees likely played a vital role in the species' decline (Marsden and Jones 1997 in Snyder 2000, p. 70) in two ways: by decreasing suitable trees for nesting sites and by forcing cockatoos to locate nesting sites lower in the canopy.

This type of habitat loss affects all four subspecies. In the case of *Cacatua sulphurea abbotti,* coconut palms have been planted, displacing their favored habitat flora such as kapuk trees and mangrove. The main cause of forest loss for *C. s. citrinocristata* has been the clearing and repeated burning of vegetation to provide land for grazing and cultivation, although between 1992 and 2002, there was no evidence of additional forest loss (Cahill *et al.* 2006, p. 165). Removal of trees for local use occurs, but there is no commercial logging on Sumba. In many areas, as a result of the shifting cultivation and annual burning for cattle grazing, the original vegetation has been replaced by fire-resistant trees, shrubs, and grasses. Where grazing and burning have been particularly intensive, the grasslands have become degraded and soil erosion is evident. A study found that on Sumba Island, birds were absent or rare in forest areas of less than 10 km^2 (Kinnaird *et al.* 2003 in Prijono 2008, p. 4). Jones *et al.* indicated that in order to protect the few remaining *C. s. citrinocristata,* the areas of remaining forest on Sumba Island must be preserved (1995, p. 49).

For *Cacatua sulphurea parvula,* the largest population is thought to be on Komodo Island in Komodo National Park. This park includes three major islands: Komodo, Rinca and Padar, in addition to several smaller islands (*http://www.komodonationalpark.org,* accessed March 3, 2011). Its total marine and land surface area is 1,817 km^2 (701 mi^2). Due to the dryer climate, wildfires are a problem (Imansyah, unpublished, in Imansyah *et al.* 2005, p. 2). Researchers believe that the species' decline may be due to the lack of nesting sites.

The yellow-crested cockatoo resides in lowland forests predominately between 100 to 600 m (328 to 1,968 ft) throughout these islands, with the highest densities of birds occurring in little-disturbed forests. The locations where the subspecies is thought to exist currently, as well as the most recent population estimates, may be found below under the Factor B discussion. Both legal and illegal logging have been the primary threats to the habitat of this species, with the threats occurring throughout the islands in lowland forests, decreasing available habitat (Prijono 2008, p. 1; Widodo 2009, p. 81). For example, research found that for every 100 km^2 (38.6 mi^2) of Seram's primary forests that were selectively logged in the last 6 years, 700 birds were likely lost from the cockatoo population (Marsden 1992, p. 12). Similarly, for every 100 km^2 of locally disturbed secondary forest that were converted to plantations, 600 birds were likely lost from the cockatoo population. Even when habitat is protected, there is generally little undisturbed habitat available, and it is of less suitable quality.

Cockatoos are highly impacted by selective logging of primary forests, especially since reduced-impact logging techniques are seldom applied. Selective logging, which targets mature trees, has a substantial negative impact on tree-cavity nesters such as *Cacatua sulphurea.* The abundance of cockatoos is positively related to the density of its preferred nest trees (large trees that would be impacted by logging).

Once the primary forest is logged, land use on other Indonesian islands shows that the secondary forest is generally converted to other uses or logged again rather than being allowed to return to primary forest. Therefore, although cockatoos may continue to inhabit secondary or degraded forests on their respective islands, their populations will be at substantially lower numbers. The trend of high loss of primary forests and degradation of secondary forests is of concern because little is known about the reproductive ecology of *Cacatua sulphurea* in the wild, including breeding success in mature forests versus secondary forests, and whether these cockatoos will survive in degraded forests in the long term. However, surveys indicate that the species is declining in the wild.

In summary, extensive logging, both legal and illegal, has damaged *Cacatua sulphurea* habitat. In some areas, deforestation and habitat degradation are still occurring. The populations have decreased on all islands, and there is no sign of improvement. Therefore, we find that the present and threatened destruction, modification, or curtailment of its habitat is a threat to the continued existence of this species throughout all of its range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Poaching for the pet trade is a factor that also affects *Cacatua sulphurea.* Not only are cockatoos desirable pets, but this species is also very vocal and conspicuous, making it an easy target for poaching (Jepson and Ladle 2005, pp. 442, 447; Prijono 2008, pp. 4–5). Extremely heavy trade during the 1970s and 1980s was indicated as the main cause of the decline of this species (BirdLife International-IP, 1998; BLI 2004 in Cahill *et al.* 2006, p. 161).

Between 1981 and 1992, 96,785 *C. sulphurea* were reported to have been exported from Indonesia (UNEP–WCMC, in Cahill 2006, p. 162). In 1992, cockatoos were worth approximately $55 USD to the wholesalers who export birds to Java (Marsden 1995 in Cahill *et al.* 2006, p. 165).

From the data collected by ProFauna about animal markets in Java and Bali, the domestic trade in parrots is still at a high level (ProFauna 2008, pp. 2–8). Many investigations indicate that these cockatoos could fairly easily be exported and at some point their origin would be unknown, yet indicated as captive-origin (BLI 2003, p. 2).

TABLE 2—LIVE EXPORTS OF *Cacatua sulphurea* BETWEEN 2000 AND 2009 (UNEP–WCMC 2010)

Total number of specimens exported	4,806
Total number of specimens exported as captive	4,719
Total number of specimens exported as wild	50
Total other or unknown	23
No source code reported	9
Top 3 exporters:	
Number of specimens exported from South Africa	1,799
Number of specimens exported from Indonesia	508
Number of specimens exported from the Philippines	481

Note: This number does not report specimens exported as *Cacatua sulphurea citrinocristata*. There was data reported in the UNEP–WCMC database for this subspecies but not for the other *C. sulphurea* subspecies (*http://www.unep-wcmc.org*).

On Sumba Island, evidence of cockatoo trapping was seen in 1996 (Kinnaird 1999), and shipments of cockatoos were confiscated on Sumba in 1998 and again in 2002 (when 32 were seized). In 2002, an investigation found that one collector in Waikabubak exported 52 yellow-crested cockatoos to other islands (Persulessy *et al.* 2003 in CITES 2004a, p. 6). In 2002, evidence was found of cockatoo trapping at Manupeu and Langgaliru, mainly in the form of snaring. Many nests at Poronumbu even had ladders attached to them for nest raiding, suggesting that trapping activity was relatively high at this site even in 2002 (Cahill *et al.* 2006, p. 166).

IPP, a local NGO which is actively working to protect *Cacatua sulphurea,* noted specific threats to the subspecies on Solombo kecil Island. They found that usually nestlings, rather than adult birds, are taken. According to ProFauna, nestlings are worth 2 to 3 times more than adults (2008, p. 8). Historically, cockatoos were trapped in large numbers by outside visitors who took them to Bali and Sumbawa Islands. Studies by social anthropologists of locals in Seram and Halmahera showed that parrot catching accounted for 25 to 30 percent of their cash income (Badcock in litt. 1997, in Snyder *et al.* 2000, p. 60). Among the Halafara people of the Manusela valley on Seram, locals would catch and sell parrots to raise their bride price (Badcock in litt. 1997, in Snyder *et al.* 2000, p. 60). Now, with the marked decline in their numbers, the birds are even sought by government officials, who keep them as pets due to the prestige of owning such a rare bird (IPP 2008, p. 3).

Due to high demand for cockatoos and based on trade reports in 1993, the CITES Standing Committee recommended that countries suspend imports from Indonesia, pending surveys to assess the status of the species after a significant trade review (CITES 2001, AC17 Inf. 3 p. 4; CITES Notification to the Parties No. 737). Singapore continued to re-export wild-caught birds originating from Indonesia after the export suspension of Indonesia in 1994 (CITES 2001, AC17 Inf. 3 p. 4). In total, 1,229 wild-caught birds were reported to be re-exported from Singapore between 1994 and 1999 (CITES 2001, AC17 Inf. 3 p. 4; WCMC 2001 in CITES 2004a, pp. 9–10). Although trade was recognized to be a problem, this species was not listed on Appendix I of CITES until 2005. Poaching for the pet trade, as with all cockatoo species referenced in this rule, is a significant threat to this species as well.

Although some subspecies are monitored and are on remote islands, poaching still occurs. Poaching can be extremely lucrative, and there is relatively low risk involved in poaching. None of these subspecies is fully protected from the illegal pet trade. Based on our review, we find that overutilization, specifically poaching for the pet trade, continues to be a threat to *Cacatua sulphurea* throughout its range.

Factor C. Disease or Predation

There is no evidence that disease or predation is a threat to *Cacatua sulphurea* in the wild. Our review did not find any indication that disease is a threat to *C. sulphurea.* With respect to predation, two predators, a spotted kestrel (*Falco moluccensis*) and a white bellied sea-eagle (*Haliaeetus leucogaster*), have been observed attacking cockatoos (Prijono 2008, pp. 4–5). Although *C. sulphurea* has natural predators, to our knowledge, these predators are not having a negative impact on the species. After a review of the best scientific and commercial information, we conclude that neither disease nor predation are threats to *C. sulphurea.*

Factor D. The Inadequacy of Existing Regulatory Mechanisms

After surveys conducted in the late 1990s by the Directorate-General of Forest Protection and Nature Conservation (PHPA) and BirdLife International-Indonesia, it was determined that *Cacatua sulphurea* populations had collapsed (Snyder *et al.* 2000, p. 59). Prior to 1993, at which time legal trade was prohibited, there was a reported average of 1,600 *C. s. citrinocristata* individuals being removed from Sumba annually, yet the 1992 population was only approximately 3,200 (Cahill *et al.* 2006, p. 161). This level of trade was quite obviously unsustainable. The population had increased, likely due to the moratorium on international trade and local protections (Cahill *et al.* 2006, p. 164); however, the population is declining now (BLI 2010d; Metz 2010, pers. comm.). In 1992, the Regent of West Sumba (Decree no. 147) banned trapping and transport of cockatoos. This was followed by a similar decree in East Sumba (Decree no. 21), and in 1994, the government of Indonesia imposed a zero export quota (Cahill *et al.* 2006, p. 162). In 1997, this species was provided additional protection by the Forestry Ministerial Decrees No. 350/Kpts–II/1997 and No. 522/Kpts–II/1997.

According to a CITES 2004 proposal to uplist *Cacatua sulphurea* to Appendix I, the Philippines, Singapore, South Africa, and Indonesia were the main countries exporting captive-bred specimens of *Cacatua sulphurea.* In Indonesia and Singapore, there has been a ''sudden turn up of captive bred specimens since 1994, the time the legal trade in wild specimens stopped'' (CITES 2004, p. 5). In 2004, two captive breeding operations of *C. sulphurea* were identified in Indonesia: PT. Bali Exotica Fauna and PT. Anak Burung Tropikana. Both of these companies were located in Bali Province (CITES 2004a, p. 5). Currently, however, there are no CITES-registered operations for breeding *C. sulphurea* for commercial purposes (CITES 2010d, npn.).

When the proposal to transfer the *Cacatua sulphurea* from Appendix II to Appendix I (CITES CoP13, 2–14 October, Bangkok, Thailand) was being considered in 2004, BLI noted in their position paper that the difficulty in distinguishing captive-bred birds from wild ones is facilitating both illegal capture from the wild and illegal international trading of the captured birds (BLI 2003). They pointed to

examples of these birds found in markets in Indonesia (BLI 2003 p. 2).

Between 2000 and 2009, the UNEP–WCMC Trade Database indicated that 4,837 live specimens of *Cacatua sulphurea* were exported (subspecies are unknown). Between the same time period, an additional 1,648 live specimens of *C. s. citrinocristata* were reported to be exported. In 2009 alone, 11 live specimens of *C. s. citrinocristata* were exported from South Africa to the United Arab Emirates, one of the countries most frequently importing cockatoos (*http://www.unep-wcmc.org/citestrade*). Nearly all of these were documented as captive-bred, but wildlife laundering does still occur (ProFauna 2008; 2010; Cantú-Guzmán *et al.* 2007, 121 pp.) and is quite lucrative.

A 2003 IUCN review found that *Cacatua sulphurea* is readily available in Indonesian bird markets (BLI 2003, pp. 1–2). Poaching is relatively easy, poverty is widespread, and there is little incentive or awareness for local communities to conserve their resources. Although the species occurs within a number of protected areas and a recovery plan was initiated in 1998, declines are still occurring. Birds are still likely smuggled to and exported from Singapore and the Philippines, at a minimum (ProFauna 2008). Continued trapping and large-scale logging that are not sufficiently regulated or mitigated by the Indonesian government remain threats to the species. For some subspecies, there are specific local protections in place, but they are inadequate to combat the threats facing the species according to a local NGO who works on the conservation of this species. For example, a local law for the protection of *C. s. abbotti* exists, which IPP assisted in obtaining in 2010 (Metz 2010, pers. comm.).

With respect to the adequacy of internal government controls within Indonesia, we find that they are inadequate (refer to discussion and finding under Factor D for the white cockatoo, which faces the same threats with respect to this factor). Poaching and illegal trade of this species continue to occur. This species continues to experience population declines, and the protections in place are inadequate to protect this species. CITES regulates international trade of this species, and we have no evidence to suggest that CITES is inadequate in regulating legal trade of this species. Therefore, we find that the inadequacy of regulatory mechanisms is a threat to *Cacatua sulphurea* throughout its range.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Interspecific Competition

The Komodo dragon (*Varanus komodoensis*) preys upon eggs and uses nests of *Cacatua sulphurea* during the species' arboreal phase. Observations have been made of competition between the dragon and cockatoo when using the tree *Sterculia foetida* for nesting (Agista & Rubyanto 2001 in Prijono 2008, p. 4). Although individuals of *C. sulphurea* may be subject to occasional competition with Komodo dragons, there is no evidence that this is occurring at a level which may affect the status of *C. sulphurea* on Komodo Island as a whole.

Small and Declining Population

All four subspecies of *Cacatua sulphurea* have very limited geographic ranges and small, declining populations. Their existing populations are extremely localized, and sometimes geographically isolated from one another, leaving them vulnerable to localized extinctions from habitat modification and destruction; natural catastrophic changes to their habitat (*e.g.,* flood scour, drought); other stochastic disturbances; and decreased fitness from reduced genetic diversity. It is likely that fewer than 1,000 to 2,000 individuals representing each subspecies remain in the wild; in the case of *C. s. abbotti* and *C. s. sulphurea,* there are likely fewer than 100 of each subspecies (Metz 2010, pers. comm.) (see Table 3).

TABLE 3—YELLOW-CRESTED COCKATOO POPULATION ESTIMATES

Species	Where found and date of population estimate	Estimated number remaining in the wild
Yellow-crested cockatoo (*Cacatua sulphurea*)	Indonesia and Timor-Leste	2,500 to 6,000*
Subspecies:		
C. s. abbotti	Sulawesi Strait (2010)	30
C. s. citrinocristata	Sulawesi Strait (2002)	565 to 2,054
C. s. parvula	Sulawesi Strait (2000, 2009)	500 to 2,000
	Timor (2000, 2004)	500
C. s. sulphurea	Sulawesi Strait (2010)	100 to 150

* Number includes all four subspecies.

Species with limited geographic ranges and small, declining populations are extremely vulnerable. Demographic stochasticity may affect this species as well, and is defined as chance changes in the population growth rate for a species (Gilpin and Soulé 1986, p. 27). Population growth rates are influenced by individual birth and death rates (Gilpin and Soulé 1986, p. 27), immigration and emigration rates, and changes in population sex ratios. Natural variation in survival and reproductive success of individuals and chance disequilibrium of sex ratios may act in concert to contribute to demographic stochasticity (Gilpin and Soulé 1986, p. 27).

Genetic stochasticity is caused by changes in gene frequencies due to genetic drift, diminished genetic diversity, effects due to inbreeding (*i.e.,* inbreeding depression), or a combination of these factors (Lande 1995, p. 786). Inbreeding can have individual or population-level consequences, either by increasing the phenotypic expression (the outward appearance, or observable structure, function, or behavior of a living organism) of recessive, deleterious alleles or by reducing the overall fitness of individuals in the population (Charlesworth and Charlesworth 1987, p. 231; Shaffer 1981, p. 131). Environmental stochasticity is defined as the susceptibility of small, isolated populations of wildlife species to natural levels of environmental variability and related ''catastrophic'' events (*e.g.,* severe storms, extreme cold spells, wildfire) (Dunham *et al.* 1999, p. 9; Mangel and Tier 1994, p. 612; Young 1994, pp. 410–412). Each risk will be analyzed specifically for each species.

Small, isolated populations of wildlife species that have gone through a reduction in population numbers can be

susceptible to demographic and genetic problems (Shaffer 1981, pp. 130–134). These threat factors, which may act in concert, include: Natural variation in survival and reproductive success of individuals; chance disequilibrium of sex ratios; changes in gene frequencies due to genetic drift; diminished genetic diversity and associated effects due to inbreeding (*i.e.,* inbreeding depression); dispersal of just a few individuals; a few clutch failures; a skewed sex ratio in recruited offspring over just one or a few years; and chance mortality of just a few reproductive-age individuals. These small populations are also susceptible to natural levels of environmental variability and related catastrophic events, which we will refer to as environmental stochasticity (Dunham *et al.* 1999, p. 9; Mangel and Tier 1994, p. 612; Young 1994, pp. 410–412).

Based on the best scientific and commercial information available, we conclude that *Cacatua sulphurea's* very small and rapidly declining populations are a threat to the species throughout its range, particularly when combined with other threats to this species.

Finding for the Yellow-Crested Cockatoo

As required by the ESA, we considered the five factors in assessing whether *Cacatua sulphurea* is endangered or threatened throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by *C. sulphurea.* We reviewed the petition, information available in our files, and other available published and unpublished information.

We analyzed the potential threats to *Cacatua sulphurea,* including habitat loss and habitat degradation, take for the pet trade, disease and predation, and the inadequacy of regulatory controls. We found that habitat loss as a result of deforestation is a threat to *C. sulphurea,* and the subspecies are declining rangewide. This species faces immediate and significant threats, primarily from the destruction and modification of its habitats from logging (Factor A). Efforts such as reforestation and building of nest boxes may continue to improve the habitat of this species, which may subsequently increase their numbers. However, no improvement has been seen yet as a result of conservation efforts (Metz 2010, pers. comm.). We conclude that the present or threatened destruction, modification, or curtailment of its habitat or range is a significant threat to *C. sulphurea.*

We found information that poaching for the pet trade is also a significant threat to the species. Illegal poaching of the cockatoo for the pet trade is still common, despite existing laws, education, and public awareness campaigns. Pet birds are an important part of Indonesian culture, with large numbers of wild-caught parrots traded domestically and internationally. Trappers remain active, and wild-caught birds are openly sold in Asian markets (Prijono 2008, p. 18). Efforts to curtail illegal trade are hampered by Indonesia's large coastline and enforcement officials with limited resources and knowledge. The continuing illegal trade of the cockatoo is a threat to the survival of the species. Therefore, we find overutilization for commercial, recreational, scientific, or educational purposes (Factor B) is a threat to *Cacatua sulphurea* throughout its range.

We found no evidence that diseases significantly affect *Cacatua sulphurea* in the wild. Other avian species may be susceptible to certain diseases, but there is no evidence that disease occurs to an extent that it is a threat to this species. Predation was not found to affect *C. sulphurea* populations; however, we will continue to monitor this factor. Based on the best available information, we conclude that neither disease nor predation (Factor C) is a threat to the species throughout its range.

Although Indonesia has a good legal framework to manage wildlife and their habitats, implementation of its laws and regulatory mechanisms has been inadequate to address the threats to *Cacatua sulphurea.* Logging laws and policies are frequently ignored and rarely enforced, and illegal logging is rampant, even occurring in national parks and nature reserves (Prijono 2008). The illegal trade of this species continues to occur. The current range of *C. sulphurea* is much smaller than its historical range. The population estimates for each subspecies range from 30 to 2,054 individuals. Threats to *C. sulphurea* continue, and based on the best available information, the population trends are declining. Thus, we conclude that inadequate regulatory mechanisms are a threat to *C. sulphurea* throughout its range.

Finally, we conclude that small, declining populations of *Cacatua sulphurea* are a threat to the species, particularly when combined with the other threats to the species (Factor E).

Despite the conservation measures in place, this species faces severe threats, and the population trend for this species continues to decline. Based on our review of the best available scientific and commercial information pertaining to the five factors, we find that *Cacatua sulphurea* is in danger of extinction (endangered) throughout all of its range. Therefore, we propose to list *C. sulphurea* as endangered under the ESA.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages and results in conservation actions by Federal and State governments, private agencies and interest groups, and individuals.

The ESA and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. These prohibitions, at 50 CFR 17.21 and 17.31, in part, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt any of these) within the United States or upon the high seas; import or export; deliver, receive, carry, transport, or ship in interstate commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the ESA. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits for endangered species are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. For threatened species, a permit may be issued for the same activities, as well as zoological exhibition, education, and special purposes consistent with the ESA.

Special Rule

Section 4(d) of the ESA states that the Secretary of the Interior (Secretary) may, by regulation, extend to threatened species prohibitions provided for endangered species under section 9 of the ESA. Our implementing regulations for threatened wildlife at 50 CFR 17.31

incorporate the section 9 prohibitions for endangered wildlife, except when a special rule is promulgated. For threatened species, section 4(d) of the ESA gives the Secretary discretion to specify the ESA prohibitions and any exceptions to those prohibitions that are appropriate for the species. A special rule allows us to include provisions that are tailored to the specific conservation needs of the threatened species and which may be more or less restrictive than the general provisions at 50 CFR 17.31.

The proposed special rule for the white cockatoo, in most instances, adopts the existing conservation regulatory requirements of CITES and the WBCA as the appropriate regulatory provisions for the import and export of certain captive white cockatoos. It would also allow interstate commerce. However, import and export of birds taken from the wild after the date this species is listed under the ESA, take, and foreign commerce would need to meet the requirements of 50 CFR 17.31 and 17.32. ''Take'' under the ESA includes both harm and harass. When applied to captive wildlife, take does not include generally accepted animal husbandry practices, breeding procedures, or provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife. When conducting an activity that could take or incidentally take wildlife, a permit under the ESA is required.

If adopted, the proposed special rule would allow import and export of certain white cockatoos and interstate commerce of this species without a permit under the ESA as explained below.

Import and export. The proposed special rule would apply to all commercial and noncommercial international shipments of live white cockatoos and parts and products, including the import and export of personal pets and research samples. It proposes to allow a person to import or export a specimen that was held in captivity prior to the date this species is listed under the ESA or that was captive-bred provided the import is authorized under CITES and the WBCA and export is authorized under CITES. The terms ''captive-bred'' and ''captivity'' used in the proposed special rule are defined in the regulations at 50 CFR 17.3 and refer to wildlife produced in a controlled environment that is intensively manipulated by man from parents that mated or otherwise transferred gametes in captivity. The proposed special rule would apply to birds captive-bred in the United States and abroad. Import and export of specimen that have been held in captivity prior to the date this species is list under the ESA or that was captive-bred would be allowed without a permit under the ESA provided the provisions of CITES and WBCA are met. With respect to captive-bred specimens, the CITES import and export permits would need to indicate that the specimen was not taken from the wild by using a source code on the face of the permit other than U (unknown) or W (taken from the wild). If the specimen was taken from the wild prior to the date this species is listed under the ESA, the importer or exporter would need to demonstrate that the cockatoo was taken from the wild prior to that date. Under the special rule, a person would need to provide records, receipts, or other documents when applying for permits under CITES and WBCA to show the specimen was held in captivity prior to the date this species is listed under the ESA.

We assessed the conservation needs of the white cockatoo in light of the broad protections provided to the species under the WBCA and CITES. The purpose of the WBCA is to promote the conservation of exotic birds and to ensure that international trade involving the United States does not harm exotic birds. The white cockatoo is also protected by CITES, a treaty which contributes to the conservation of the species by monitoring international trade and ensuring that trade in Appendix II species is not detrimental to the survival of the species (see Conservation Status for the white cockatoo). The best available commercial data indicate that the current threat to the white cockatoo stems from illegal trade in the domestic and international markets of Indonesia and surrounding countries. Thus, the general prohibitions on import and export contained in 50 CFR 17.31, which only extend within the jurisdiction of the United States, would not regulate such activities. Accordingly we find that the import and export requirements of the proposed special rule provide the necessary and advisable conservation measures that are needed for this species.

Interstate commerce. Under the proposed special rule, a person may deliver, receive, carry, transport, ship, sell, offer to sell, purchase, or offer to purchase a white cockatoos in interstate commerce. Although we do not have current data, we believe there are a large number of white cockatoos in the United States. Current ISIS (International Species Information System) information shows 252 white cockatoos are held in U.S. zoos (ISIS 2008, p. 4). This number is an underestimate, as some zoos do not enter data into the ISIS database. We have no information to suggest that interstate commerce activities are associated with threats to the white cockatoo or would negatively affect any efforts aimed at the recovery of wild populations of the species. At the same time, the prohibitions on take under 50 CFR 17.31 would apply under this special rule, and any interstate commerce activities that could incidentally take cockatoos would require a permit under 50 CFR 17.32.

Pet Birds

A ''Pre''-ESA (or ''Pre-Act'') specimen of a species is one that was made or obtained prior to the species being listed under the ESA and has not been involved in a commercial transaction since that time. Specimens of species held in captivity or in a controlled environment on (a) December 28, 1973, or (b) the date of publication in the **Federal Register** for a final species listing, whichever is later, are exempt from prohibitions of the ESA, provided such holding or any subsequent holding or use of the specimen was not in the course of a commercial activity (any activity that is intended for profit or gain). An affidavit and supporting material documenting pre-ESA status must accompany the shipment of any listed species. A pre-ESA exemption does not apply to wildlife, including parts and products, offered for sale. In order to export a pet bird, an owner would need to provide information that the specimen was acquired or held in a controlled environment on or before (a) December 28, 1973, or the date when the species was listed, and (b) has not entered into commerce (*e.g.,* been bought, sold, or offered for sale by you or anyone else) since December 28, 1973, or the date when listed. Any specimens of an endangered or threatened species born in captivity from pre-ESA parents are fully protected and are not considered pre-ESA. See *http://www.fws.gov/forms/3-200-23.pdf* for additional information.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. However, given that these species are not native to the United States, we are not

designating critical habitat for these species under section 4 of the Act.

Peer Review

In accordance with our policy, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' that was published on July 1, 1994 (59 FR 34270), we will seek the expert opinion of at least three appropriate independent specialists regarding this proposed rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analysis. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and the data that are the basis for our conclusions regarding the proposal to list as endangered the Philippine cockatoo (*Cacatua haematuropygia*) and the yellow-crested cockatoo (*C. sulphurea*), and to list as threatened the white cockatoo (*C. alba*), under the ESA.

We will consider all comments and information we receive during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, our final decision may differ from this proposal.

Required Determinations

Clarity of Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the names of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that we do not need to prepare an environmental assessment, as defined under the authority of the National Environmental Policy Act of 1969, in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A list of all references cited in this document is available at *http://www.regulations.gov,* Docket No. FWS–R9–ES–2010–0099, or upon request from the U.S. Fish and Wildlife Service, Endangered Species Program, Branch of Foreign Species (see **FOR FURTHER INFORMATION CONTACT** section).

Author

The primary authors of this notice are staff members of the Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by adding new entries for ''Cockatoo, Philippine,'' ''Cockatoo, white,'' and ''Cockatoo, yellow-crested'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife, as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Cockatoo, Philippine	*Cacatua haematuropygia.*	Philippines	Entire	E	786	NA	NA
Cockatoo, white	*Cacatua alba*	Indonesia	Entire	T	786	NA	17.41(d)
Cockatoo, yellow-crested.	*Cacatua sulphurea*	Indonesia and Timor-Leste (East Timor).	Entire	E	786	NA	NA
*	*	*	*	*	*		*

3. Amend § 17.41 by adding paragraph (d) to read as follows:

§ 17.41 Special rules—birds.

* * * * *

(d) White cockatoo (*Cacatua alba*).

(1) Except as noted in paragraphs (d)(2) and (d)(3) of this section, all prohibitions and provisions of §§ 17.31

and 17.32 of this part apply to the white cockatoo.

(2) *Import and export.* You may import or export a specimen without a permit issued under § 17.32 of this part only when the provisions of parts 13, 14, 15, and 23 of this chapter have been met and you meet the following requirements:

(i) Captive-bred specimens: The source code on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) document accompanying the specimen must be ''F'' (captive-bred), ''C'' (bred in captivity), or ''D'' (bred in captivity for commercial purposes) (see 50 CFR 23.24); or

(ii) Specimens held in captivity prior to the date this species was listed under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*): You must provide documentation to demonstrate that the specimen was held in captivity prior to the date the species is listed under the ESA. Such documentation may include copies of receipts, accession or veterinary records, CITES documents, or wildlife declaration forms, which must be dated prior to the date this species was listed under the Endangered Species Act of 1973, as amended.

(3) *Interstate commerce.* Except where use after import is restricted under § 23.55 of this subchapter, you may deliver, receive, carry, transport, ship, sell, offer to sell, purchase, or offer to purchase in interstate commerce a live white cockatoo.

Dated: July 26, 2011.

James J. Slack,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–19532 Filed 8–8–11; 8:45 am]

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Part IV

Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedures for Residential Clothes Washers; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2010–BT–TP–0021]

RIN 1904–AC08

Energy Conservation Program: Test Procedures for Residential Clothes Washers

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

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In this supplemental notice of proposed rulemaking (SNOPR), the U.S. Department of Energy (DOE) proposes to revise its test procedure for residential clothes washers established under the Energy Policy and Conservation Act (EPCA). DOE proposes to incorporate provisions of the International Electrotechnical Commission (IEC) Standard 62301, ''Household electrical appliances—Measurement of standby power'' (Second Edition). DOE also proposes to update the provisions for measuring active mode energy and water consumption.

DATES: DOE will accept comments, data, and information regarding this SNOPR no later than September 8, 2011 See section V, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the SNOPR for Test Procedures for residential clothes washers, and provide docket number EERE–2010–BT–TP–0021 and/or regulatory information number (RIN) number 1904–AC08. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
2. *E-mail: RES-CW-2010-TP-0021@ee.doe.gov*. Include the docket number and/or RIN in the subject line of the message.
3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.
4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. *Telephone:* (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Office of Energy Efficiency and Renewable Energy through the methods listed above and by e-mail to *Christine_J._Kymn@omb.eop.gov*.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket is available for review at *http://www.regulations.gov/#!docketDetail;D=EERE-2010-BT-TP-0021,* including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. The *regulations.gov* web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *regulations.gov.*

For further information on how to submit a comment or review other public comments and the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by *e-mail: Brenda.Edwards@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen L. Witkowski, 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) 586–7463. *E-mail: Stephen.Witkowski@ee.doe.gov*.

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*.

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I. Authority and Background

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.*; ''EPCA'' or, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140 (Dec. 19, 2007)). Part B of title III (42 U.S.C. 6291–6309), which was subsequently redesignated for editorial reasons as Part A on codification in the U.S. Code, establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' These include residential clothes washers, the subject of today's notice. (42 U.S.C. 6292(a)(7))

Under EPCA, this program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use (1) As the basis for certifying to DOE that their products comply with the applicable energy conservation

standards adopted under EPCA, and (2) for making representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with any relevant standards promulgated under EPCA.

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides in relevant part that any test procedures prescribed or amended under this section must be reasonably designed to produce test results that measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use. Test procedures must not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

DOE Test Procedure at Appendix J1

The DOE test procedure for clothes washers currently being manufactured is found at 10 CFR part 430, subpart B, appendix J1. DOE adopted appendix J1 in a 1997 final rule (hereinafter referred to as the August 1997 Final Rule) to correct for changes in consumer habits that resulted in an overstatement of average annual energy consumption when using the methods specified in appendix J. 62 FR 45508 (Aug. 27, 1997). DOE added appendix J1, rather than amending appendix J, to accommodate continued use of appendix J until DOE amended the residential clothes washer conservation standards to reference the new appendix J1.[1] On January 12, 2001, DOE published a final rule (hereinafter referred to as the January 2001 Final Rule), to amend the energy conservation standards for residential clothes washers. The January 2001 Final Rule references the efficiency metrics as defined in appendix J1. 66 FR 3314. Use of the amended J1 test procedure was required to demonstrate compliance with these amended energy conservation standards as of January 1, 2004. Since 1997, DOE has amended the test procedure in appendix J1 three times, twice substantively to address test cloth correlation procedures, and once to correct the introductory note. 63 FR 16669 (Apr. 6, 1998); 66 FR 3314, 3330 (Jan. 12, 2001); 68 FR 62198, 62204 (Oct. 31, 2003).

The test procedure at appendix J1 includes provisions for determining the modified energy factor (MEF) for clothes washers, which is a function of the total energy used for each cubic foot (ft^3) of clothes washer capacity. The test procedure measures the total energy consumption of the clothes washer and provides for calculation of the remaining moisture content (RMC) of the clothes at the completion of the machine's full cycle. The test procedure at appendix J1 does not address energy use in the standby or off modes.

DOE Test Procedure Updates: Authority and Regulatory Background

EPCA requires DOE to review its test procedures at least once every seven years to determine whether amendments are warranted. (42 U.S.C. 6293(b)(1)) This rulemaking satisfies EPCA's periodic review requirement.

The Energy Independence and Security Act of 2007 (EISA 2007), Public Law No. 110–140 also amended EPCA to require DOE to amend its test procedures to integrate measures of standby mode and off mode energy consumption into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedure already fully accounts for and incorporates standby and off mode energy consumption or such integration is technically infeasible. If an integrated test procedure is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Any such amendment must consider the most current versions of IEC Standard 62301 and IEC Standard 62087, ''Methods of measurement for the power consumption of audio, video, and related equipment.''[2]

In evaluating amendments to its test procedure for clothes washers, DOE considered input from the public received in its separate rulemaking proceeding to consider amendments to the energy conservation standards applicable to residential clothes washers.[3] On August 28, 2009, DOE published a notice in the **Federal Register** announcing the availability of a framework document in its rulemaking to consider amended energy conservation standards for residential clothes washers (hereafter the August 2009 framework document). 74 FR 44306. In the August 2009 framework document, DOE requested comments on revising the clothes washer test procedure. DOE also held a public meeting on September 21, 2009 (hereinafter referred to as the September 2009 public meeting) to discuss the issues presented in the framework document, including issues related to the test procedure.

DOE received comments in response to the August 2009 framework document stating that it should consider changes to the active mode test procedure for clothes washers. As a result, in addition to proposing amendments to its test procedure to include measures for standby and off mode power consumption, DOE proposed to address issues regarding the active mode provisions of the test procedure. As discussed in more detail below, the proposals were set forth in a notice of proposed rulemaking issued on September 21, 2010 (75 FR 57556) (hereinafter referred to as the September 2010 NOPR) and are being refined in this SNOPR.

In the September 2010 NOPR, DOE proposed a number of revisions and additions to the test procedure at appendix J1, including: (1) Incorporating standby and off mode power consumption into a combined energy metric; (2) addressing technologies not covered by the appendix J1 test procedure, such as steam wash cycles and self-clean cycles; (3) revising the number of annual wash cycles; (4) updating use factors; (5) revising the procedures and specifications for test cloth; (6) redefining the appropriate water fill

[1] Because appendix J applies only to clothes washers manufactured before January 1, 2004, appendix J is now obsolete. 10 CFR 430 appendix J1.

[2] IEC standards are available online at *http://www.iec.ch.*

[3] EISA 2007 also amended EPCA, in relevant part, to revise the energy conservation standards for residential clothes washers. The revised standards established a maximum water consumption factor (WF) of 9.5, effective January 1, 2011. EISA 2007 further required that DOE publish a final rule no later than December 31, 2011 determining whether to amend the standards in effect for clothes washers manufactured on or after January 1, 2015. (42 U.S.C. 6295(g)(9)) DOE is also required to consider standby and off mode standards for residential clothes washers. (42 U.S.C. 6295(gg)(2)(C).

level for the capacity measurement method; (7) establishing a new measure of water consumption; and (8) revising the definition of the energy test cycle. DOE requested comment on the proposals in the September 2010 NOPR and held a public meeting on October 28, 2010 (hereinafter referred to as the October 2010 public meeting) to discuss the issues presented.

The principal test procedure issues on which interested parties commented included: (1) The referenced version of IEC Standard 62301; (2) mode definitions; (3) inclusion of steam and self-clean cycles; (4) measurement of delay start and cycle finished mode; (5) calculation of annual energy use; (6) test cloth specifications; (7) usage patterns, in particular annual use cycles, wash temperatures, and load sizes, including a potential bias in favor of large-capacity clothes washers; and (8) test burden.

II. Summary of the Supplemental Notice of Proposed Rulemaking

The following paragraphs summarize the changes and additions to the September 2010 NOPR that DOE proposes in today's SNOPR. In the regulatory text set forth at the end of this SNOPR, DOE sets forth the proposed regulatory text from the September 2010 NOPR, as amended by today's proposals. DOE's supporting analysis and discussion for the portions of the proposed regulatory text not affected by this SNOPR may be found in the September 2010 NOPR. 75 FR 57556 (Sept. 21, 2010).

A. Standby Mode and Off Mode

In the September 2010 NOPR, DOE proposed amendments to its clothes washer test procedure including incorporating by reference specific provisions from IEC Standard 62301, First Edition 2005–06 (''IEC Standard 62301 (First Edition)'' or ''First Edition'') regarding test conditions and test procedures for measuring standby mode and off mode power consumption. 75 FR 57556, 57560 (Sept. 21, 2010). DOE also proposed to incorporate the definitions of ''active mode,'' ''standby mode,'' and ''off mode'' that were based on the definitions for those terms provided in the most current draft at that time of an updated version of IEC Standard 62301 (the Committee Draft for Vote, or ''CDV'' version). *Id.* at 57560–62. Further, DOE proposed to include additional language that would clarify the application of clauses from IEC Standard 62301 (First Edition) for measuring standby mode and off mode power consumption.[4] *Id.* at 57562–63.

In response to the September 2010 NOPR, commenters suggested that the draft updated version of IEC Standard 62301 would improve the mode definitions and testing methodology. The IEC published IEC Standard 62301, Edition 2.0 2011–01 (''IEC Standard 62301 (Second Edition)'' or ''Second Edition'') on January 27, 2011. DOE has reviewed this updated test procedure and believes that it improves some measurements of standby mode and off mode energy use. Accordingly, DOE proposes in today's SNOPR to incorporate certain provisions of the IEC Standard 62301 (Second Edition), along with clarifying language, into the new clothes washer test procedure. DOE also proposes to incorporate into the new test procedure definitions of ''active mode,'' ''standby mode,'' and ''off mode'' based on the definitions provided in IEC Standard 62301 Second Edition. In addition, DOE proposes to incorporate measures of energy consumption associated with delay start and cycle finished modes. Although these modes would be considered part of active mode, the proposed measurements and calculations for standby and off mode power consumption would include the energy use in such modes in a simplified approach to account for energy use associated with all low-power modes by means of a single power measurement.

Finally, DOE proposes in today's SNOPR to revise the calculations for per-cycle energy use and annual energy cost to incorporate non-active washing mode energy consumption. (42 U.S.C. 6293(b)(3); 42 U.S.C. 6291(4), (7).

B. Current Usage Patterns and Capabilities

The proposed test procedure would update certain values from the existing test procedure to reflect current usage patterns and capabilities. DOE received multiple comments on this issue in response to the August 2009 framework document, and reviewed current consumer data from surveys conducted in 2004 and 2005 to propose updates in the September 2010 NOPR. Based on this information and comments received in response to the September 2010 NOPR, DOE is proposing additional amendments to the load adjustment factor in today's SNOPR. DOE is also proposing in this SNOPR to update the test load sizes specified in appendix J1 to reflect the same test load sizes previously proposed for appendix J2, allowing for testing of large-capacity clothes washers to demonstrate compliance with existing energy conservation standards.

C. Additional Proposals

The revised clothes washer test procedure amendments DOE is proposing in today's SNOPR would update the procedure to clarify the existing methods for determining the energy test cycle, setting the wash time for certain clothes washers, using the most current AHAM Standard detergent, and clarifying the definition of ''cold wash'' for clothes washers that offer both ''cold wash'' and ''tap cold wash'' settings. DOE is also proposing the following amendments in today's SNOPR: Correcting the definition of cold rinse in appendix J1; deleting the redundant sections 2.6.1.1–2.6.1.2.4 in appendix J1; and correcting the calculations proposed in the September 2010 NOPR for per-cycle self-clean water consumption.

III. Discussion

A. Use of Proposed Test Procedure

The amended test procedures in 10 CFR part 430 subpart B appendix J1 and appendix J2 would become effective 30 days after the date of publication in the **Federal Register** of the final rule in this test procedure rulemaking. DOE would clarify in the published amended test procedures, however, that manufacturers would be required to use amended appendix J1 until the compliance date of any final rule establishing amended energy conservation standards that addresses standby and off mode power consumption for these products. 42 U.S.C. 6295(gg)(2)(C). At such time, manufacturers would begin using the test procedures in appendix J2.

B. Newly Proposed Standby Mode, Off Mode, and Active Mode Test Procedure Provisions

1. Incorporating by Reference IEC Standard 62301 Edition 2.0 for Measuring Standby Mode and Off Mode Power Consumption

As noted in the September 2010 NOPR, DOE considered, pursuant to EPCA, the most current versions of IEC Standard 62301 and IEC Standard 62087 for measuring power consumption in standby mode and off mode. (42 U.S.C. 6295(gg)(2)(A)) DOE noted that IEC

[4] EISA 2007 directs DOE to also consider IEC Standard 62087 when amending its test procedure to include standby mode and off mode energy consumption. See 42 U.S.C. 6295(gg)(2)(A). DOE has considered IEC Standard 62087, which addresses the methods of measuring the power consumption of audio, video, and related equipment, and determined that it is not relevant to this proposal.

Standard 62301 provides for measuring standby power in electrical appliances, including clothes washers, and therefore, is applicable to the provisions included in the new clothes washer test procedure. 75 FR 57556, 57560 (Sept. 21, 2010). DOE also noted that IEC Standard 62087, which applies to audio, video, and related equipment, is inapplicable to this rulemaking, and did not propose to include any of its provisions in the new test procedure. The Northwest Energy Efficiency Alliance (NEEA) agreed with DOE's determination that IEC Standard 62301 is an appropriate reference standard and that IEC Standard 62087 is not relevant to this rulemaking. (NEEA, No. 12 at p. 2).

DOE proposed in the September 2010 NOPR to incorporate by reference into this test procedure all applicable provisions from Sections 4 and 5 of IEC Standard 62301 (First Edition). Specifically, DOE proposed to incorporate, from section 4, (''General conditions for measurements''), paragraph 4.2, ''Test room;'' paragraph 4.4, ''Supply voltage waveform;'' paragraph 4.5, ''Power measurement accuracy;'' and from section 5, (''Measurements''), paragraph 5.1, ''General,'' Note 1; and paragraph 5.3, ''Procedure.'' 75 FR 57556, 57560 (Sept. 21, 2010). These clauses provide test conditions and test procedures for measuring average standby mode and average off mode power consumption. With respect to test conditions, section 4 of IEC Standard 62301 (First Edition) provides specifications for the test room conditions, supply voltage waveform, and power measurement meter tolerances to ensure repeatable and precise measurements of standby mode and off mode power consumption. With respect to test procedures, section 5 of IEC Standard 62301 (First Edition) provides methods for measuring power consumption when the power measurement is stable and when it is unstable.

DOE also proposed in the September 2010 NOPR to adopt certain provisions from the IEC Standard 62301 Committee Draft for Vote (CDV) version (an earlier draft version of the IEC 62301 revision), as well as the Final Draft International Standard (FDIS) version (the draft version developed just prior to the issuance of the Second Edition). Specifically, DOE proposed to adopt the 30-minute stabilization and 10-minute measurement periods as described in the CDV version and the mode definitions for active, standby and off mode as described in the FDIS version.

DOE noted in the September 2010 NOPR and at the October 2010 public meeting that the IEC was developing an updated version of IEC Standard 62301 (the Second Edition), and interested parties commented on the appropriate version to use for the measurement of standby mode and off mode energy use. Comments made at the public meeting were predicated upon IEC Standard 62301 Final Draft International Standard (FDIS) being the most current (draft) version of the updated standard. Alliance Laundry Systems (ALS); NEEA; Whirlpool Corporation (Whirlpool); the Association of Home Appliance Manufacturers (AHAM); BSH Home Appliances Corporation (BSH); and the Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCG), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE) (collectively, the ''California Utilities'') commented that DOE should reference the most current available draft of the Second Edition at the time, IEC Standard 62301 (FDIS). (ALS, No. 10 at p. 1; NEEA, No. 12 at p. 2; Whirlpool, No. 13 at pp. 1–2; AHAM, No. 14 at pp. 2–3; AHAM, Public Meeting Transcript, No. 20 at pp. 21–22; BSH, No. 17 at p. 3; California Utilities, No. 18 at p. 1) Whirlpool commented that the use of IEC Standard 62301 (FDIS) would support international harmonization and reduce manufacturer test burden. (Whirlpool, No. 13 at pp. 1–2) AHAM stated that combining mode definitions based on IEC Standard 62301 (FDIS) with the test methods from IEC Standard 62301 (First Edition) could be confusing to manufacturers, and ignores the intent of IEC Standard 62301 (FDIS). AHAM and Whirlpool further commented that DOE should not choose to reference only certain sections of IEC Standard 62301, and that the document is meant to be used in its entirety. (AHAM, No. 14 at p. 3; Whirlpool, No. 13 at p. 3) BSH agreed with DOE's proposal to use IEC Standard 62301 as the basis for the standby and lower power mode definitions, and noted that the most recent version of the standard (*i.e.,* IEC Standard 62301 (FDIS)) should be considered. (BSH, No. 17 at p. 2)

AHAM also submitted a comment supporting the incorporation by reference of the Second Edition in response to a Request for Information (RFI) issued by DOE to implement Executive Order 13563, ''Improving Regulation and Regulatory Review. (76 FR 6123, Feb. 3, 2011; AHAM, 4) [5] DOE considered this comment in today's SNOPR and, as stated below, is proposing to incorporate by reference relevant portions of the Second Edition.

IEC Standard 62301 (Second Edition) was issued on January 27, 2011 and is now the most current version of IEC Standard 62301. DOE has reviewed the FDIS and Second Edition versions of IEC Standard 62301, and notes that the provisions of the Second Edition are identical in substance to those of the FDIS version. Therefore, DOE interprets comments on IEC Standard 62301 (FDIS) to be equally applicable to IEC Standard 62301 (Second Edition).

DOE notes that IEC Standard 62301 (Second Edition) is an internationally accepted test procedure for measuring standby power in residential appliances, and that this version provides clarification to certain sections as compared to the First Edition, as discussed in the following paragraphs.

Section 4, paragraph 4.4 of the Second Edition revises the power measurement accuracy provisions of the First Edition. A more comprehensive specification of required accuracy is provided in the Second Edition that depends upon the characteristics of the power being measured. Testers using the Second Edition are required to measure the crest factor and power factor of the input power, and calculate a maximum current ratio (MCR). The Second Edition then specifies calculations to determine permitted uncertainty in MCR. DOE notes, however, that the allowable uncertainty is the same or less stringent than the allowable uncertainty specified in the First Edition, depending on the value of MCR and the power level being measured (see Table III.1 for example), so that sufficient accuracy of measurements is achieved under a full range of possible measured power levels without placing undue demands on the instrumentation. These power measurement accuracy requirements were based upon detailed technical submissions to the IEC in the development of IEC Standard 62301 (FDIS), which showed that commonly used power measurement instruments were unable to meet the original requirements for certain types of loads. Therefore, the test burden associated with the additional measurements and calculations is offset by the more reasonable requirements for testing equipment, while maintaining acceptable measurement accuracy. For these reasons, DOE proposes in today's supplemental notice to incorporate by

[5] All comments on the RFI are available at *http://www.gc.energy.gov/1705.htm.*

reference the power equipment specifications in section 4, paragraph 4.4 of IEC Standard 62301 (Second Edition).

TABLE III.1—COMPARISON OF ALLOWABLE UNCERTAINTY IN MEASURED POWER

Measured power *(W)*	Allowable uncertainty *(W)*		
	IEC 62301 (first edition)	IEC 62301 (second edition)	
		MCR = 5	MCR = 15
5.0	0.1	0.1	0.14
2.0	0.04	0.04	0.056
1.0	0.02	0.02	0.028
0.5	0.01	0.02	0.02
0.2	0.01	0.02	0.02

Additionally, IEC Standard 62301 (Second Edition) adds certain clarifications to the installation and setup procedures in section 5, paragraph 5.2 of the First Edition. The First Edition required that the product be installed in accordance with the manufacturer's instructions, except if those instructions conflict with the standby testing, and that if no instructions are given, the factory or default settings shall be used. IEC Standard 62301 (Second Edition) added provisions regarding products equipped with battery recharging circuits, as well as instructions for testing each relevant configuration option identified in the product's instructions for use.

In the September 2010 NOPR, DOE proposed that the clothes washer be installed according to the manufacturer's instructions, but did not propose additional provisions to require the use of default settings for testing standby energy consumption because it did not have information regarding the likelihood that consumers will alter the default display settings. DOE requested comment on the suitability of using the manufacturer's default settings in testing standby energy consumption. 75 FR 57556, 57563 (Sept. 21, 2010). AHAM, ALS, NEEA, and Whirlpool commented that standby energy consumption should be measured at the manufacturer default settings. ALS and AHAM further stated that if no factory default setting is indicated, the clothes washer should be tested with the settings as shipped from the manufacturer. AHAM stated that this approach would yield repeatable, reproducible results among test laboratories. (ALS, No. 10 at p. 1; AHAM, No. 14 at pp. 5–6; NEEA, No. 12 at p. 6; Whirlpool, No. 13 at p. 3)

DOE agrees with commenters that testing a clothes washer for standby mode energy use (and, by extension, the combined low-power mode energy use) at the default setting, or as shipped, if a default setting is not indicated, would ensure consistency of results test-to-test and among test laboratories. Therefore, DOE is proposing in today's SNOPR to incorporate by reference, with qualification as discussed below, the installation instructions in section 5, paragraph 5.2 of IEC Standard 62301 (Second Edition). DOE is not aware of any clothes washers with a battery recharging circuit.

Section 5, paragraph 5.2 of IEC Standard 62301 (Second Edition) also states that, where instructions for use provide configuration options, each relevant option should be separately tested. DOE believes that this requirement to separately test each configuration option could substantially increase test burden and potentially conflicts with the requirement within the same section to set up the product in accordance with the instructions for use or, if no such instructions are available, to use the factory or default settings. Therefore, DOE tentatively concludes that the portions of the installation instructions in section 5, paragraph 5.2 of IEC Standard 62301 (Second Edition) pertaining to batteries and the determination, classification, and testing of relevant modes are not appropriate for the clothes washer test procedure. Accordingly, DOE is proposing qualifying language in the test procedure amendments in today's SNOPR to disregard those portions of the installation instructions.

The Second Edition also contains provisions for the power supply (section 4.3) and power-measuring instruments (section 4.4). Paragraph 4.3.2 requires that the value of the harmonic content of the voltage supply be recorded during the test and reported. As described previously, Paragraph 4.4.1 requires the instrument to measure the crest factor and maximum current ratio. Paragraph 4.4.3 requires the instrument to be capable of measuring the average power or integrated total energy consumption over any operated-selected time interval. DOE is aware of commercially available power measurement instruments that can perform each of these required measurements individually. However, DOE is aware that certain industry-standard instruments, such as the Yokogawa WT210/WT230 digital power meter and possibly others, are unable to measure harmonic content or crest factor while measuring average power or total integrated energy consumption. DOE is concerned that laboratories currently using power-measuring instruments without this capability would be required to purchase, at potentially significant expense, additional power-measuring instruments that are able to perform all these measurements simultaneously. Therefore, DOE proposes that it would be acceptable to measure the total harmonic content, crest factor, and maximum current ratio before and after the actual test measurement if the power measuring instrument is unable to perform these measurements during the actual test measurement. DOE requests comment on whether this represents an acceptable interpretation of the power measurement requirements of the Second Edition.

The other changes in the Second Edition that relate to the measurement of standby mode and off mode power consumption involve the measurement techniques and specification of the stability criteria required to measure that power. The Second Edition contains more detailed techniques to evaluate the stability of the power consumption and to measure the power consumption for loads with different stability characteristics. The user is given a choice of measurement procedures, including sampling methods, average reading methods, and a direct meter reading method. DOE evaluated these new methods in terms of test burden and improvement in results as compared to those methods proposed in the September 2010 NOPR, which were based on IEC Standard

62301 (First Edition), and also to identify the most consistent and repeatable method for use in the DOE clothes washer test procedure.

In the September 2010 NOPR, DOE proposed to require measurement of standby mode and off mode power using section 5, paragraph 5.3 of IEC Standard 62301 (First Edition), clarified by requiring the product to stabilize for at least 30 minutes and using an energy use measurement period of not less than 10 minutes for cycle finished mode, inactive mode, and off mode. 75 FR 57556, 57562–63 (Sept. 21, 2010). For delay start mode, the September 2010 NOPR proposed to require the delay start time to be set to 5 hours, allowing at least a 5-minute stabilization period followed by a 60-minute measurement period. *Id.* at p. 57563. Further, for any clothes washer in which the power varies over a cycle, as described in section 5, paragraph 5.3.2 of the First Edition, the September 2010 NOPR proposed to require the use of the average power approach in section 5, paragraph 5.3.2(a). *Id.*

For today's supplemental notice, DOE compared the provisions of each edition under different scenarios of power consumption stability to determine the potential impacts of referencing the methodology from IEC Standard 62301 (Second Edition) rather than from the First Edition. Based on this analysis, DOE is proposing in today's SNOPR that the power measurement be made using a sampling method described in IEC Standard 62301 (Second Edition). Because, for the reasons discussed in section III.B.2, DOE is not proposing to require separate measurement of power consumption in cycle finished mode and delay start mode, the analysis presented in the following sections is limited to measurements made in inactive mode and off mode.

a. Stable Power Consumption

According to section 5, paragraph 5.3.1 of IEC Standard 62301 (First Edition), power consumption is defined as stable if it varies by less than 5 percent over 5 minutes. In such a case, a direct reading may be made at the end of the measurement period. With the proposed clarifications in the September 2010 NOPR, the total test time for inactive mode or off mode would be a minimum of 40 minutes (comprised of a minimum 30-minute stabilization period, followed by a minimum 10-minute period during which the stability criterion could be evaluated and a direct power reading taken). Alternatively, the tester may select an average power or accumulated energy approach, again with a minimum 30-minute stabilization period and a minimum 10-minute measurement period. The average power approach would simply require a different reading to be taken from the instrument (true average power instead of a direct reading of instantaneous power), while the accumulated energy approach would require the calculation of power by dividing accumulated energy by the duration of the measurement period.

In comparison, section 5, paragraph 5.3.2 of IEC Standard 62301 (Second Edition) identifies a sampling method as the preferred means for all power consumption measurements and the fastest test method when the power is stable. For any non-cyclic power consumption, power readings are initially recorded over a period of at least 15 minutes after energizing the product. Data from the first third of the measurement period are discarded, and stability is evaluated by a linear regression through all power readings in the second two-thirds of the data. If the slope of the linear regression is less than 10 milliwatts per hour (mW/h) for input power less than or equal to 1.0 W, or less than 1 percent of the input power per hour for input power greater than 1.0 W, the power consumption is calculated as the average of the power readings during the second two-thirds of the measurement period. If the slope of the linear regression does not meet these stability criteria, the total period is continuously extended until the stability criteria are met for the second two-thirds of the data. In some cases, this is a more stringent requirement than the stability criteria of IEC Standard 62301 (First Edition). The lack of a definitive test period means that the test duration could extend past 15 minutes for certain products—up to 3 hours is allowed in the Second Edition—and could introduce added test burden as compared to the First Edition. In addition, performing the continuous linear regression analysis required by the Second Edition would require the use of data-acquisition software with the capability of performing real-time statistical analysis, whereas the First Edition requires only simple data logging capabilities. DOE requests comment on the potential test burden for a laboratory that would be required to upgrade its data acquisition system to enable real-time statistical analysis capabilities.

IEC Standard 62301 (Second Edition) additionally provides an alternative measurement method which may be used when the power consumption is stable. Section 5, paragraph 5.3.4 of IEC Standard 62301 (Second Edition) specifies a direct reading method in which a minimum 30-minute stabilization period must be observed, followed by a first power measurement. After an additional period of 10 minutes, a second power measurement is taken. If the average of the two measurements divided by the time interval between them meets certain threshold criteria, then the power consumption is considered to be the average of the two power measurements. Thus, the total test period would still be a minimum of 40 minutes. DOE agrees that this method likely improves the validity of the test results as compared to the First Edition, since it is a more stringent measure of the stability of the power consumption over a longer period of time than the First Edition requires. However, if the threshold criteria are not met at the end of the test, a different measurement method must be used. Further, the Second Edition specifies that the direct reading method shall not be used for verification purposes. Both of these qualifications potentially increase test burden as compared to the First Edition, possibly requiring the tester to conduct the more complex methodology of the methods available under the Second Edition.

b. Unstable, Non-Cyclic Power Consumption

Section 5, paragraph 5.3.2 from IEC Standard 62301 (First Edition), which DOE proposed in the September 2010 NOPR to incorporate by reference with clarification, specifies that either the average power method or accumulated energy approach could be used for measuring unstable, non-cyclic power consumption (described in the Second Edition as non-cyclic and ''varying'' power consumption). As described previously, the clarifications proposed in the September 2010 NOPR would limit total test duration to 40 minutes for inactive mode and off mode.

In contrast, paragraph 5.3 of the Second Edition requires the use of either a sampling method or average reading method for measuring unstable, non-cyclic power consumption in standby mode or off mode. As noted previously, DOE is proposing to require the use of the sampling method, based on the following analysis.

The sampling method in paragraph 5.3.2 is the same as described previously, but the measurement period must be at least 60 minutes, and the cumulative average of all data points recorded during the second two-thirds of the total period must fall within a band of ± 0.2 percent. The test procedure does not provide an upper time limit for testing, possibly resulting in significantly increased measurement

time if the cumulative average criteria cannot be achieved after 60 minutes.

The average reading method in section 5, paragraph 5.3.3 in IEC Standard 62301 (Second Edition) describes both an average power method and accumulated energy method, either of which may be selected for unstable, non-cyclic power. For both types of the average reading method, a 30-minute stabilization period is specified, followed by two comparison measurement periods of not less than 10 minutes each. The average power values, which are either measured directly or calculated from accumulated energy during each period, are compared to determine whether they agree to within certain threshold criteria. If the threshold is not achieved, the comparison periods are each extended in approximately equal increments until the threshold is met. If agreement is not achieved after reaching 30 minutes for each comparison period, the sampling method must then be used. Therefore, the minimum test period is 50 minutes, but may extend up to 90 minutes, at which time an additional test may be required.

DOE believes that the stability criteria in either method improves the accuracy and representativeness of the measurement as compared to the First Edition, but would cause the required test time to increase, with a corresponding increase in manufacturer burden due to the additional time and complexity of the test conduct. Additionally, DOE believes that manufacturers could face the risk of significant additional test burden if the average reading method is initially chosen but the power measurements do not meet the threshold criteria with the allowable 90-minute maximum test time, requiring a subsequent test using the sampling method.

c. Cyclic Power Consumption

As noted previously, DOE proposed in the September 2010 NOPR to use the average power approach of section 5, paragraph 5.3.2(a) in IEC Standard 62301 (First Edition), with a minimum 30-minute stabilization period and 10-minute measurement period. The First Edition also requires that at least one or more complete cycles be measured.

In the Second Edition, cyclic power must be measured according to the sampling method in section 5, paragraph 5.3.2, but this method requires a measurement period of at least four complete cycles (for a total of at least 40 minutes) divided into two comparison periods, with stability criteria evaluated by calculating the difference in average power measured in each comparison period divided by the time difference of the mid-point of each comparison period. This ''slope'' must be less than 10 mW/h for input powers less than or equal to 1 W, and less than 1 percent of the input power per hour for input powers greater than 1 W. If the appropriate stability criterion is not met, additional cycles are added to each comparison period until the criterion is achieved. Once stability has been reached, the power consumption is calculated as the average of all readings from both comparison periods. DOE believes that this methodology produces an improved measurement over the methodology from the First Edition, but the test duration could be extended, again potentially introducing issues of test burden.

Conclusions on Incorporation of IEC Standard 62301 (Second Edition)

In evaluating IEC Standard 62301 (Second Edition) and comparing it to the First Edition, DOE recognizes the considerable body of comments on and input to the provisions and methodology that IEC developed as part of its latest revision process. DOE recognizes that, in some cases, test burden and complexity would be increased by requiring the use of the power supply, power measuring equipment, and test methods specified in the Second Edition. However, DOE believes that in most cases for residential clothes washers this added burden on manufacturers is outweighed by the improved accuracy and representativeness of the resulting power consumption measurement. Furthermore, manufacturers supported DOE's use of the Second Edition. Therefore, DOE concludes provisionally that the application of the provisions of the Second Edition to all power measurements in standby mode and off mode for clothes washers would be an improvement over the First Edition and would not be unduly burdensome to conduct. Therefore, DOE is proposing incorporation by reference of the relevant paragraphs of section 4 and section 5 of IEC Standard 62301 (Second Edition) in the clothes washer test procedure.

To this end, DOE is also proposing to amend the reference in 10 CFR 430.3 to add a reference to IEC Standard 62301 (Second Edition). DOE is not proposing to replace the reference to the First Edition in 10 CFR 430.3 because several test procedures for other covered products not addressed in today's SNOPR incorporate provisions from it. There are also certain section numbering differences between the First Edition and Second Edition of IEC Standard 62301 that impact the text of the measurement provisions proposed for the clothes washer test procedure in appendix J2. DOE further notes that the mode definitions that were proposed in the September 2010 NOPR would not be affected by the reference to IEC Standard 62301 (Second Edition) because the definitions were based on IEC Standard 62301 (FDIS), which is identical in substance to the Second Edition.

Further, DOE observes that although the Second Edition allows the choice of multiple test methods for both stable and unstable non-cyclic power consumption, the sampling method provides for a test duration that is approximately the same or shorter than the allowable alternative methods and does not require classification of the nature of the power consumption (*e.g.,* stable or unstable, non-cyclic) in advance of the test. The average reading method in the Second Edition allows the use of either the average power method or accumulated energy method, at the discretion of the test laboratory, which could result in inconsistent test results among different test laboratories. Furthermore, for cyclic power consumption, the Second Edition requires the use of the sampling method. For these reasons, DOE proposes in today's SNOPR to specify the use of the sampling method in IEC Standard 62301 (Second Edition) section 5.3.2 for all measures of standby mode and off mode power consumption.

2. Calculation of Energy Use in Low-Power Modes

In the September 2010 NOPR, DOE proposed two possible approaches for measuring energy consumption in modes other than active washing mode; *i.e.,* inactive (standby) mode, off mode, delay start mode, and cycle finished mode [6] (hereafter, collectively referred to as low-power modes).

For the first approach, DOE proposed allocating 295 hours per year to the active washing mode, 16 hours to self-clean mode (if applicable), 25 hours per year to delay start mode (if applicable), 15 hours per year to cycle finished mode (if applicable), and the remainder to off and/or inactive mode. 75 FR 57556, 57564–65 (Sept. 21, 2010). Using this approach, the energy use per cycle associated with inactive, off, delay start, and cycle finished modes would be calculated by (1) Calculating the product of wattage and allocated hours for all possible inactive, off, delay start and cycle finished modes; (2) summing

[6] Delay start and cycle finished modes are considered part of the active mode.

the results; (3) dividing the sum by 1,000 to convert from Wh to kWh; and (4) dividing by the proposed 295 use cycles per year.

For the second ''alternate approach,'' DOE proposed measuring power consumption for only off and inactive modes for the purpose of calculating the total energy consumed in all low-power modes. Using this approach, separate measurements of delay start and cycle finished mode energy consumption would not be required; instead, all the hours not associated with active washing mode or self-clean mode (8,465 hours total) would be allocated to the inactive and off modes. DOE noted that delay start and cycle finished modes represent a relatively small number of hours at low power consumption levels. For clothes washers currently on the market, these levels are comparable to those for off/inactive modes. *Id.*

In evaluating the best approach for measuring energy use in low-power modes, DOE considered comments from interested parties regarding the allocation of hours to modes other than active washing mode. A number of these comments related to the estimates DOE provided of the number of hours associated with each low-power mode.

NEEA objected to DOE's proposed allocation of the time spent in cycle finished mode, based on an estimate of 3 minutes per cycle. NEEA stated that DOE relied on anecdotal data from Australia to determine its estimates. NEEA also noted that DOE was aware of units capable of operating up to 10 hours in cycle finished mode, but had no field data to support an assumption about what fraction of the 10 hours were used, nor any data that would allow an estimate of the typical cycle finished mode duration. NEEA recommended that DOE acquire data to provide a statistically valid basis for assumptions about the duration of cycle finished mode. NEEA further commented that there is no reason to exclude the measurement of the energy use of fans and motors in the cycle finished mode, or to arbitrarily curtail the time period for their measurement. (NEEA, No. 12 at pp. 3, 7; NEEA, Public Meeting Transcript, No. 20 at pp. 75–76)

NEEA also commented that recent field measurements conducted for the California Public Utility Commission (CPUC) indicate that inactive mode energy use can be significant, equivalent to the energy consumption of an additional wash load per week (not including hot water energy consumption). (NEEA, No. 12 at p. 3) NEEA stated that DOE's estimates for the time spent in the inactive mode call into question the need for the specified accuracy in measuring the power use in the inactive mode. (NEEA, No. 12 at p. 7)

The California Utilities commented that DOE should increase the length of time allocated to cycle finished mode in the test procedure calculations. The California Utilities further noted that the Australian study on which DOE relied for other estimates in the proposed test procedure showed that 20 percent of the total use time not allocated to active washing or delay start mode would be associated with the cycle finished mode. Additionally, the California Utilities noted that DOE's estimates were based on internal testing, although it is not clear if the proposed cycle finished mode duration was based on all machines tested, or only those having a cycle finished mode, and requested either a clarification or correction to this calculation. The California Utilities stated that it also was not clear whether DOE's test sample included machines providing periodic air flow or tumbling in the cycle finished mode, or if it only tested machines with an extended display operation. The California Utilities recommended that DOE test machines with these additional features to determine their typical cycle finished mode duration, which for some machines may be hours after completion of the wash cycle. (California Utilities, No. 18 at pp. 2–3)

ALS did not agree that cycle finished mode energy consumption should be accounted for separately from the active washing mode. (ALS, No. 10 at p. 1) Whirlpool commented that DOE should not measure or include in the test procedure cycle finished energy consumed by air movement fans or by periodic tumbling, as these are very limited application features where the measurement burden would substantially outweigh the value of the energy measurement. (Whirlpool, No. 13 at p. 2) Whirlpool commented further that the significant test burden associated with measuring cycle finished mode results in virtually no consumer benefit, and these values should be dropped from the test procedure's calculations. (Whirlpool, No. 13 at p. 4)

AHAM also commented in response to the RFI issued by DOE to implement Executive Order 13563, ''Improving Regulation and Regulatory Review, opposing any test procedure requirement to measure separately the energy use of delay start and cycle finished modes. AHAM stated that the additional burden that would be required to measure a de minimis amount of energy would not be justified. (76 FR 6123, Feb. 3, 2011; AHAM, 5–6)

DOE also received multiple comments from interested parties regarding the proposed ''alternate approach,'' which would allocate all the hours not associated with active washing mode to the inactive and off modes.

ALS, AHAM, and BSH support the alternative calculation proposed in the September 2010 NOPR. (ALS, No. 10 at p. 2; AHAM, No. 14 at p. 8; AHAM, Public Meeting Transcript, No. 20 at pp. 87–88; BSH, No. 17 at p. 3) ALS and AHAM generally oppose the proposed method of separately allocating annual hours to delay start mode, cycle finished mode, and self-clean mode because they believe that DOE does not have reliable consumer use data for these modes. In addition, as stated above, ALS and AHAM stated that these modes represent insignificant energy consumption to justify measuring them separately. (ALS, No. 10 at p. 2; AHAM, No. 14 at p. 7; AHAM, Public Meeting Transcript, No. 20 at pp. 55–56, 73, 93) Whirlpool also commented that the test procedure should not include delay start mode, cycle finished mode, or off mode because these modes represent insignificant energy consumption. (Whirlpool, No. 13 at p. 4).

NEEA opposed the proposed alternative calculation method, stating that it would be inappropriate to ignore the delay start and cycle finished modes with almost no data on the actual duration and energy use for these modes. (NEEA, No. 12 at p. 8) NEEA believes that the energy use in delay start mode and cycle finished mode is not insignificant, and should be included in the energy use calculations. According to NEEA, manufacturers would have no incentive to minimize energy used in these modes if they were not included in the calculations. (NEEA, No. 12 at p. 8) NEEA further commented that the proposed calculation method for measuring each mode is sound, but could be simplified if the calculation simply involved active mode, with delay start mode and cycle finished mode folded in, and inactive mode, as measured for each model tested. (NEEA, No. 12 at p. 7) NEEA did, however, comment that it might support the alternative approach if the active wash mode is defined for each machine to include any cycle finished mode, including machines with cycle finished modes with intermittent tumbling that can last as long as 10 hours. (NEEA, Public Meeting Transcript, No. 20 at p. 88)

The Appliance Standards Awareness Project (ASAP), American Council for an Energy-Efficient Economy (ACEEE), and NRDC (hereafter referred to as the ''Joint Comment'') expressed support for

NEEA's proposal to fold delay start and cycle finished modes into a single energy test cycle that would also include the active wash cycle. The Joint Comment stated that this approach would seem to simplify the test, and it would ensure that any energy and/or water consumption that occurs after the final spin, such as the addition of steam, would be captured by the test procedure. (Joint Comment, No. 16 at p. 4)

DOE acknowledges that certain clothes washers provide optional tumbling or air circulation features in cycle finished mode. As noted in the September 2010 NOPR, the number of residential clothes washers equipped with a periodic tumbling or air circulation feature during cycle finished mode represents less than 10 percent of the models produced by manufacturers comprising over 90 percent of the market. 75 FR 57556, 57561 (Sept. 21, 2010). In addition, review of product literature for the clothes washers equipped with such features shows that these functions are typically consumer-selected options.

To further support the proposal in today's SNOPR, DOE performed additional laboratory testing to quantify the energy consumption in cycle finished mode. DOE tested the residential clothes washer model that it identified as having the longest-duration and most energy-intensive cycle finished feature on the market. This clothes washer includes a user-selectable option that provides periodic tumbling and air circulation for up to 10 hours following the completion of the wash cycle. For the duration of this cycle finished mode, the cycle finished indicator on the control panel remains activated, the door remains locked, and an additional feature indicator light on the control panel flashes.

DOE measured the energy consumption of this cycle finished feature for the maximum possible 10 hour duration, using the warm wash/cold rinse energy test cycle and the average test load size as indicated by Table 5.1 in appendix J1, extended linearly as discussed in section III.B.7.a. These test parameters were chosen because they correspond to the highest usage factors according to the appendix J1 test procedure. DOE also measured the clothes washer's standby energy consumption. Figure III.1 shows the power consumption in W during the active washing mode followed by the first 45 minutes of cycle-finished mode. The shaded portion of the figure indicates cycle finished mode.

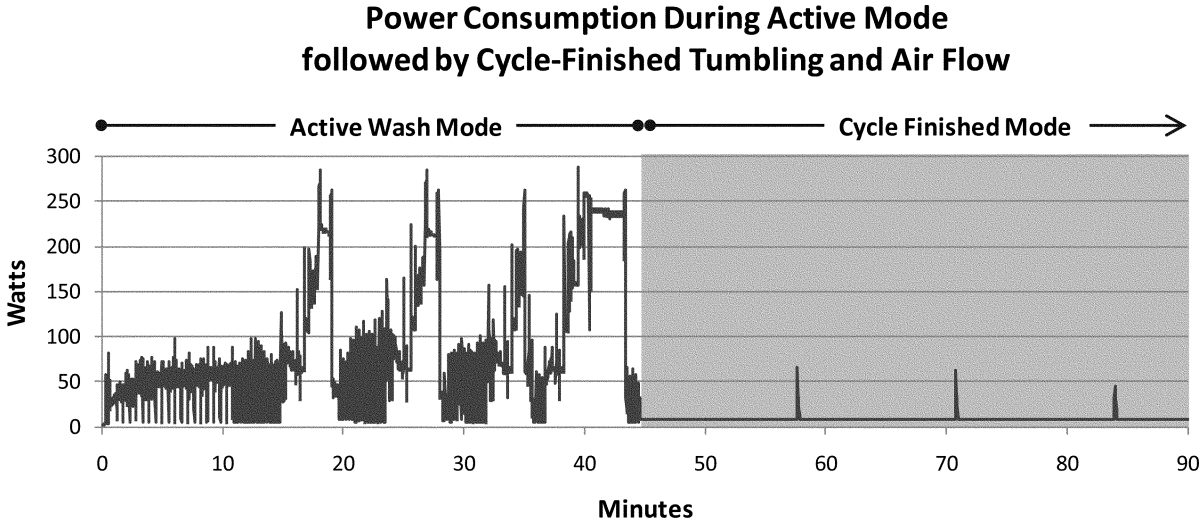

Figure III.1 Example Power Consumption During Active Washing Mode and Cycle Finished Mode

Table III.2 shows the cycle finished mode energy consumption for the test clothes washer along with the other factors that the proposed Integrated Modified Energy Factor (IMEF) metric incorporates: (1) Machine electrical energy use in active washing mode, (2) hot water energy use in active washing mode, (3) energy associated with moisture removal (*i.e.,* drying energy), and (4) standby (inactive) mode energy use.

TABLE III.2—EXAMPLE COMPARISON OF TOTAL PER-CYCLE ENERGY CONSUMPTION WITH AND WITHOUT CYCLE FINISHED MODE

Mode	Per-cycle energy consumption contributors (kWh/cycle)	
	Standby mode only	Cycle-finished mode included
Active washing mode—Machine electrical energy	0.16	0.16
Active washing mode—Hot water energy	0.23	0.23
Active washing mode—Drying energy	1.58	1.58
Standby mode (23 hours)	0.06	N/A

TABLE III.2—EXAMPLE COMPARISON OF TOTAL PER-CYCLE ENERGY CONSUMPTION WITH AND WITHOUT CYCLE FINISHED MODE—Continued

Mode	Per-cycle energy consumption contributors (kWh/cycle)	
	Standby mode only	Cycle-finished mode included
Cycle finished mode (10 hours)	N/A	0.08
Standby mode (13 hours)	N/A	0.04
Total per-cycle energy consumption (kWh)	2.03	2.09
IMEF (ft^3/kWh/cycle)	1.91	1.85

Figure III.2 shows the relative magnitude of each of the contributors to total per-cycle energy consumption for both scenarios.

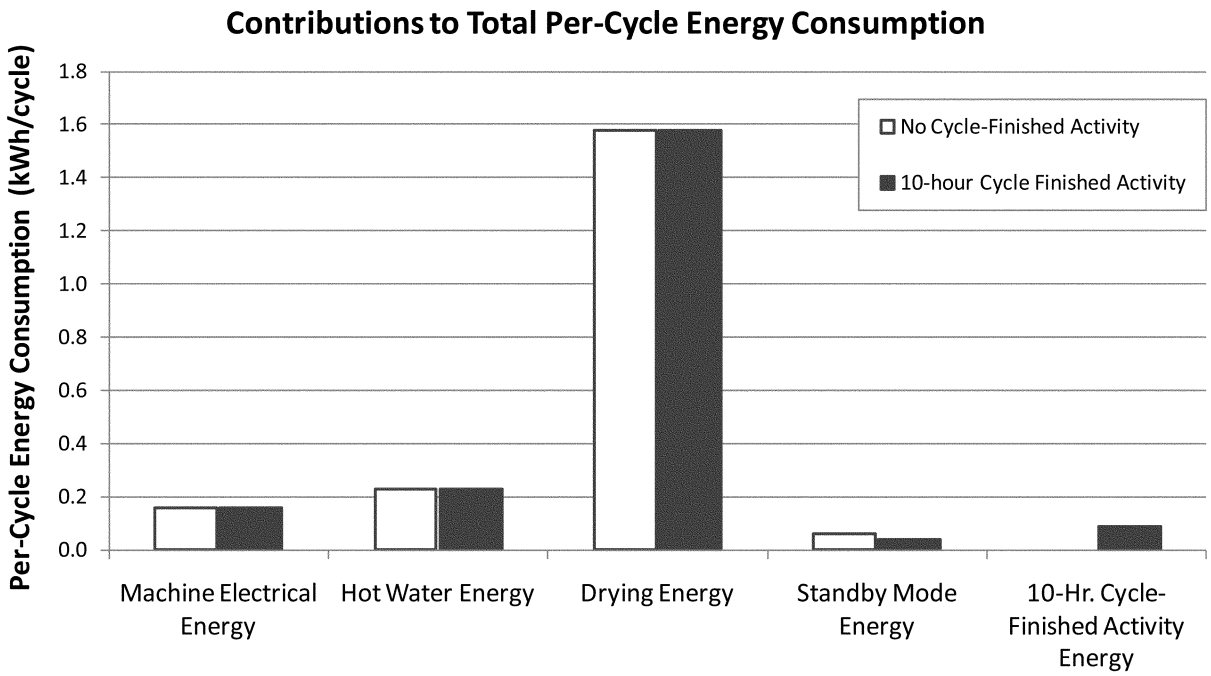

Figure III.2 Example Components of Total Per-Cycle Energy Consumption

The cycle finished feature of this clothes washer consumes 0.08 kWh over the maximum 10-hour duration. After accounting for the 10 fewer hours in inactive mode, the cycle finished feature with intermittent tumbling and air circulation would add a net 0.06 kWh to the total per-cycle energy consumption of this clothes washer, an increase of 3.0 percent. If consumers were to select this feature for all wash cycles, IMEF would decrease by 3.0 percent.

DOE recognizes that the 3.0 percent decrease in IMEF represents a worst-case scenario. A 3-percent increase in annual energy consumption would occur only if a consumer activated this feature on 100 percent of laundry cycles and if the cycle-finished activity persisted for the full 10 hours after every cycle. While DOE lacks consumer usage data of this cycle finished feature, DOE believes it is reasonable that consumers would activate this feature less than 100 percent of the time, and that, on average, the cycle finished activity would persist for less than the full 10 hours. For illustrative purposes, if a consumer selected the cycle finished option on 50 percent of all wash cycles, and, on average, the cycle finished activity persisted for 50 percent of the maximum allowable time (*i.e.,* for 5 hours), total annual energy consumption would increase by only 0.75 percent.

Based on the results of the data presented here, DOE believes that including a specific measurement of energy use of a cycle finished feature that incorporates intermittent tumbling and air circulation would not significantly impact the total annual energy consumption. Furthermore, measuring the energy use over the entire duration of cycle finished mode would increase the test duration by up to 10 hours, depending on the maximum duration of cycle finished mode provided on the clothes washer under test. DOE believes this would represent a significant increase in test burden that would not be warranted by the minimal additional energy use captured by measuring cycle finished mode separately or as part of the active washing mode.

Therefore, in consideration of the data and estimates previously presented in the September 2010 NOPR, the

additional energy consumption estimates presented in this SNOPR, the uncertainty regarding consumer usage patterns, and the additional test burden required, DOE is not proposing to adopt provisions to measure cycle finished mode separately or as part of the active washing mode. In the absence of a compelling reason to treat cycle finished mode separately, DOE believes that its assumption set forth in the September 2010 NOPR that the power consumption in each low-power mode is similar remains valid, and that in such a case, measuring power consumption of each mode separately would introduce significant test burden without a corresponding improvement in a representative measure of annual energy use. Therefore, DOE is proposing in today's SNOPR to adopt the ''alternate approach'' for measuring total energy consumption, in which all low-power mode hours are allocated to the inactive and off modes, and the low-power mode power consumption is measured only in the inactive and off modes, depending on which of these modes is present.

3. Energy Test Cycle Definition

The energy test cycle is the cycle currently used in determining the modified energy factor (MEF) and water factor (WF) for a clothes washer, and proposed to be used for determining integrated modified energy factor (IMEF) and integrated water consumption factor (IWF). The energy test cycle is defined in section 1.7 of the current clothes washer test procedure based on (A) The cycle recommended by the manufacturer for washing cotton or linen clothes, which includes all wash/rinse temperature selections and water levels offered in that cycle; and (B) other cycles that may include other temperature or water level options if they contribute to an accurate representation of energy consumption. In the September 2010 NOPR, DOE proposed to amend part (B) of the energy test cycle definition to provide clarity in determining whether to test temperature options available only on cycle settings other than that defined in part (A) of the definition. Specifically, DOE proposed modifying part (B) as follows:

''* * * (B) if the cycle described in (A) does not include all wash/rinse temperature settings available on the clothes washer and required for testing as described in this test procedure, the energy test cycle shall also include the portions of a cycle setting offering these wash/rinse temperature settings with agitation/tumble operation, spin speed(s), wash times, and rinse times that are largely comparable to those for the cycle recommended by the manufacturer for washing cotton or linen clothes. Any cycle under (A) or (B) shall include the default agitation/tumble operation, soil level, spin speed(s), wash times, and rinse times applicable to that cycle, including water heating time for water heating clothes washers.'' 75 FR 57556, 57575–76 (Sept. 21, 2010).

In testing conducted since the September 2010 NOPR, DOE has observed that some clothes washers retain in memory the most recent options selected for a cycle setting the next time that cycle is run. To ensure repeatability of test results, particularly for cycles under part (B) of the energy test cycle definition, DOE proposes in today's SNOPR to further clarify that the manufacturer default conditions for each cycle setting shall be used, except for the temperature selection, if necessary. For example, if the extra hot temperature selection was only available on the ''whites'' cycle, the manufacturer would use the whites cycle to test that temperature setting. Because the default temperature setting for the whites cycle may be warm or hot, however, the manufacturer would have to manually adjust the temperature to get to extra hot. For certification testing in such cases, the manufacturer would use the default settings on the whites cycle for all options except the temperature setting, which would be manually adjusted to achieve the desired temperature.

In addition, DOE proposes to delete ''and required for testing as described in this test procedure'' from part (B) as redundant and unnecessary.

AHAM commented that DOE's proposal in the September 2010 NOPR to amend Part B of the energy test cycle definition was vague, undefined, and included a significant amount of variability. AHAM noted that variability in a test procedure has substantial consequences for manufacturers, and that the test procedure must be clear and be uniformly understood to avoid serious consequences in variations in testing across laboratories or technicians. (AHAM, No. 14 at p. 15) DOE believes that the proposed modification to part (B) provides additional specificity on the wash cycle settings (*i.e.,* agitation/tumble operation, spin speed(s), wash times, and rinse times) that, if comparable to those for the cycle recommended by the manufacturer for washing cotton or linen clothes, must be considered under part (B) of the energy test cycle definition.

4. Load Adjustment Factor

The clothes washer test procedure relies on use factors to weight different consumer behaviors in the overall energy and water consumption calculations. The factors are based on consumer use data and represent the fraction of all cycles that are run with certain settings or characteristics. The Load Adjustment Factor (LAF) represents the ratio of maximum load size to average load size. This ratio is used in the calculation of the energy required to remove moisture from the test load (*i.e.,* drying energy). The RMC value used in this calculation is based only on tests using the maximum test load—the LAF is used to scale this value down to the average load size. In the September 2010 NOPR, DOE noted that it lacked information warranting adjusting this value or changing it from a fixed value to one that varies as a function of average load size, and therefore did not propose to amend the LAF in the test procedure. 75 FR 57556, 57572 (Sept. 21, 2010).

AHAM and ALS support DOE's proposal to retain the existing LAF in the test procedure. (AHAM, No. 14 at p. 13; ALS, No. 10 at p. 4) BSH, The California Utilities, Energy Solutions (ES), NEEA, Natural Resources Defense Council (NRDC), and the Joint Comment stated that it is an inconsistency in the test procedure to have a single LAF that does not correlate with the load usage factors. (BSH, Public Meeting Transcript, No. 20 at pp. 149–150; California Utilities, No. 18 at p. 4; ES, Public Meeting Transcript, No. 20 at p. 150; Joint Comment, No. 16 at pp. 5–6; NEEA, Public Meeting Transcript, No. 20 at p. 149) ASAP commented that an average load size value that depends on capacity does not represent consumer usage. (ASAP, Public Meeting Transcript, No. 20 at pp. 151–152) ES stated that the ratio of average load size to maximum load size is 70–75 percent for small clothes washers but is closer to 50–55 percent for larger clothes washers. (ES, Public Meeting Transcript, No. 20 at p. 150) The California Utilities recommended that RMC be measured by testing with minimum, average, and maximum test load sizes, with the average test load size calculated as 65 percent of the maximum load size. The California Utilities further commented that the results from each test load size should be weighted using the same load usage factors as those used for the energy test cycle. (California Utilities, No. 18 at p. 4) NRDC stated that a single LAF could be calculated from the three weighting values assigned to the load usage factors. (NRDC, Public Meeting Transcript, No. 20 at pp. 142–145, 148–149) NEEA and the Joint Comment doubted that the relationship between

tested RMC values and load size is linear for most clothes washers. According to the Joint Comment, the Bern Clothes Washer Study found that RMC decreases with increasing load size and that this effect is more significant for top-loaders than for front-loaders. Due to this finding, the Joint Comment believes that measuring RMC at a maximum load size and assuming that the same RMC would apply to an ''average'' load size likely underestimates actual RMC and therefore dryer energy consumption for an ''average'' load size. Instead, the Joint Comment suggested that RMC be measured for minimum, maximum, and average load sizes and that dryer energy consumption be calculated for each load size using the corresponding measured RMC. A weighted-average dryer energy consumption could then be calculated using the load usage factors. The Joint Comment stated that, although this approach would slightly increase test burden, it believes the increased burden would be insignificant because tests with the different load sizes are already required to be run in the current test procedure. Therefore, the Joint Comment stated that the only addition would be an RMC measurement for each of the different load size test cycles rather than just for the maximum load test cycle. (Joint Comment, No. 16 at pp. 7–8) NEEA also noted that there is no average test load size for manual fill models, but three different load sizes for adaptive fill models. According to NEEA, a weighted-average value for LAF is more appropriate, but even better would be to conduct RMC tests at various load sizes, and use the load usage factors to obtain weighted-average results. (NEEA, No. 12 at pp. 12–13)

DOE notes that both the LAF and load usage factors are intended to adjust test results measured at discrete load sizes to values that are representative of real-world consumer use. The LAF, however, is also intended to capture the dependence of RMC on load size because the RMC test is conducted using only the maximum load size.

As observed by the California Utilities, data collected as part of the Bern Clothes Washer Study suggest that an RMC test conducted at maximum load size would produce a different RMC than a test conducted at the average load size. Because the LAF must account for two effects—the percentage of times that users select different load sizes and the variation of measured RMC with load size—it would be expected to differ somewhat from any of the load usage factors, which capture only the consumer load size selection effect. For the August 1997 Final Rule, however, DOE obtained information that, when averaged with data provided by interested parties, showed that the relationship between load size and RMC was almost non-existent. For this reason, DOE concluded in the August 1997 Final Rule that it was acceptable to test RMC using only the maximum load size. DOE does not believe that conducting multiple RMC measurements at different load sizes would improve the calculation of drying energy use. Additionally, DOE believes that the Bern Study is inconclusive with respect to the LAF because (1) The relationship between RMC and load size was not demonstrated for individual machines, and (2) the test load composition was not controlled.

In light of the available data suggesting that load size does not affect the RMC measurement, the remaining trend that the LAF is intended to capture is the pattern of consumer selection of load size, which is already incorporated in the test procedure via the load usage factors. This suggests that the LAF is duplicative of, yet inconsistent with, the load usage factors. Therefore, DOE proposes in today's SNOPR that, for consistency with the rest of the test procedure, the representative load size calculation in the equation for drying energy should incorporate the load usage factors rather than a separate LAF. In the current drying energy calculation, the representative load size is calculated by multiplying the fixed value of LAF by the maximum load size. DOE proposes that this representative load size be replaced by a weighted-average load size calculated by multiplying the minimum, average, and maximum load usage factors by the minimum, average, and maximum load sizes, respectively, and summing the products.

5. Wash Time Setting

The current test procedure specifies the wash time setting to be used in the energy test cycle. If only one wash time is prescribed in the energy test cycle, that wash setting is to be used; otherwise, the wash time setting is required to be the higher of either the minimum wash time or 70 percent of the maximum wash time available in the energy test cycle. DOE has recently become aware that, for certain clothes washers equipped with an electromechanical dial to control wash time, the dial may yield different results for the same setting depending on the direction in which the dial is turned to reach the desired setting. DOE believes that consistency in setting the wash time in such cases may be achieved by resetting the dial to the minimum wash time and then turning it in the direction of increasing wash time to reach the desired setting. If the desired setting is passed, the dial should not be turned in the direction of decreasing wash time to reach the setting. Instead, the dial should be returned to the minimum wash time and then turned in the direction of increasing wash time until the desired setting is reached. DOE, therefore, proposes to add these clarifications to the wash time setting provisions in both appendix J1 and appendix J2. DOE believes that this clarification would not affect the energy and water use measurements, but would help ensure consistency when determining compliance with energy conservation standards. To provide further consistency, DOE also proposes the further clarification that the conditions stated in the case of more than one wash time setting—that the wash time setting shall be the higher of either the minimum, or 70 percent of the maximum wash time available in the energy test cycle—shall apply regardless of the labeling of suggested dial locations.

6. Annual Energy Cost

In the September 2010 NOPR, DOE considered whether to amend the estimated annual operating cost calculation in 10 CFR 430.23 to include the cost of energy consumed in the non-active washing modes, but did not propose such amendments for the following reasons:

- DOE believed that the cost of energy consumed in self-clean, standby, off, delay start, and cycle finished modes is small relative to the total annual energy cost for clothes washers, and therefore, would make little difference in the estimated annual operating cost calculation.
- The Federal Trade Commission's (FTC's) EnergyGuide Label for clothes washers uses the estimated annual operating cost as its primary indicator of product energy efficiency, compared to a range of annual operating costs of similar products. Appendix F1 to 16 CFR part 305. An estimated annual operating cost incorporating self-clean, standby, off, delay start, and cycle finished mode energy use would no longer be directly comparable to the minimum and maximum energy costs prescribed for the EnergyGuide label.

75 FR 57556, 57567 (Sept. 21, 2010).

ALS and AHAM supported DOE's proposal to maintain the existing energy cost calculation. (ALS, No. 10 at p. 3; AHAM, No. 14 at p. 9) AHAM and Whirlpool commented, however, that DOE's proposal to exclude non-active

washing modes from the annual energy cost calculation is inconsistent with the proposal to include these modes in the IMEF calculation. (Whirlpool, No. 13 at p.5; AHAM, No. 14 at p. 9).

NEEA disagreed with DOE's assertion that the cost of energy consumed in non-active washing modes would make little difference in the estimated annual operating cost calculation. NEEA noted that no publicly available data exists on which to base such an assertion, but that end-use data from the field suggests that standby energy could constitute as much as 5 to 10 percent of total clothes washer energy use, not including drying energy use. (NEEA, No. 12 at p. 8)

EPCA requires that 180 days after the amended test procedure is prescribed, all representations related to the energy use, efficiency, or cost of energy consumed for residential clothes washers must reflect the results of testing according to the amended test procedure, which will include provisions for measuring standby and off mode energy use. (42 U.S.C. 6293(c)(2)) Additionally, EPCA requires that any revisions to the labels for residential clothes washers include disclosure of the estimated annual operation cost (determined in accordance with DOE's test procedures prescribed under section 6293 of EPCA), unless the Secretary determines that disclosure of annual operating cost is not technologically feasible, or if the FTC determines that such disclosure is not likely to assist consumers in making purchasing decisions or is not economically feasible. (42 U.S.C. 6294(c)(1))

For these reasons, DOE agrees that the annual energy cost calculations in 10 CFR 430.23 for residential clothes washers should be amended to include the cost of energy consumed in non-active washing modes. Therefore, DOE proposes to amend the clothes washer test procedure to revise the estimated annual operating cost calculation to integrate energy use in standby, off and self-clean modes. The estimated annual operating cost would be obtained by multiplying the 295 average number of annual use cycles by: (1) When electrically heated water is used: (total per-cycle machine electrical energy consumption + per-cycle hot water energy consumption + per-cycle self-clean energy consumption + per-cycle ''combined low-power'' mode energy consumption) × (the representative average unit cost in dollars per kWh, as provided by the Secretary); or (2) when gas-heated or oil-heated water is used: [(per-cycle machine electrical energy consumption + per-cycle self-clean machine electrical energy consumption + per-cycle combined low-power mode energy consumption) × (the representative average unit cost in dollars per kWh, as provided by the Secretary)] + [(per-cycle water energy consumption for gas-heated or oil-heated water + per-cycle self-clean water energy consumption for gas-heated or oil-heated water) × (representative average unit cost in dollars per Btu for oil or gas, as appropriate, as provided by the Secretary)]. The estimated annual operating cost would be rounded off to the nearest dollar per year. To provide for the appropriate per-cycle electrical and water heating measures used in the annual energy cost calculation, DOE proposes new calculations of per-cycle self-clean electrical, hot water, and overall energy consumption in today's SNOPR.

7. Additional Proposals

a. Extension of Test Load Size Table

The clothes washer test procedure at appendix J1 specifies test load size for the active washing mode energy tests based on the clothes washer's container volume. The table specifying the test load sizes, Table 5.1, currently covers clothes washer container volumes up to only 3.8 ft^3. DOE stated in the September 2010 NOPR that it was aware of multiple clothes washers available on the market that have clothes container volumes exceeding 3.8 ft^3, and proposed to revise Table 5.1 in the amended test procedure in appendix J2 to establish test load size specifications for clothes washer container volumes up to 6.0 ft^3. The proposed extension was based on a continuation of the linear relationship between test load size and clothes washer container volume in the DOE clothes washer test procedure at appendix J1. 75 FR 57556, 57570–71 (Sept. 21, 2010).

DOE also received petitions for waiver from the current clothes washer test procedure from a number of manufacturers for clothes washers that they produce with clothes container volumes greater than 3.8 ft^3. DOE granted waivers to these manufacturers, all of which contained alternate test procedures based on similar linear extensions of Table 5.1.

DOE proposes to extend Table 5.1 in appendices J1 and J2 based on the extended version of Table 5.1 proposed in the September 2010 NOPR for appendix J2, with some minor adjustments. In the September 2010 NOPR, DOE presented inconsistent decimal places in the minimum, average, and maximum load sizes in Table 5.1. This subsequently affected the calculation of some of the average load size values in the table. In today's SNOPR, DOE proposes to amend the extension to Table 5.1 in appendices J1 and J2 by specifying each load size value to the hundredths decimal place.

b. Correction to Cold Rinse Definition

After the publication of the September 2010 NOPR, DOE became aware of an error in the definition of cold rinse in the test procedure at appendix J1. Specifically, cold rinse is defined in section 1.22 of appendix J1 as ''the coldest rinse temperature available on the machine (and should be the same rinse temperature selection tested in 3.7 of this appendix).'' However, section 3.7 of appendix J1 contains provisions for testing warm rinse, which instruct that such tests be conducted with the hottest rinse temperature available. Thus, section 3.7 is inapplicable to the definition of cold rinse in section 1.22. DOE proposes in today's SNOPR to remove reference to section 3.7 in the definition of cold rinse in both section 1.22 of appendix J1 and proposed section 1.7 of appendix J2.

c. Deletion of Redundant Test Cloth Specifications

In the September 2010 NOPR, DOE proposed deleting the redundant sections 2.6.1.1–2.6.1.2.4 from appendix J2. These sections pertain to test cloth specifications and preconditioning and were made obsolete in the 2001 Final Rule, which added sections 2.6.3 through 2.6.7.2 into appendix J1. 66 FR 3314. In today's SNOPR, DOE proposes to remove these redundant sections from appendix J1 as well. Consistent with the proposal in the September 2010 NOPR, DOE proposes to use in section 2.6.4.3 the thread count specification from deleted section 2.6.1.1(A), of 65 × 57 per inch (warp × fill), based on supplier data. Additionally, DOE proposes to maintain a shrinkage limit, relocated from section 2.6.1.1(B) to new section 2.6.4.7, but to increase the current 4 percent limit to 5 percent. DOE also proposes to require the cloth shrinkage to be measured as per the American Association of Textile Chemists and Colorists (AATCC) Test Method 135–2010, ''Dimensional Changes of Fabrics after Home Laundering.'' These revisions are also supported by supplier data, according to AHAM. (AHAM, No. 15 at p. 15).

d. Detergent Specifications for Test Cloth Preconditioning

In the September 2010 NOPR, DOE proposed amending the clothes washer test procedure to specify the use of AHAM standard test detergent Formula

3 in test cloth preconditioning, at a dosing of 27.0 g + 4.0 g/lb. DOE proposed incorporating this amendment into the proposed appendix J2 test procedure.

ALS supported DOE's proposal to specify the use of AHAM standard detergent Formula 3 in test cloth preconditioning as well as the proposal to follow the instructions included with the detergent, because it is makes the dosing common with the Dryer Test Load preconditioning procedure. (ALS, No. 10 at p. 5) NEEA stated that it foresees no problem with, and some benefit from, adopting the AHAM detergent specification. (NEEA, No. 12 at p. 14) Whirlpool stated that the proposed detergent formulation and dosage changes are consistent with AHAM Standard HLD–1–2009, which Whirlpool supports. (Whirlpool, No. 13 at p. 14) AHAM supported DOE's proposal to amend the test procedure to specify the use of AHAM standard test detergent Formula 3 in test cloth preconditioning at a dosing of 27.0g +4.0g/lb (AHAM, No. 14 at p. 15; Public Meeting Transcript, No. 20 at pp. 194–195).

In today's SNOPR, DOE proposes to amend the appendix J1 and J2 test procedures to require the use of the current AHAM standard test detergent formula for test cloth preconditioning, at a dosing of 27.0g +4.0g/lb. The current AHAM standard test detergent is Formula 3.

e. Cold Wash Temperature Selection

DOE has observed multiple clothes washer models that offer a ''tap cold'' wash temperature setting in addition to a ''cold'' wash temperature setting. DOE proposes to clarify how to classify these temperature selections in appendix J1 and appendix J2.

Section 3.6 of appendix J1 defines the cold wash selection as ''the coldest wash temperature selection available.'' Additionally, section 1.18 of Appendix J1 defines ''warm wash'' as ''all wash temperature selections below the hottest hot, less than 135 °F, and above the coldest cold temperature selection.'' In some cases with these models, DOE has observed that the ''cold'' setting mixes in hot water to raise the temperature above the cold water supply temperature, as defined in section 2.3 of Appendix J1. In such cases, DOE proposes that the manufacturer specified ''cold'' setting should be considered a warm wash, as defined in section 1.18; and that the ''tap cold'' setting should be considered the cold wash, as defined in section 3.6. In cases where the ''cold'' setting does not add any hot water for any of the test loads required for the energy test cycle, the ''cold'' setting should be considered the cold wash; and the ''tap cold'' setting would not be required for testing. DOE requests comment on the appropriateness of this clarification.

f. Correction to Per-Cycle Self-Clean Water Consumption Calculation

In the September 2010 NOPR, DOE proposed incorporating per-cycle self-clean hot water energy consumption (section 4.1.8) into the calculation for IMEF, as well as total per-cycle self-clean water consumption (section 4.2.14) into the calculation for IWF in appendix J2. The proposed calculations in section 4.1.8 and section 4.2.14 did not contain the numeric multipliers required to apportion the total annual self-clean water consumption over the 295 representative average number of clothes washer cycles in a year. In today's SNOPR, DOE proposes to adjust the calculations in section 4.1.8 and 4.2.14 by including a multiplier of 12/295, where 12 represents the average number of clothes washer self-clean cycles in a year, and 295 represents the average number of clothes washer cycles in a year.

C. Compliance With Other EPCA Requirements

1. Test Burden

EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results that measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use. Test procedures must also not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)).

In the September 2010 NOPR, DOE noted that the proposed amendments to the residential clothes washer test procedure would incorporate a test standard that is accepted internationally for measuring power consumption in standby mode and off mode (IEC Standard 62301). DOE analyzed the available versions of IEC Standard 62301 at that time—IEC Standard 62301 (First Edition), IEC Standard 62301 (CDV), and IEC Standard 62301 (FDIS)—and determined that the proposed amendments to the residential clothes washer test procedure would produce standby mode and off mode average power consumption measurements that are representative of an average use cycle. DOE also determined that the test methods and equipment that the amendments would require for measuring standby mode and off mode power in these products would not be substantially different from the test methods and equipment required in the current DOE test. Thus, DOE tentatively concluded that the proposed test procedure amendments would not require manufacturers to make significant investments in test facilities and new equipment. In sum, DOE tentatively concluded in the September 2010 NOPR that the amended test procedures would produce test results that measure the standby mode and off mode power consumption during representative use, and that the test procedures would not be unduly burdensome to conduct. 75 FR 57556, 57578 (Sept. 21, 2010).

DOE also noted in the September 2010 NOPR that the proposed active mode amendments may require some manufacturers to incur equipment purchases on the order of hundreds of dollars, and would require testing additional cycles that could increase the total test time for certain clothes washers by approximately 25 percent. DOE tentatively concluded, however, that including these additional cycles in the test procedure would provide for a more representative measurement of machine energy efficiency and water use, and that the time commitment required to test these additional cycles would not represent a significant burden on manufacturers since the current test procedure already requires multiple energy test cycles. *Id.*

Today's supplemental proposed amendments to the DOE test procedures are based on an updated version of IEC Standard 62301, IEC Standard 62301 (Second Edition). As discussed in section III.B.1 of this notice, DOE believes that the provisions of IEC Standard 62301 (Second Edition) that it proposes to incorporate by reference in today's SNOPR provide a means to measure power consumption with greater accuracy and repeatability than the provisions from IEC Standard 62301 (First Edition) that were originally proposed in the December 2010 NOPR. For this reason, DOE concludes that today's supplemental proposed amendments would also provide measurements representative of average consumer use of the residential clothes washer under test. DOE further believes these new provisions in the applicable sections of IEC Standard 62301 (Second Edition) improve test results without undue testing burden. DOE also believes that the potential for increased test burden for certain power consumption measurements is offset by more reasonable requirements for testing equipment, while maintaining acceptable measurement accuracy.

Thus, DOE tentatively concludes that the amended test procedures newly proposed in today's SNOPR would produce test results that measure the standby mode and off mode power consumption during representative use, and that the test procedures would not be unduly burdensome to conduct.

The active mode provisions newly proposed in today's SNOPR consist of clarifications to test conduct and revised calculations, and would not require any additional investment, equipment purchases, or test time beyond those described in the September 2010 NOPR. Therefore, DOE's retains its tentative conclusion that the proposed active mode amendments would not impose a significant burden on manufacturers.

2. Integration of Standby Mode and Off Mode Energy Consumption Into the Efficiency Metric

Section 325(gg)(2)(A) of EPCA requires that standby mode and off mode energy consumption be integrated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedures already fully account for the standby mode and off mode energy consumption or if an integrated test procedure is technically infeasible. (42 U.S.C. 6295(gg)(2)(A))

Today's SNOPR incorporates the clothes washer standby and off mode energy consumption into a ''combined low-power mode'' energy consumption, expressed in kWh, and converted into an IMEF, as discussed in section III.B.2 of this notice.

EPCA provides that test procedure amendments adopted to comply with the new EPCA requirements for standby and off mode energy consumption will not determine compliance with previously established standards. (42 U.S.C. 6295(gg)(2)(C)) Because DOE is incorporating these changes in a new appendix J2 to 10 CFR part 430 subpart B that manufacturers would not be required to use until the compliance date of amended energy conservation standards for residential clothes washers, the test procedure amendments pertaining to standby mode and off mode energy consumption that DOE proposes to adopt in this rulemaking would not apply to, and would have no effect on, existing standards.

3. Commercial Clothes Washers

The test procedure for commercial clothes washers is required to be the same test procedure established for residential clothes washers. (42 U.S.C. 6314(a)(8)) Thus, the test procedure set forth in appendix J1 of subpart B of 10 CFR part 430 is also currently used to test commercial clothes washers. (10 CFR part 431.154)

DOE noted in the September 2010 NOPR that the impacts to testing commercial clothes washers would be limited to the proposed amendments associated with active washing mode because commercial clothes washer standards are based on MEF and WF. Among others, these include proposed changes to the test load size specification, temperature use factors, dryer usage factor (DUF), capacity measurement, and water supply pressure specification, all of which could affect the measured energy and water efficiencies of a commercial clothes washer. DOE believed that the most significant impacts could be associated with the proposed amendments for capacity measurement and usage factors, but did not have information to evaluate any impacts for commercial clothes washers. 75 FR 57556, 57578 (Sept. 21, 2010).

In response, DOE received several comments on potential impacts of an amended clothes washer test procedure on commercial clothes washers. In today's SNOPR, DOE addresses those comments that pertain to the revised proposal.

ALS commented that the most significant impact of the proposed amended test procedure on commercial clothes washers is the standby power measurement, because unlike most residential clothes washers, commercial clothes washers are vended and have lighted displays to invite customers to use them and provide instructions for use. According to ALS, the inclusion of standby power would significantly impact the ability for existing commercial clothes washers to meet more stringent minimum energy conservation standards without requiring a ready-to-use vended clothes washer to power down the display. ALS stated that a powered-down display would cause a potential customer to think the washer is not operational or ready to use, and thus discourage its use. (ALS, No. 10 at pp. 5–6).

ALS also commented that the next most significant impact of the proposed amended test procedure would be the clothes container capacity measurement method, which would reduce the existing capacity rating. This would significantly reduce an already smaller tub used in commercial markets to even less volume measured, making it more difficult to achieve the minimum required energy efficiency standard. (ALS, No. 10 at p. 6)

Whirlpool commented that the nature of use for commercial clothes washers would preclude the existence of delay start mode, cycle finished mode, and steam cycles. Whirlpool stated that the clothes washer test procedure should ignore those features if they are not on the unit under test. Whirlpool also expressed concern regarding the capacity measurement and modified temperature use factors. Whirlpool stated that the proposed IMEF and IWF calculations are suitable for commercial clothes washers. (Whirlpool, No. 13 at p. 14).

In response to these comments, and as stated above, the impacts to testing commercial clothes washers would be limited to the proposed amendments associated with active washing mode because commercial clothes washer standards are based on MEF and WF. Because commercial clothes washer standards do not include standby and off mode, the addition of procedures to measure the energy use in standby and off modes would be inapplicable to and would not affect the standards for commercial clothes washers pursuant to 42 U.S.C. 6293(e). For the active mode provisions of the proposed test procedure that could affect the measured energy and water efficiencies of a commercial clothes washer, DOE notes that 42 U.S.C. 6293(e)(3) provides the following: models of covered products in use before the date on which an amended energy conservation standard (developed using the amended test procedure pursuant to 42 U.S.C. 6293(e)(2)) becomes effective that comply with the energy conservation standard applicable to such covered products on the day before such date are deemed to comply with the amended standard. The same is true of revisions of such models that come into use after such date and have the same energy efficiency, energy use or water use characteristics.

DOE concurs that commercial clothes washers would not be affected by any provisions for measuring delay start mode, cycle finished mode, or steam cycles. Under the proposal in today's SNOPR, the energy use for delay start and cycle finished modes would be included in the test results pursuant to the ''alternate method'' for measuring standby mode and off mode energy use, described in section III.B.2, and any such energy use is not included in the MEF and WF metrics used for commercial clothes washers.

4. Certification Requirements

Sections 6299–6305 and 6316 of EPCA authorize DOE to enforce compliance with the energy and water

conservation standards established for certain consumer products and commercial equipment. (42 U.S.C. 6299–6305 (consumer products), 6316 (commercial equipment)) On March 7, 2011, the Department revised, consolidated, and streamlined its existing certification, compliance, and enforcement regulations for certain consumer products and commercial and industrial equipment covered under EPCA, including residential clothes washers. 76 FR 12422. These regulations for residential clothes washers are codified in 10 CFR part 429.20.

The certification requirements for residential clothes washers consist of a sampling plan for selection of units for testing and requirements for certification reports. Because the proposed amendments to the test procedure would not revise the current energy conservation standards, DOE is not proposing any amendments to the certification reporting requirements for these products. However, because DOE proposes in today's SNOPR to introduce two new metrics (IMEF and IWF), DOE proposes amended provisions in the sampling plan in 10 CFR part 429.20(a)(2) that would include IMEF along with the existing measure of MEF, and IWF along with the existing measure of WF.

D. Impact on EnergyGuide

In the September 2010 NOPR, DOE determined that the proposed test procedure amendments would not affect the FTC EnergyGuide labeling program because DOE did not propose to amend the estimated annual operating cost calculation in 10 CFR 430.23.

NEEA commented that the energy use and annual energy cost information on the Energy Guide label is supposed to represent a reasonably accurate estimate of the annual energy use and energy cost associated with the use of the labeled product. NEEA stated that it would be nearly impossible to justify any rules associated with the accuracy of such representations if whole categories of annual energy use and cost are ignored. NEEA stated that Congress intended to account for the energy use of every appliance in its inactive mode and to make the results known to consumers. (NEEA, No.12 at p. 8)

NEEA also noted that the ratings of many models may change as a result of the revised test procedure. NEEA commented that the EnergyGuide labels for individual models tested under appendix J1 and appendix J2 will exist in the marketplace together for a short time, raising the likelihood of consumer confusion when this happens. According to NEEA, there has been considerable consumer confusion in the past when new models arrive with energy use and annual cost numbers that are lower (or higher) than the lowest (or highest) numbers in the range on the EnergyGuide label. (NEEA, No. 12 at pp.15–16).

The Joint Comment stated that the EnergyGuide label is designed to communicate to consumers the estimated average annual operating cost of a given product. Since the annual operating cost for a washer that a consumer will incur includes the cost of energy consumed in all modes including self-clean, standby, off, delay start, and cycle finished modes, the operating costs of all modes should be included in the annual operating cost calculation. (Joint Comment, No. 16 at p. 2).

In addition, the Joint Comment stated that the cost of energy consumed in the additional non-active modes for many products will likely be significant compared to the total energy cost, which DOE estimates could consume as much as 48 kWh/year. The Joint Commenters noted that the EnergyGuide label includes only the cost of the machine energy and the water heating energy, and does not include the cost of the energy required to remove the remaining moisture from the clothes, which makes the cost of energy consumed in non-active-washing modes more significant. According to the Joint Comment, the most efficient washers listed by the FTC with a capacity greater than 3 cubic feet only use about 110–130 kWh/year, and, therefore, the energy consumed in modes other than the active washing mode could represent up to about 40 percent of total annual energy use, which is significant. (Joint Comment, No. 16 at pp. 2–3).

Whirlpool objected to measuring additional energy use in non-active modes but not reporting them on the EnergyGuide tag, stating that this would be inconsistent. (Whirlpool, Public Meeting Transcript, No. 20 at pp. 95–96).

ASAP commented that when the new standards go into effect, the minimum and maximum operating costs on the EnergyGuide label would have to be revised anyway to take into account the new standards, and that the additional annual operating costs could be incorporated at that point. ASAP stated that it supports incorporating all energy use, including energy use in non-active modes. (ASAP, Public Meeting Transcript, No. 20 at p. 96).

As discussed in section III.B.6, DOE proposes in today's SNOPR to amend the estimated annual operating cost by incorporating the cost of energy consumed in the non-active washing modes. DOE also proposed in the September 2010 NOPR to update the number of annual use cycles. This will affect the estimated annual operating cost disclosed on the EnergyGuide label. Pursuant to 42 U.S.C. 6294, the FTC may revise the EnergyGuide label for residential clothes washers when the amended test procedure becomes effective.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

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

DOE reviewed today's supplemental proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE tentatively concluded that the September 2010 NOPR would not have a significant impact on a substantial number of small entities, and today's SNOPR contains no revisions to that proposal that would result a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

The Small Business Administration (SBA) considers a business entity to be

small business, if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. These size standards and codes are established by the North American Industry Classification System (NAICS). The threshold number for NAICS classification code 335224, which applies to household laundry equipment manufacturers and includes clothes washer manufacturers, is 1,000 employees. Searches of the SBA Web site [7] to identify clothes washer manufacturers within these NAICS codes identified, out of approximately 17 manufacturers supplying clothes washers in the United States, only one small business. This small business manufactures laundry appliances, including clothes washers. The other manufacturers supplying clothes washers are large multinational corporations.

The proposed rule would amend DOE's test procedure by incorporating testing provisions to address active mode, standby mode, and off mode energy and water consumption that will be used to demonstrate compliance with energy conservation standards. The proposed test procedure amendments for measuring standby and off mode power consumption using the ''alternative method'' involve measuring power input when the clothes washer is in inactive mode or off mode, or both if both modes are available on the clothes washer under test, as a proxy for measuring power consumption in all low power modes. These tests can be conducted in the same facilities used for the current energy testing of these products, so it is anticipated that manufacturers would not incur any additional facilities costs as a result of the proposed test procedure amendments. The power meter required for these tests might require greater accuracy than the power meter used for current energy testing, but the investment required for a possible instrumentation upgrade is expected to be approximately a few thousand dollars. The duration of each non-active washing mode test period is expected to be roughly 30–45 minutes, depending on stability of the power consumption, using the alternative approach described previously. This is comparable to approximately one-half to two-thirds the time required to conduct a single energy test cycle. Each clothes washer tested requires, on average, approximately 15 test cycles for energy testing, which equates to about 3 days of testing. Using the alternative approach proposed in today's SNOPR, DOE estimates roughly a 3-percent increase in total test period duration. This represents a significant reduction compared to the 11 percent increase DOE estimated in the September 2010 NOPR, which was based on the proposal to measure inactive, off, delay start, and cycle finished modes separately. DOE notes that the provisions from IEC Standard 62301 (Second Edition) proposed to incorporate by reference in today's SNOPR would require longer test durations in the event that the threshold stability criteria of the power measurement are not met. DOE believes that the likelihood of such a longer test being required is very small, based on the observations during testing for the September 2010 NOPR.

DOE also estimates that it costs a manufacturer approximately $2300 on average, including the cost of consumables, to conduct energy testing for a particular clothes washer. DOE further estimates that the cost of additional testing for non-active washing modes using the proposed alternative approach would average $75 per machine, a 3-percent increase over current test costs. This represents a significant reduction compared to the 9 percent increase ($200) DOE estimated in the September 2010 NOPR, which was based on the proposal to measure inactive, off, delay start, and cycle finished modes separately. For the same reason as discussed above, DOE does not believe it is likely that these test costs will be higher due to extended test times required by IEC Standard 62301 (Second Edition) in the event that the threshold stability criteria of the power measurement are not met.

DOE believes these additional requirements for equipment and time and additional cost to conduct the proposed non-active washing mode test would not be expected to impose a significant economic burden on entities subject to the applicable testing requirements. Although the small business has significantly lower sales than other manufacturers over which to amortize these additional costs, it produces only a single platform which would be subject to the proposed non-active washing mode tests.

DOE does not believe that the proposed test procedure amendments for the active washing mode discussed in today's SNOPR would increase test burden because they comprise revisions to calculations rather than additional, longer, or more complex methodology. For standby mode and off mode, as described in section III.B.1, certain provisions in section 5 of IEC Standard 62301 Second Edition could require additional testing time compared to the First Edition. However, DOE expects the large majority of clothes washers to require less than one hour of testing time to perform the standby power test under the proposed alternative approach. Therefore, DOE does not believe these proposed amendments would have a significant impact on a substantial number of small entities.

For these reasons, DOE tentatively concludes and certifies that the September 2010 NOPR, as modified by today's SNOPR, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE has previously transmitted the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b). DOE seeks comment on the updated certification set forth above.

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of residential clothes washers must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for clothes washers, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including residential clothes washers. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

[7] A searchable database of certified small businesses is available online at: *http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm.*

D. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for residential clothes washers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://www.gc.doe.gov*. DOE examined today's proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

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

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of residential clothes washers is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the FTC concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedure addressed by this action incorporate testing methods contained in the commercial standard, IEC Standard 62301, Edition 2.0 2011–01, ''Household electrical appliances—Measurement of standby power.'' DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE will consult with the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in this standard, before prescribing a final rule.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via *http://www.regulations.gov*. The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *regulations.gov* cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via e-mail, hand delivery, or mail. Comments and documents submitted via e-mail, hand delivery, or mail also will be posted to *regulations.gov*. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, e-mail address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via e-mail, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the

information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via e-mail or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) Incorporation by reference of certain provisions of IEC 62301 (Second Edition), and the accompanying impacts on measurement improvement and test burden (see section III.B.1);

(2) The acceptability of measuring the total harmonic content, crest factor, and maximum current ratio before and after the actual test measurement if the power measuring instrument is unable to perform these measurements during the actual test measurement;

(3) The potential test burden that would be required for a laboratory to upgrade its data acquisition system to enable real-time statistical analysis capabilities;

(4) The alternate method for measuring energy use in low-power modes by means of measuring power consumption only in the inactive mode and off mode (see section III.B.2);

(5) The proposed clarification of the energy test cycle definition (see section III.B.3);

(6) The proposed use of a weighted-average load size based on the load usage factors and the minimum, average, and maximum load sizes rather than the product of the LAF and maximum load size in the drying energy calculation (see section III.B.4); and

(7) The proposed clarification of how to classify the wash temperature settings for clothes washers with both a ''cold'' wash setting and a ''tap cold'' wash setting.

(8) DOE's tentative conclusion and certification that the September 2010 NOPR, as modified by today's SNOPR, would not have a significant economic impact on a substantial number of small entities.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Energy conservation, Household appliances, Incorporation by reference, Small businesses.

Issued in Washington, DC, on July 26, 2011.

Kathleen Hogan,

Deputy Assistant Secretary of Energy, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 430 of title 10 of the Code of Federal Regulations, as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

2. Section 429.20 is amended by revising paragraphs (a)(2)(i) introductory text and (a)(2)(ii) introductory text to read as follows:

§ 429.20 Residential clothes washers.

(a) * * *

(2) * * *

(i) Any represented value of the water factor, integrated water factor, the estimated annual operating cost, the energy or water consumption, or other measure of energy or water consumption of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

* * * * *

(ii) Any represented value of the modified energy factor, integrated modified energy factor, or other measure of energy or water consumption of a basic model for which consumers would favor higher values shall be less than or equal to the lower of:

* * * * *

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

3. The authority citation for Part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

4. Section 430.3 is amended by:

a. Redesignating paragraphs (c) through (o) as paragraphs(d) through (p);

b. Adding new paragraph (c);

c. Revising newly designated paragraph (m)(2).

The additions read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(c) *AATCC.* American Association of Textile Chemists and Colorists, P.O. Box 1215, Research Triangle Park, NC 27709, 919–549–8141, or go to *http://www.aatcc.org.*

(1) AATCC Test Method 79–2010, Absorbency of Bleached Textiles,, IBR approved for Appendix J1 and Appendix J2.

(2) AATCC Test Method 118–2007, Oil Repellency: Hydrocarbon Resistance Test,, IBR approved for Appendix J1 and Appendix J2.

(3) AATCC Test Method 135–2010, Dimensional Changes of Fabrics after Home Laundering, IBR approved for Appendix J1 and Appendix J2.

* * * * *

(m) * * *

(2) IEC Standard 62301 (''IEC 62301''), *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01), IBR approved for Appendix J2.

* * * * *

5. Section 430.23 is amended by revising paragraph (j) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(j) *Clothes washers.* (1) The estimated annual operating cost for automatic and semi-automatic clothes washers must be rounded off to the nearest dollar per year and is defined as follows:

(i) Before use of appendix J2 becomes mandatory,

(A) When electrically heated water is used,

$(N_1 \times E_{TE1} \times C_{KWH})$

Where,

N_1 = the representative average residential clothes washer use of 392 cycles per year according to appendix J1,

E_{TE1} = the total per-cycle energy consumption when electrically heated water is used, in kilowatt-hours per cycle, determined according to section 4.1.7 of appendix J1, and

C_{KWH} = the representative average unit cost, in dollars per kilowatt-hour, as provided by the Secretary.

(B) When gas-heated or oil-heated water is used,

$(N_1 \times ((ME_{T1} \times C_{KWH}) + (HE_{TG1} \times C_{BTU})))$

Where,

N_1 and C_{KWH} are defined in paragraph (j)(1)(i)(A) of this section,

ME_{T1} = the total weighted per-cycle machine electrical energy consumption, in kilowatt-hours per cycle, determined according to section 4.1.6 of appendix J1,

HE_{TG1} = the per-cycle hot water energy consumption using gas-heated or oil-heated water, in Btu per cycle, determined according to section 4.1.4 of appendix J1, and

C_{BTU} = the representative average unit cost, in dollars per Btu for oil or gas, as appropriate, as provided by the Secretary.

(ii) After use of appendix J2 becomes mandatory (see the note at the beginning of appendix J2),

(A) When electrically heated water is used,

$(N_2 \times (E_{TE2} + E_{TSC} + E_{TSO}) \times C_{KWH})$

Where,

N_2 = the representative average residential clothes washer use of 295 cycles per year according to appendix J2,

E_{TE2} = the total per-cycle energy consumption, in kilowatt-hours per cycle, determined according to section 4.1.7 of appendix J2,

E_{TSC} = the per-cycle self-clean energy consumption, in kilowatt-hours per cycle, determined according to section 4.5 of appendix J2,

E_{TSO} = the per-cycle combined low-power mode energy consumption, in kilowatt-hours per cycle, determined according to section 4.4 of appendix J2, and

C_{KWH} is defined in paragraph (j)(1)(i)(A) of this section.

(B) When gas-heated or oil-heated water is used,

$(N_2 \times ((ME_{T2} + ME_{SC} + E_{TSO}) \times C_{KWH}) + ((HE_{TG2} + HE_{SCG}) \times C_{BTU}))$

Where,

N_2 and E_{TSO} are defined in (j)(1)(ii)(A) of this section,

ME_{T2} = the total weighted per-cycle machine electrical energy consumption, in kilowatt-hours per cycle, determined according to section 4.1.6 of appendix J2,

ME_{SC} = the per-cycle self-clean machine electrical energy consumption, in kilowatt-hours per cycle, determined according to section 4.1.10 of appendix J2,

C_{KWH} is defined in (j)(1)(i)(A) of this section,

HE_{TG2} = the per-cycle hot water energy consumption using gas-heated or oil-heated water, in Btu per cycle, determined according to section 4.1.4 of appendix J2,

HE_{SCG} = the per-cycle self-clean hot water energy consumption using gas-heated or oil-heated water, in Btu per cycle, determined according to section 4.1.9 of appendix J2, and

C_{BTU} is defined in (j)(1)(i)(B) of this section.

(2)(i) The modified energy factor for automatic and semi-automatic clothes washers is determined in accordance with section 4.4 of appendix J1 before appendix J2 becomes mandatory and section 4.6 of appendix J2 when appendix J2 becomes mandatory. The result shall be rounded off to the nearest 0.01 cubic foot per kilowatt-hour per cycle.

(ii) The integrated modified energy factor for automatic and semi-automatic clothes washers is determined in accordance with section 4.7 of appendix J2 when appendix J2 becomes mandatory. The result shall be rounded off to the nearest 0.01 cubic foot per kilowatt-hour per cycle.

(3) Other useful measures of energy consumption for automatic or semi-automatic clothes washers shall be those measures of energy consumption which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of appendix J1 before the date that appendix J2 becomes mandatory or appendix J2 upon the date that appendix J2 becomes mandatory. In addition, the annual water consumption of a clothes washer can be determined by the product of:

(i) Before appendix J2 becomes mandatory, the representative average-use of 392 cycles per year and the total weighted per-cycle water consumption for cold wash in gallons per cycle determined according to section 4.2.2 of appendix J1. The water consumption factor can be determined in accordance with section 4.2.3 of appendix J1. The remaining moisture content can be determined in accordance with section 3.8 of appendix J1.

(ii) After appendix J2 becomes mandatory, the representative average-use of 295 cycles per year and the total weighted per-cycle water consumption for all wash cycles in gallons per cycle determined according to section 4.2.13 of appendix J2. The water consumption factor can be determined in accordance with section 4.2.15 of appendix J2. The integrated water consumption factor can be determined in accordance with section 4.2.16 of appendix J2. The remaining moisture content can be determined in accordance with section 3.8 of appendix J2.

* * * * *

Appendix J—[Removed]

6. Appendix J to subpart B of part 430 is removed.

Appendix J1—[Amended]

7. Appendix J1 to subpart B of part 430 is amended by:

a. Revising the introductory text;

b. Revising section 1.22;

c. Removing sections 2.6.1.1 through 2.6.1.2.4;

d. Revising section 2.6.3.1;

e. Revising section 2.10;

f. Revising section 3.6;

g. Revising section 4.1.4, and

h. Revising section 5.

The revisions read as follows:

Appendix J1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-automatic Clothes Washers

Appendix J1 is effective until the compliance date of any amended standards for residential clothes washers. After this date, all residential clothes washers shall be tested using the provisions of Appendix J2 of this appendix.

* * * * *

1.22 *Cold rinse* means the coldest rinse temperature available on the machine.

* * * * *

2.6.3.1 Perform 5 complete normal wash-rinse-spin cycles, the first two with AHAM Standard detergent Formula 3 and the last three without detergent. Place the test cloth in a clothes washer set at the maximum water level. Wash the load for ten minutes in soft water (17 ppm hardness or less) using 27.0 grams + 4.0 grams per lb of cloth load of AHAM Standard detergent Formula 3. The wash temperature is to be controlled to 135 °F ± 5 °F (57.2 °C ± 2.8 °C) and the rinse temperature is to be controlled to 60 °F ± 5 °F (15.6 °C ± 2.8 °C). Repeat the cycle with detergent and then repeat the cycle three additional times without detergent, bone drying the load between cycles (total of five wash and rinse cycles).

* * * * *

2.10 *Wash time setting.* If one wash time is prescribed in the energy test cycle, that shall be the wash time setting; otherwise, the wash time setting shall be the higher of either the minimum or 70 percent of the maximum wash time available in the energy test cycle, regardless of the labeling of suggested dial locations. If the clothes washer is equipped with an electromechanical dial controlling wash time, reset the dial to the minimum wash time and then turn it in the direction of increasing wash time to reach the

appropriate setting. If the appropriate setting is passed, return the dial to the minimum wash time and then turn in the direction of increasing wash time until the setting is reached.

* * * * *

3.6 *''Cold Wash'' (Minimum Wash Temperature Selection).* Water and electrical energy consumption shall be measured for each water fill level or test load size as specified in sections 3.6.1 through 3.6.3 of this Appendix for the coldest wash temperature selection available. For a clothes washer that offers two or more wash temperature settings labeled as cold, such as ''Cold'' and ''Tap Cold'', the setting with the minimum wash temperature shall be considered the cold wash. If any of the other cold wash temperature settings add hot water to raise the wash temperature above the cold water supply temperature, as defined in section 2.3 of this Appendix, those setting(s) shall be considered warm wash setting(s), as defined in section 1.18 of this Appendix. If none of the cold wash temperature settings add hot water for any of the water fill levels or test load sizes required for the energy test cycle, the wash temperature setting labeled as ''Cold'' shall be considered the cold wash, and the other wash temperature setting(s) labeled as cold shall not be required for testing.

* * * * *

4. Calculation of Derived Results From Test Measurements.

* * * * *

4.1.4 *Total per-cycle hot water energy consumption using gas-heated or oil-heated water.* Calculate for the energy test cycle the per-cycle hot water consumption, HE_{TG}, using gas-heated or oil-heated water, expressed in Btu per cycle (or megajoules per cycle) and defined as:

$HE_{TG} = HE_T \times 1/e \times 3412$ Btu/kWh or

$HE_{TG} = HE_T \times 1/e \times 3.6$ MJ/kWh

where:

e = Nominal gas or oil water heater efficiency = 0.75.

HE_T=As defined in 4.1.3.

* * * * *

5. Test Loads

TABLE 5.1—TEST LOAD SIZES

Container volume		Minimum load		Maximum load		Average load	
Cu. ft.	Liter	Lb	kg	lb	kg	lb	Kg
≥ <	≥ <						
0–0.8	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.4
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.7
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.85	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.05	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.25	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.45	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.65	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.85	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.05	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.25	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.45	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.65	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
Cu. ft.	Liter	Lb	kg	lb	kg	lb	Kg
≥ <	≥ <						
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21

Notes: (1) All test load weights are bone dry weights.
(2) Allowable tolerance on the test load weights are ±0.10 lbs (0.05 kg).

8. Add a new Appendix J2 to subpart B of part 430 to read as follows:

Appendix J2 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers

Appendix J1 is effective until the compliance date of any amended standards for residential clothes washers. After this date, all residential clothes washers shall be tested using the provisions of Appendix J2.

1. Definitions and Symbols

1.1 *Active mode* means a mode in which the clothes washer is connected to a mains power source, has been activated, and is performing one or more of the main functions of washing, soaking, tumbling, agitating, rinsing, and/or removing water from the clothing, or is involved in functions necessary for these main functions, such as admitting water into the washer or pumping water out of the washer. Active mode also includes delay start, cycle finished, and self-clean modes.

1.2 *Active washing mode* means a mode in which the clothes washer is performing any of the operations included in a complete cycle intended for washing a clothing load, including the main functions of washing, soaking, tumbling, agitating, rinsing, and/or removing water from the clothing.

1.3 *Adaptive control system* means a clothes washer control system, other than an adaptive water fill control system, which is capable of automatically adjusting washer operation or washing conditions based on characteristics of the clothes load placed in the clothes container, without allowing or requiring consumer intervention or actions. The automatic adjustments may, for example, include automatic selection, modification, or control of any of the following: Wash water temperature, agitation or tumble cycle time, number of rinse cycles, and spin speed. The characteristics of the clothes load, which could trigger such adjustments, could, for example, consist of or be indicated by the presence of either soil, soap, suds, or any other additive laundering substitute or complementary product.

Note: Appendix J2 does not provide a means for determining the energy consumption of a clothes washer with an adaptive control system. A waiver must be obtained pursuant to 10 CFR 430.27 to establish an acceptable test procedure for each such clothes washer.

1.4 *Adaptive water fill control system* means a clothes washer water fill control system which is capable of automatically adjusting the water fill level based on the size or weight of the clothes load placed in the clothes container, without allowing or requiring consumer intervention or actions.

1.5 *Bone-dry* means a condition of a load of test cloth which has been dried in a dryer at maximum temperature for a minimum of 10 minutes, removed and weighed before cool down, and then dried again for 10 minute periods until the final weight change of the load is 1 percent or less.

1.6 *Clothes container* means the compartment within the clothes washer that holds the clothes during the operation of the machine.

1.7 *Cold rinse* means the coldest rinse temperature available on the machine.

1.8 *Combined low-power mode* means the aggregate of available modes other than active washing mode and self-clean mode, including inactive mode, off mode, delay start mode, and cycle finished mode.

1.9 *Compact* means a clothes washer which has a clothes container capacity of less than 1.6 ft^3 (45 L).

1.10 *Cycle finished mode* means an active mode which provides continuous status display following operation in active washing mode.

1.11 *Deep rinse cycle* means a rinse cycle in which the clothes container is filled with water to a selected level and the clothes load is rinsed by agitating it or tumbling it through the water.

1.12 *Delay start mode* means an active mode in which activation of active washing mode is facilitated by a timer.

1.13 *Energy test cycle* for a basic model means (A) The cycle recommended by the manufacturer for washing cotton or linen clothes, and includes all wash/rinse temperature selections and water levels offered in that cycle, and (B) if the cycle described in (A) does not include all wash/rinse temperature settings available on the clothes washer, the energy test cycle shall also include the portions of a cycle setting offering these wash/rinse temperature settings with agitation/tumble operation, spin speed(s), wash times, and rinse times that are largely comparable to those for the cycle recommended by the manufacturer for washing cotton or linen clothes. Any cycle under (A) or (B) shall include the manufacturer's default agitation/tumble operation, soil level, spin speed(s), wash times, and rinse times applicable to that cycle, including water heating time for water heating clothes washers.

1.14 *IEC 62301* means the test standard published by the International Electrotechnical Commission, entitled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 Edition 2.0 2011–01 (incorporated by reference; see § 430.3).

1.15 *Inactive mode* means a standby mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display.

1.16 *Integrated modified energy factor* means the quotient of the cubic foot (or liter) capacity of the clothes container divided by the total clothes washer energy consumption per cycle, with such energy consumption expressed as the sum of:

(a) The machine electrical energy consumption;

(b) The hot water energy consumption;

(c) The energy required for removal of the remaining moisture in the wash load;

(d) The combined low-power mode energy consumption; and

(e) The self-clean energy consumption, as applicable.

1.17 *Integrated water consumption factor* means the quotient of the total clothes washer water consumption per cycle in gallons, with such water consumption expressed as the sum of the total weighted per-cycle water consumption and the per-cycle self-clean water consumption, divided by the cubic foot (or liter) capacity of the clothes washer.

1.18 *Load use factor* means the percentage of the total number of wash loads that a user would wash a particular size (weight) load.

1.19 *Manual control system* means a clothes washer control system which requires that the consumer make the choices that determine washer operation or washing conditions, such as, for example, wash/rinse temperature selections, and wash time before starting the cycle.

1.20 *Manual water fill control system* means a clothes washer water fill control system which requires the consumer to determine or select the water fill level.

1.21 *Modified energy factor* means the quotient of the cubic foot (or liter) capacity of the clothes container divided by the total clothes washer energy consumption per cycle, with such energy consumption expressed as the sum of the machine electrical energy consumption, the hot water energy consumption, and the energy required for removal of the remaining moisture in the wash load.

1.22 *Non-water-heating clothes washer* means a clothes washer which does not have an internal water heating device to generate hot water.

1.23 *Off mode* means a mode in which the clothes washer is connected to a mains power source and is not providing any active or standby mode function, and where the mode may persist for an indefinite time. An indicator that only shows the user that the product is in the off position is included within the classification of an off mode.

1.24 *Self-clean mode* means an active clothes washer operating mode that is:

(a) Dedicated to cleaning, deodorizing, or sanitizing the clothes washer by eliminating sources of odor, bacteria, mold, and mildew;

(b) Recommended to be run intermittently by the manufacturer; and

(c) Separate from clothes washing cycles.

1.25 *Spray rinse cycle* means a rinse cycle in which water is sprayed onto the clothes for a period of time without maintaining any specific water level in the clothes container.

1.26 *Standard* means a clothes washer which has a clothes container capacity of 1.6 ft^3 (45 L) or greater.

1.27 *Standby mode* means any modes in which the clothes washer is connected to a mains power source and offers one or more of the following user oriented or protective functions that may persist for an indefinite time:

(a) To facilitate the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, or timer;

(b) Continuous functions, including information or status displays (including clocks) or sensor-based functions. A timer is a continuous clock function (which may or may not be associated with a display) that provides regular scheduled tasks (*e.g.,* switching) and that operates on a continuous basis.

1.28 *Steam cycle* means a wash cycle in which steam is injected into the clothes container.

1.29 *Symbol usage.* The following identity relationships are provided to help clarify the symbology used throughout this procedure.

E—Electrical Energy Consumption;
H—Hot Water Consumption;
C—Cold Water Consumption;
R—Hot Water Consumed by Warm Rinse;
TUF—Temperature Use Factor;
HE—Hot Water Energy Consumption;
F—Load Usage Factor;
Q—Total Water Consumption;
ME—Machine Electrical Energy Consumption;
RMC—Remaining Moisture Content;
WI—Initial Weight of Dry Test Load;
WC—Weight of Test Load After Extraction;
P—Power;
S—Annual Hours;
s—Steam Wash;
m—Extra Hot Wash (maximum wash temp. > 135 °F (57.2 °C));
h—Hot Wash (maximum wash temp. ≤ 135 °F (57.2 °C));
w—Warm Wash;
c—Cold Wash (minimum wash temp.);
r—Warm Rinse (hottest rinse temp.);
sc—Self Clean;
x or max—Maximum Test Load;
a or avg—Average Test Load;
n or min—Minimum Test Load;
ia—Inactive Mode;
o—Off Mode;
oi—Combined Off and Inactive Modes;
LP—Combined Low-Power Mode.

The following examples are provided to show how the above symbols can be used to define variables:

Em_x = ''Electrical Energy Consumption'' for an ''Extra Hot Wash'' and ''Maximum Test Load''.
R_a = ''Hot Water Consumed by Warm Rinse'' for the ''Average Test Load''.
TUF_m = ''Temperature Use Factor'' for an ''Extra Hot Wash''.
HE_{min} = ''Hot Water Energy Consumption'' for the ''Minimum Test Load''.
Q_{sc} = ''Total Water Consumption'' for ''Self Clean''.
P_{ia} = ''Power'' in ''Inactive Mode''.
S_o = ''Annual Hours'' in ''Off Mode''.

1.30 *Temperature use factor* means, for a particular wash/rinse temperature setting, the percentage of the total number of wash loads that an average user would wash with that setting.

1.31 *Thermostatically controlled water valves* means clothes washer controls that have the ability to sense and adjust the hot and cold supply water.

1.32 *Uniformly distributed warm wash temperature selection(s)* means (A) Multiple warm wash selections for which the warm wash water temperatures have a linear relationship with all discrete warm wash selections when the water temperatures are plotted against equally spaced consecutive warm wash selections between the hottest warm wash and the coldest warm wash. If the warm wash has infinite selections, the warm wash water temperature has a linear relationship with the distance on the selection device (*e.g.* dial angle or slide movement) between the hottest warm wash and the coldest warm wash. The criteria for a linear relationship as specified above is that the difference between the actual water temperature at any warm wash selection and the point where that temperature is depicted on the temperature/selection line formed by connecting the warmest and the coldest warm selections is less than ± 5 percent. In all cases, the mean water temperature of the warmest and the coldest warm selections must coincide with the mean of the ''hot wash'' (maximum wash temperature ≤ 135 °F (57.2 °C)) and ''cold wash'' (minimum wash temperature) water temperatures within ± 3.8 °F (± 2.1 °C); or (B) on a clothes washer with only one warm wash temperature selection, a warm wash temperature selection with a water temperature that coincides with the mean of the ''hot wash'' (maximum wash temperature ≤ 135 °F (57.2 °C)) and ''cold wash'' (minimum wash temperature) water temperatures within ± 3.8 °F (± 2.1 °C).

1.33 *Warm rinse* means the hottest rinse temperature available on the machine.

1.34 *Warm wash* means all wash temperature selections that are below the maximum wash temperature ≤ 135 °F (57.2 °C) and above the minimum wash temperature.

1.35 *Water consumption factor* means the quotient of the total weighted per-cycle water consumption divided by the cubic foot (or liter) capacity of the clothes washer.

1.36 *Water-heating clothes washer* means a clothes washer where some or all of the hot water for clothes washing is generated by a water heating device internal to the clothes washer.

2. Testing Conditions

2.1 *Installation.* Install the clothes washer in accordance with manufacturer's instructions. For combined low-power mode testing, the product shall be installed in accordance with Section 5, Paragraph 5.2 of IEC 62301 (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes.

2.2 *Electrical energy supply.*

2.2.1 *Supply voltage and frequency.* Maintain the electrical supply at the clothes washer terminal block within 2 percent of 120, 120/240, or 120/208Y volts as applicable to the particular terminal block wiring system and within 2 percent of the nameplate frequency as specified by the manufacturer. If the clothes washer has a dual voltage conversion capability, conduct test at the highest voltage specified by the manufacturer.

2.2.2 *Supply voltage waveform.* For the combined low-power mode testing, maintain the electrical supply voltage waveform indicated in Section 4, Paragraph 4.3.2 of IEC 62301 (incorporated by reference; see § 430.3). If the power measuring instrument used for testing is unable to measure and record the total harmonic content during the test measurement period, it is acceptable to measure and record the total harmonic content immediately before and after the test measurement period.

2.3 *Supply Water.*

2.3.1 *Clothes washers in which electrical energy consumption or water energy consumption are affected by the inlet water temperature. (For example, water heating clothes washers or clothes washers with thermostatically controlled water valves.).* The temperature of the hot water supply at the water inlets shall not exceed 135 °F (57.2 °C) and the cold water supply at the water inlets shall not exceed 60 °F (15.6 °C). A water meter shall be installed in both the hot and cold water lines to measure water consumption.

2.3.2 *Clothes washers in which electrical energy consumption and water energy consumption are not affected by the inlet water temperature.* The temperature of the hot water supply shall be maintained at 135 °F ± 5 °F (57.2 °C ± 2.8 °C) and the cold water supply shall be maintained at 60 °F ± 5 °F (15.6 °C ± 2.8 °C). A water meter shall be installed in both the hot and cold water lines to measure water consumption.

2.4 *Water pressure.* The static water pressure at the hot and cold water inlet connection of the clothes washer shall be maintained at 35 pounds per square inch gauge (psig) ±2.5 psig (241.3 kPa ± 17.2 kPa) when the water is flowing. The static water pressure for a single water inlet connection shall be maintained at 35 psig ± 2.5 psig (241.3 kPa ± 17.2 kPa) when the water is flowing. A water pressure gauge shall be installed in both the hot and cold water lines to measure water pressure.

2.5 *Instrumentation.* Perform all test measurements using the following instruments as appropriate:

2.5.1 *Weighing scales.*

2.5.1.1 *Weighing scale for test cloth.* The scale shall have a resolution of no larger than 0.2 oz (5.7 g) and a maximum error no greater than 0.3 percent of the measured value.

2.5.1.2 *Weighing scale for clothes container capacity measurement.* The scale should have a resolution no larger than 0.50 lbs (0.23 kg) and a maximum error no greater than 0.5 percent of the measured value.

2.5.2 *Watt-hour meter.* The watt-hour meter shall have a resolution no larger than 1 Wh (3.6 kJ) and a maximum error no greater than 2 percent of the measured value for any demand greater than 50 Wh (180.0 kJ).

2.5.3 *Watt meter.* The watt meter used to measure combined low-power mode power consumption shall comply with the requirements specified in Section 4, Paragraph 4.4 of IEC 62301 (incorporated by reference, see § 430.3). If the power measuring instrument used for testing is unable to measure and record the crest factor, power factor, or maximum current ratio during the test measurement period, it is acceptable to measure the crest factor, power factor, and maximum current ratio immediately before and after the test measurement period.

2.5.4 *Temperature measuring device.* The device shall have an error no greater than ± 1 °F (± 0.6 °C) over the range being measured.

2.5.5 *Water meter.* The water meter shall have a resolution no larger than 0.1 gallons (0.4 liters) and a maximum error no greater than 2 percent for the water flow rates being measured.

2.5.6 *Water pressure gauge.* The water pressure gauge shall have a resolution of 1 pound per square inch gauge (psig) (6.9 kPa) and shall have an error no greater than 5 percent of any measured value.

2.6 *Test cloths.*

2.6.1 *Energy Test Cloth.* The energy test cloth shall be made from energy test cloth material, as specified in section 2.6.4 of this Appendix, that is 24 ± ½ inches by 36 ± ½ inches (61.0 ± 1.3 cm by 91.4 ± 1.3 cm) and has been hemmed to 22 ± ½ inches by 34 ± ½ inches (55.9 ± 1.3 cm by 86.4 ± 1.3 cm) before washing. The energy test cloth shall be clean and shall not be used for more than 60 test runs (after preconditioning as specified in 2.6.3 of this appendix). All energy test cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

2.6.2 *Energy Stuffer Cloth.* The energy stuffer cloth shall be made from energy test cloth material, as specified in section 2.6.4 of this Appendix, and shall consist of pieces of material that are 12 ± ¼ inches by 12 ± ¼ inches (30.5 ± 0.6 cm by 30.5 ± 0.6 cm) and have been hemmed to 10 ± ¼ inches by 10 ± ¼ inches (25.4 ± 0.6 cm by 25.4 ± 0.6 cm) before washing. The energy stuffer cloth shall be clean and shall not be used for more than 60 test runs (after preconditioning as specified in section 2.6.3 of this Appendix). All energy stuffer cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

2.6.3 *Preconditioning of Test Cloths.* The new test cloths, including energy test cloths and energy stuffer cloths, shall be pre-conditioned in a clothes washer in the following manner:

2.6.3.1 Perform 5 complete normal wash-rinse-spin cycles, the first two with current AHAM Standard detergent Formula 3 and the last three without detergent. Place the test cloth in a clothes washer set at the maximum water level. Wash the load for ten minutes in soft water (17 ppm hardness or less) using 27.0 grams + 4.0 grams per lb of cloth load of AHAM Standard detergent Formula 3. The wash temperature is to be controlled to 135 °F ± 5 °F (57.2 °C ± 2.8 °C) and the rinse temperature is to be controlled to 60 °F ± 5 °F (15.6 °C ± 2.8 °C). Repeat the cycle with detergent and then repeat the cycle three additional times without detergent, bone drying the load between

cycles (total of five wash and rinse cycles).

2.6.4 *Energy test cloth material.* The energy test cloths and energy stuffer cloths shall be made from fabric meeting the following specifications. The material should come from a roll of material with a width of approximately 63 inches and approximately 500 yards per roll. However, other sizes may be used if they fall within the specifications.

2.6.4.1 *Nominal fabric type.* Pure finished bleached cloth made with a momie or granite weave, which is nominally 50 percent cotton and 50 percent polyester.

2.6.4.2 The fabric weight specification shall be 5.60 ± 0.25 ounces per square yard (190.0 ± 8.4 g/m^2).

2.6.4.3 The thread count shall be 65 x 57 per inch (warp × fill), ±2 percent.

2.6.4.4 The warp yarn and filling yarn shall each have fiber content of 50 percent ± 4 percent cotton, with the balance being polyester, and be open end spun, 15/1 ± 5 percent cotton count blended yarn.

2.6.4.5 Water repellent finishes, such as fluoropolymer stain resistant finishes shall not be applied to the test cloth. The absence of such finishes shall be verified by:

2.6.4.5.1 American Association of Textile Chemists and Colorists (AATCC) Test Method 118–2007, *Oil Repellency: Hydrocarbon Resistance Test* (incorporated by reference; see § 430.3), of each new lot of test cloth (when purchased from the mill) to confirm the absence of Scotchguard™ or other water repellent finish (required scores of ''D'' across the board).

2.6.4.5.2 American Association of Textile Chemists and Colorists (AATCC) Test Method 79–2010, *Absorbency of Bleached Textiles* (incorporated by reference; see § 430.3), of each new lot of test cloth (when purchased from the mill) to confirm the absence of Scotchguard™ or other water repellent finish (time to absorb one drop should be on the order of 1 second).

2.6.4.6 The moisture absorption and retention shall be evaluated for each new lot of test cloth by the Standard Extractor Remaining Moisture Content (RMC) Test specified in section 2.6.5 of this Appendix.

2.6.4.6.1 Repeat the Standard Extractor RMC Test in section 2.6.5 of this Appendix three times.

2.6.4.6.2 An RMC correction curve shall be calculated as specified in section 2.6.6 of this Appendix.

2.6.4.7 The maximum shrinkage after preconditioning shall not be more than 5 percent on the length and width. Measure per AATCC Test Method 135–2010, *Dimensional Changes of Fabrics After Home Laundering* (incorporated by reference; see § 430.3).

2.6.5 *Standard Extractor RMC Test Procedure.* The following procedure is used to evaluate the moisture absorption and retention characteristics of a lot of test cloth by measuring the RMC in a standard extractor at a specified set of conditions. Table 2.6.5 of this Appendix is the matrix of test conditions. When this matrix is repeated 3 times, a total of 60 extractor RMC test runs are required. For the purpose of the extractor RMC test, the test cloths may be used for up to 60 test runs (after preconditioning as specified in section 2.6.3 of this Appendix).

TABLE 2.6.5—MATRIX OF EXTRACTOR RMC TEST CONDITIONS

	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	4 min. spin
100				
200				
350				
500				
650				

2.6.5.1 The standard extractor RMC tests shall be run in a North Star Engineered Products Inc. (formerly Bock) Model 215 extractor (having a basket diameter of 19.5 inches, length of 12 inches, and volume of 2.1 ft^3), with a variable speed drive (North Star Engineered Products, P.O. Box 5127, Toledo, OH 43611) or an equivalent extractor with same basket design (*i.e.,* diameter, length, volume, and hole configuration) and variable speed drive.

2.6.5.2 *Test Load.* Test cloths shall be preconditioned in accordance with section 2.6.3 of this Appendix. The load size shall be 8.4 lbs, consistent with section 3.8.1 of this Appendix.

2.6.5.3 *Procedure.*

2.6.5.3.1 Record the ''bone-dry'' weight of the test load (WI).

2.6.5.3.2 Prepare the test load for soak by grouping four test cloths into loose bundles. Bundles are created by hanging four cloths vertically from one corner and loosely wrapping the test cloth onto itself to form the bundle. Bundles are then placed into the water for soak. Eight to nine bundles will be formed depending on the test load. The ninth bundle may not equal four cloths but can incorporate energy stuffer cloths to help offset the size difference.

2.6.5.3.3 Soak the test load for 20 minutes in 10 gallons of soft (<17 ppm) water. The entire test load shall be submerged. The water temperature shall be 100 °F ± 5°F (38 °C ± 3 °C)

2.6.5.3.4 Remove the test load and allow each of the test cloth bundles to drain over the water bath for a maximum of 5 seconds.

2.6.5.3.5 Manually place the test cloth bundles in the basket of the extractor, distributing them evenly by eye. The draining and loading process should take less than 1 minute. Spin the load at a fixed speed corresponding to the intended centripetal acceleration level (measured in units of the acceleration of gravity, g) ± 1g for the intended time period ± 5 seconds.

2.6.5.3.6 Record the weight of the test load immediately after the completion of the extractor spin cycle (WC).

2.6.5.3.7 Calculate the RMC as (WC–WI)/WI.

2.6.5.3.8 It is not necessary to drain the soak tub if the water bath is corrected for water level and temperature before the next extraction.

2.6.5.3.9 It is not necessary to dry the test load in between extraction runs. However, the bone dry weight shall be checked after every 12 extraction runs to make sure the bone dry weight is within tolerance (8.4 ± 0.1 lb).

2.6.5.3.10 The RMC of the test load shall be measured at five g levels: 100 g, 200 g,
350 g, 500 g, and 650 g, using two different spin times at each g level: 4 minutes and 15 minutes.

2.6.5.4 Repeat section 2.6.5.3 of this Appendix using soft (<17 ppm) water at 60 °F ± 5 °F.

2.6.6 *Calculation of RMC Correction Curve.*

2.6.6.1 Average the values of 3 test runs and fill in Table 2.6.5 of this Appendix. Perform a linear least-squares fit to relate the standard RMC ($RMC_{standard}$) values (shown in Table 2.6.6.1 of this Appendix) to the values measured in section 2.6.5 of this Appendix:

(RMC_{cloth}): $RMC_{standard} - A \times RMC_{cloth} + B$

where A and B are coefficients of the linear least-squares fit.

TABLE 2.6.6.1—STANDARD RMC VALUES

[RMC Standard]

"g Force"	RMC percentage			
	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	4 min. spin
100	45.9	49.9	49.7	52.8
200	35.7	40.4	37.9	43.1
350	29.6	33.1	30.7	35.8
500	24.2	28.7	25.5	30.0
650	23.0	26.4	24.1	28.0

2.6.6.2 Perform an analysis of variance test using two factors, spin speed and lot, to check the interaction of speed and lot. Use the values from Table 2.6.5 and Table 2.6.6.1 of this Appendix in the calculation. The ''P'' value in the variance analysis shall be greater than or equal to 0.1. If the ''P'' value is less than 0.1, the test cloth is unacceptable. ''P'' is a theoretically based probability of interaction based on an analysis of variance.

2.6.7 *Application of the RMC correction curve.*

2.6.7.1 Using the coefficients A and B calculated in section 2.6.6.1 of this Appendix:

$RMC_{corr} = A \times RMC + B$

2.6.7.2 Substitute RMC_{corr} values in calculations in section 3.8 of this Appendix.

2.7 *Test Load Sizes.* Maximum, minimum, and, when required, average test load sizes shall be determined using Table 5.1 of this Appendix and the clothes container capacity as measured in sections 3.1.1 through 3.1.5 of this Appendix. Test loads shall consist of energy test cloths, except that adjustments to the test loads to achieve proper weight can be made by the use of energy stuffer cloths with no more than 5 stuffer cloths per load.

2.8 *Use of Test Loads.* Table 2.8 of this Appendix defines the test load sizes and corresponding water fill settings which are to be used when measuring water and energy consumptions. Adaptive water fill control system and manual water fill control system are defined in section 1 of this Appendix:

TABLE 2.8—TEST LOAD SIZES AND WATER FILL SETTINGS REQUIRED

Manual water fill control system		Adaptive water fill control system	
Test load size	Water fill setting	Test load size	Water fill setting
Max Min	Max Min	Max Avg Min	As determined by the Clothes Washer.

2.8.1 The test load sizes to be used to measure RMC are specified in section 3.8.1 of this Appendix.

2.8.2 Test loads for energy and water consumption measurements shall be bone dry prior to the first cycle of the test, and dried to a maximum of 104 percent of bone dry weight for subsequent testing.

2.8.3 Load the energy test cloths by grasping them in the center, shaking them to hang loosely and then put them into the clothes container prior to activating the clothes washer.

2.9 *Pre-Conditioning.*

2.9.1 *Non-water-heating clothes washer.* If the clothes washer has not been filled with water in the preceding 96 hours, pre-condition it by running it through a cold rinse cycle and then draining it to ensure that the hose, pump, and sump are filled with water.

2.9.2 *Water-heating clothes washer.* If the clothes washer has not been filled with water in the preceding 96 hours, or if it has not been in the test room at the specified ambient conditions for 8 hours, pre-condition it by running it through a cold rinse cycle and then draining it to ensure that the hose, pump, and sump are filled with water.

2.10 *Wash time setting.* If one wash time is prescribed in the energy test cycle, that shall be the wash time setting; otherwise, the wash time setting shall be the higher of either the minimum or 70 percent of the maximum wash time available in the energy test cycle, regardless of the labeling of suggested dial locations. If the clothes washer is equipped with an electromechanical dial controlling wash time, reset the dial to the minimum wash time and then turn it in the direction of increasing wash time to reach the appropriate setting. If the appropriate setting is passed, return the dial to the minimum wash time and then turn in the direction of increasing wash time until the setting is reached.

2.11 *Test room temperature.*

2.11.1 *Non-water-heating clothes washer.* For combined low-power mode testing, maintain room ambient air temperature conditions as specified in Section 4, Paragraph 4.2 of IEC 62301 (incorporated by reference; see § 430.3).

2.11.2 *Water-heating clothes washer.* Maintain the test room ambient air temperature at 75°F ± 5°F (23.9°C ± 2.8°C). For combined low-power mode testing, maintain room ambient air temperature conditions as specified in Section 4, Paragraph 4.2 of IEC 62301 (incorporated by reference; see § 430.3).

2.12 *Bone dryer temperature.* The dryer used for bone drying must heat the test cloth and energy stuffer cloths above 210 °F (99 °C).

3. Test Measurements

3.1 *Clothes container capacity.* Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation according to the following procedures:

3.1.1 Place the clothes washer in such a position that the uppermost edge of the clothes container opening is leveled horizontally, so that the container will hold the maximum amount of water.

3.1.2 Line the inside of the clothes container with 2 mil (0.051 mm) plastic sheet. All clothes washer components which occupy space within the clothes container and which are recommended for use with the energy test cycle shall be in place and shall be lined with 2 mil (0.051 mm) plastic sheet to prevent water from entering any void space.

3.1.3 Record the total weight of the machine before adding water.

3.1.4 Fill the clothes container manually with either 60 °F ± 5 °F (15.6 °C ± 2.8 °C) or 100 °F ± 10 °F (37.8 °C ± 5.5 °C) water, with the door open. For a top-loading, vertical-axis clothes washer, fill the clothes container to the uppermost edge of the rotating portion, including any balance ring. For a front-loading, horizontal-axis clothes washer, fill the clothes container to the uppermost edge that is in contact with the door seal. For all clothes washers, any volume which cannot be occupied by the clothing load during operation must be excluded from the measurement. Measure and record the weight of water, W, in pounds.

3.1.5 The clothes container capacity is calculated as follows:

$C = W/d$

Where:

C = Capacity in cubic feet (liters).

W = Mass of water in pounds (kilograms).

d = Density of water (62.0 lbs/ft^3 for 100 °F (993 kg/m^3 for 37.8 °C) or 62.3 lbs/ft^3 for 60 °F (998 kg/m^3 for 15.6 °C)).

3.2 *Procedure for measuring water and energy consumption values on all automatic and semi-automatic washers.* All energy consumption tests shall be performed under the energy test cycle(s), unless otherwise specified. Table 3.2 of this Appendix defines the sections below which govern tests of particular clothes washers, based on the number of wash/rinse temperature selections available on the model, and also, in some instances, method of water heating. The procedures prescribed are applicable regardless of a clothes washer's washing capacity, loading port location, primary axis of rotation of the clothes container, and type of control system.

3.2.1 *Inlet water temperature and the wash/rinse temperature settings.*

3.2.1.1 For automatic clothes washers set the wash/rinse temperature selection control to obtain the wash water temperature selection control to obtain the wash water temperature desired (extra hot, hot, warm, or cold) and cold rinse, and open both the hot and cold water faucets.

3.2.1.2 For semi-automatic washers:

(1) For hot water temperature, open the hot water faucet completely and close the cold water faucet;

(2) For warm inlet water temperature, open both hot and cold water faucets completely;

(3) For cold water temperature, close the hot water faucet and open the cold water faucet completely.

3.2.1.3 *Determination of warm wash water temperature(s) to decide whether a clothes washer has uniformly distributed warm wash temperature selections.* The wash water temperature, Tw, of each warm water wash selection shall be calculated or measured.

(1) For non-water heating clothes washers, calculate Tw as follows:

$Tw(°F) = ((Hw \times 135\ °F) + (Cw \times 60\ °F))/(Hw+Cw)$

or

$Tw(°C) = ((Hw \times 57.2\ °C) + (Cw \times 15.6\ °C))/(Hw + Cw)$

Where:

Hw = Hot water consumption of a warm wash.

Cw = Cold water consumption of a warm wash.

(2) For water-heating clothes washers, measure and record the temperature of each warm wash selection after fill.

3.2.2 Total water consumption during the energy test cycle shall be measured, including hot and cold water consumption during wash, deep rinse, and spray rinse.

3.2.3 *Clothes washers with adaptive water fill/manual water fill control systems*

3.2.3.1 *Clothes washers with adaptive water fill control system and alternate manual water fill control systems.* If a clothes washer with an adaptive water fill control system allows consumer selection of manual controls as an alternative, then both manual and adaptive modes shall be tested and, for each mode, the energy consumption (HE_T, ME_T, and D_E) and water consumption (Q_T), values shall be calculated as set forth in section 4 of this Appendix. Then the average of the two values (one from each mode, adaptive and manual) for each variable shall be used in section 4 of this Appendix for the clothes washer.

3.2.3.2 *Clothes washers with adaptive water fill control system.*

3.2.3.2.1 Not user adjustable. The maximum, minimum, and average water levels as defined in the following sections shall be interpreted to mean that amount of water fill which is selected by the control system when the respective test loads are used, as defined in Table 2.8 of this Appendix. The load usage factors which shall be used when calculating energy consumption values are defined in Table 4.1.3 of this Appendix.

3.2.3.2.2 User adjustable. Four tests shall be conducted on clothes washers with user adjustable adaptive water fill controls which affect the relative wash water levels. The first test shall be conducted with the maximum test load and with the adaptive water fill control system set in the setting that will give the most energy intensive result. The second test shall be conducted with the minimum test load and with the adaptive water fill control system set in the setting that will give the least energy intensive result. The third test shall be conducted with the average test load and with the adaptive water fill control system set in the setting that will give the most energy intensive result for the given test load. The fourth test shall be conducted with the average test load and with the adaptive water fill control system set in the setting that will give the least energy intensive result for the given test load. The energy and water consumption for the average test load and water level shall be the average of the third and fourth tests.

3.2.3.3 *Clothes washers with manual water fill control system.* In accordance with Table 2.8 of this Appendix, the water fill selector shall be set to the maximum water level available on the clothes washer for the maximum test load size and set to the minimum water level for the minimum test load size. The load usage factors which shall be used when calculating energy consumption values are defined in Table 4.1.3 of this Appendix.

TABLE 3.2—TEST SECTION REFERENCE

Max. Wash Temp. Available	≤135 °F (57.2 °C)			>135 °F (57.2 °C) **	
Number of Wash Temp. Selections	1	2	>2	3	>3
Test Sections Required to be Followed	.....	.....	.....	3.3	3.3
	.....	3.4	3.4	.....	3.4
	.....	.....	3.5	3.5	3.5
	3.6	3.6	3.6	3.6	3.6
	.....	.....	*3.7	*3.7	*3.7
	3.8	3.8	3.8	3.8	3.8
	.....	.....	.....	†3.9	†3.9

* Only applicable to machines with warm rinse.
** Only applicable to water heating clothes washers on which the maximum wash temperature available exceeds 135 °F (57.2 °C).
† Only applicable to machines equipped with a steam cycle.

3.3 *''Extra Hot Wash'' (Max Wash Temp > 135 °F (57.2 °C)) for water heating clothes washers only.* Water and electrical energy consumption shall be measured for each water fill level and/or test load size as specified in sections 3.3.1 through 3.3.3 of this Appendix for the hottest wash setting available.

3.3.1 *Maximum test load and water fill.* Hot water consumption (Hm_x), cold water consumption (Cm_x), and electrical energy consumption (Em_x) shall be measured for an extra hot wash/cold rinse energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.3.2 *Minimum test load and water fill.* Hot water consumption (Hm_n), cold water consumption (Cm_n), and electrical energy consumption (Em_n) shall be measured for an extra hot wash/cold rinse energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.3.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hm_a), cold water consumption (Cm_a), and electrical energy consumption (Em_a) for an extra hot wash/cold rinse energy test cycle, with an average test load size as determined per Table 5.1 of this Appendix.

3.4 *''Hot Wash'' (Max Wash Temp ≤ 135 °F (57.2 °C)).* Water and electrical energy consumption shall be measured for each water fill level or test load size as specified in sections 3.4.1 through 3.4.3 of this Appendix for a *135 °F (57.2 °C)* wash, if available, or for the hottest selection less than *135 °F (57.2 °C).*

3.4.1 *Maximum test load and water fill.* Hot water consumption (Hh_x), cold water consumption (Ch_x), and electrical energy consumption (Eh_x) shall be measured for a hot wash/cold rinse energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.4.2 *Minimum test load and water fill.* Hot water consumption (Hh_n), cold water consumption (Ch_n), and electrical energy consumption (Eh_n) shall be measured for a hot wash/cold rinse energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.4.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hh_a), cold water consumption (Ch_a), and electrical energy consumption (Eh_a) for a hot wash/cold rinse energy test cycle, with an average test load size as determined per Table 5.1 of this Appendix.

3.5 *''Warm Wash.''* Water and electrical energy consumption shall be determined for each water fill level and/or test load size as specified in sections 3.5.1 through 3.5.2.3 of this Appendix for the applicable warm water wash temperature(s) with a cold rinse.

3.5.1 *Clothes washers with uniformly distributed warm wash temperature selection(s).* The reportable values to be used for the warm water wash setting shall be the arithmetic average of the measurements for the hot and cold wash selections. This is a calculation only, no testing is required.

3.5.2 *Clothes washers that lack uniformly distributed warm wash temperature selections.* For a clothes washer with fewer than four discrete warm wash selections, test all warm wash temperature selections. For a clothes washer that offers four or more warm wash selections, test at all discrete selections, or test at 25 percent, 50 percent, and 75 percent positions of the temperature selection device between the hottest hot (≤ 135 °F (57.2 °C)) wash and the coldest cold wash. If a selection is not available at the 25, 50 or 75 percent position, in place of each such unavailable selection use the next warmer setting. Each reportable value to be used for the warm water wash setting shall be the arithmetic average of all tests conducted pursuant to this section.

3.5.2.1 *Maximum test load and water fill.* Hot water consumption (Hw_x), cold water consumption (Cw_x), and electrical energy consumption (Ew_x) shall be measured with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.5.2.2 *Minimum test load and water fill.* Hot water consumption (Hw_n), cold water consumption (Cw_n), and electrical energy consumption (Ew_n) shall be measured with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.5.2.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hw_a), cold water consumption (Cw_a), and electrical energy consumption (Ew_a) with an average test load size as determined per Table 5.1 of this Appendix.

3.6 *''Cold Wash'' (Minimum Wash Temperature Selection).* Water and electrical energy consumption shall be measured for each water fill level or test load size as specified in sections 3.6.1 through 3.6.3 of this Appendix for the coldest wash temperature selection available. For a clothes washer that offers two or more wash temperature settings labeled as cold, such as ''Cold'' and ''Tap Cold'', the setting with the minimum wash temperature shall be considered the cold wash. If any of the other cold wash temperature settings add hot water to raise the wash temperature above the cold water supply temperature, as defined in

section 2.3 of this Appendix, those setting(s) shall be considered warm wash setting(s), as defined in section 1.34 of this Appendix. If none of the cold wash temperature settings add hot water for any of the water fill levels or test load sizes required for the energy test cycle, the wash temperature setting labeled as ''Cold'' shall be considered the cold wash, and the other wash temperature setting(s) labeled as cold shall not be required for testing.

3.6.1 *Maximum test load and water fill.* Hot water consumption (Hc_x), cold water consumption (Cc_x), and electrical energy consumption (Ec_x) shall be measured for a cold wash/cold rinse energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.6.2 *Minimum test load and water fill.* Hot water consumption (Hc_n), cold water consumption (Cc_n), and electrical energy consumption (Ec_n) shall be measured for a cold wash/cold rinse energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.6.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hc_a), cold water consumption (Cc_a), and electrical energy consumption (Ec_a) for a cold wash/cold rinse energy test cycle, with an average test load size as determined per Table 5.1 of this Appendix.

3.7 *''Warm Wash/Warm Rinse.''* Water and electrical energy consumption shall be determined for each water fill level and/or test load size as specified in sections 3.7.2.1 through 3.7.2.3 of this Appendix for the applicable warm wash temperature selection as described in section 3.7.1 or 3.7.2 of this Appendix and the hottest available rinse temperature selection.

3.7.1 *Clothes washers with uniformly distributed warm wash temperature selection(s).* Test the warm wash/warm rinse cycle at the wash temperature selection with the temperature selection device at the 50 percent position between the hottest hot (≤ 135 °F (57.2 °C)) wash and the coldest cold wash.

3.7.2 *Clothes washers that lack uniformly distributed warm wash temperature selections.* For a clothes washer with fewer than four discrete warm wash selections, test all warm wash temperature selections. For a clothes washer that offers four or more warm wash selections, test at all discrete selections, or test at 25 percent, 50 percent, and 75 percent positions of the temperature selection device between the hottest hot (≤ 135 °F (57.2 °C)) wash and the coldest cold wash. If a selection is not available at the 25, 50, or 75 percent position, in place of each such unavailable selection use the next warmer setting. Each reportable value to be used for the warm water wash setting shall be the arithmetic average of all tests conducted pursuant to this section.

3.7.2.1 *Maximum test load and water fill.* Hot water consumption (Hww_x), cold water consumption (Cww_x), and electrical energy consumption (Eww_x) shall be measured with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.7.2.2 *Minimum test load and water fill.* Hot water consumption (Hww_n), cold water consumption (Cww_n), and electrical energy consumption (Eww_n) shall be measured with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.7.2.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hww_a), cold water consumption (Cww_a), and electrical energy consumption (Eww_a) with an average test load size as determined per Table 5.1 of this Appendix.

3.8 *Remaining Moisture Content:*

3.8.1 The wash temperature will be the same as the rinse temperature for all testing. Use the maximum test load as defined in Table 5.1 and section 3.1 of this Appendix for testing.

3.8.2 *For clothes washers with cold rinse only:*

3.8.2.1 Record the actual ''bone dry'' weight of the test load (WI_{max}), then place the test load in the clothes washer.

3.8.2.2 Set water level selector to maximum fill.

3.8.2.3 Run the energy test cycle.

3.8.2.4 Record the weight of the test load immediately after completion of the energy test cycle (WC_{max}).

3.8.2.5 Calculate the remaining moisture content of the maximum test load, RMC_{max}, expressed as a percentage and defined as:

$$RMC_{max} = ((WC_{max} - WI_{max})/WI_{max}) \times 100\%$$

3.8.3 *For clothes washers with cold and warm rinse options:*

3.8.3.1 Complete sections 3.8.2.1 through 3.8.2.4 of this Appendix for cold rinse. Calculate the remaining moisture content of the maximum test load for cold rinse, RMC_{COLD}, expressed as a percentage and defined as:

$$RMC_{COLD} = ((WC_{max} - WI_{max})/WI_{max}) \times 100\%$$

3.8.3.2 Complete sections 3.8.2.1 through 3.8.2.4 of this Appendix for warm rinse. Calculate the remaining moisture content of the maximum test load for warm rinse, RMC_{WARM}, expressed as a percentage and defined as:

$$RMC_{WARM} = ((WC_{max} - WI_{max})/WI_{max}) \times 100\%$$

3.8.3.3 Calculate the remaining moisture content of the maximum test load, RMC_{max}, expressed as a percentage and defined as:

$$RMC_{max} = RMC_{COLD} \times (1 - TUF_r) + RMC_{WARM} \times (TUF_r)$$

where:

TUF_r is the temperature use factor for warm rinse as defined in Table 4.1.1 of this Appendix.

3.8.4 Clothes washers that have options such as multiple selections of spin speeds or spin times that result in different RMC values and that are available in the energy test cycle, shall be tested at the maximum and minimum extremes of the available options, excluding any ''no spin'' (zero spin speed) settings, in accordance with requirements in section 3.8.2 or 3.8.3 of this Appendix. The calculated $RMC_{max,max\ extraction}$ and $RMC_{max,min\ extraction}$ at the maximum and minimum settings, respectively, shall be combined as follows and the final RMC to be used in section 4.3 of this Appendix shall be:

$$RMC = 0.75 \times RMC_{max,max\ extraction} + 0.25 \times RMC_{max,min\ extraction}$$

3.9 *''Steam Wash'' for clothes washers equipped with a steam cycle.* Water and electrical energy consumption shall be measured for each water fill level and/or test load size as specified in sections 3.9.1 through 3.9.3 of this Appendix for the hottest wash setting available with steam.

3.9.1 *Maximum test load and water fill.* Hot water consumption (Hs_x), cold water consumption (Cs_x), and electrical energy consumption (Es_x) shall be measured for a steam energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.9.2 *Minimum test load and water fill.* Hot water consumption (Hs_n), cold water consumption (Cs_n), and electrical energy consumption (Es_n) shall be measured for a steam energy test cycle, with the controls set for the minimum

water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this Appendix.

3.9.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hs_a), cold water consumption (Cs_a), and electrical energy consumption (Es_a) for a steam energy test cycle using an average test load size as determined per Table 5.1 of this Appendix.

3.10 *Self-clean.* Set the controls to obtain the self-clean cycle. Hot water consumption (H_{sc}), cold water consumption (C_{sc}), and electric energy consumption (E_{sc}) shall be measured for the self-clean cycle. Do not use a test load.

3.11 *Combined low-power mode power.* Connect the clothes washer to a watt meter as specified in section 2.5.3 of this Appendix. Establish the testing conditions set forth in sections 2.1, 2.2 and 2.11 of this Appendix. For clothes washers that take some time to enter a stable state from a higher power state as discussed in Section 5, Paragraph 5.1, note 1 of IEC 62301 (incorporated by reference; see § 430.3), allow sufficient time for the clothes washer to reach the lower power state before proceeding with the test measurement. Follow the test procedure for the sampling method specified in Section 5, Paragraph 5.3.2 of IEC 62301 for testing in each possible mode as described in sections 3.11.1 and 3.11.2 of this Appendix.

3.11.1 If a clothes washer has an inactive mode as defined in section 1.15 of this Appendix, measure and record the average inactive mode power of the clothes washer, P_{ia}, in watts.

3.11.2 If a clothes washer has an off mode as defined in section 1.23 of this Appendix, measure and record its average off mode power, P_o, in watts.

4. Calculation of Derived Results From Test Measurements

4.1 *Hot water and machine electrical energy consumption of clothes washers.*

4.1.1 *Per-cycle temperature-weighted hot water consumption for maximum, average, and minimum water fill levels using each appropriate load size as defined in section 2.8 and Table 5.1 of this Appendix.* Calculate for the cycle under test the per-cycle temperature weighted hot water consumption for the maximum water fill level, Vh_x, the average water fill level, Vh_a, and the minimum water fill level, Vh_n, expressed in gallons per cycle (or liters per cycle) and defined as:

(a) $Vh_x = [Hs_x \times TUF_s] + [Hm_x \times TUF_m] + [Hh_x \times TUF_h] + [Hw_x \times TUF_w] + [Hww_x \times TUF_{ww}] + [Hc_x \times TUF_c]$

(b) $Vh_a = [Hs_a \times TUF_s] + [Hm_a \times TUF_m] + [Hh_a \times TUF_h] + [Hw_a \times TUF_w] + [Hww_a \times TUF_{ww}] + [Hc_a \times TUF_c]$

(c) $Vh_n = [Hs_n \times TUF_s] + [Hm_n \times TUF_m] + [Hh_n \times TUF_h] + [Hw_n \times TUF_w] + [Hww_n \times TUF_{ww}] + [Hc_n \times TUF_c]$

Where:

Hs_x, Hs_a, and Hs_n, are reported hot water consumption values, in gallons per cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the steam cycle with the appropriate test loads as defined in section 2.8 of this Appendix.

Hm_x, Hm_a, and Hm_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the extra hot wash cycle with the appropriate test loads as defined in section 2.8 of this Appendix.

Hh_x, Hh_a, and Hh_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the hot wash cycle with the appropriate test loads as defined in section 2.8 of this Appendix.

Hw_x, Hw_a, and Hw_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the warm wash cycle with the appropriate test loads as defined in section 2.8 of this Appendix.

Hww_x, Hww_a, and Hww_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the warm wash/warm rinse cycle with the appropriate test loads as defined in section 2.8 of this Appendix.

Hc_x, Hc_a, and Hc_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the cold wash cycle with the appropriate test loads as defined in section 2.8 of this Appendix.

TUF_s, TUF_m, TUF_h, TUF_w, TUF_{ww}, and TUF_c are temperature use factors for steam wash, extra hot wash, hot wash, warm wash, warm wash/warm rinse, and cold wash temperature selections, respectively, and are as defined in Table 4.1.1 of this Appendix.

TABLE 4.1.1—TEMPERATURE USE FACTORS

Max wash temp available	≤135 (57.2 °C)	≤135 °F (57.2 °C)	≤135 °F (57.2 °C)	>135 °F (57.2 °C)	>135 °F (57.2 °C)	Steam	Steam
No. Wash Temp Selections	Single	2 Temps	>2 Temps	3 Temps	>3 Temps	3 Temps	>3 Temps
TUF_s (steam)	NA	NA	NA	NA	NA	0.02	0.02
TUF_m (extra hot)	NA	NA	NA	0.14	0.05	0.12	0.03
TUF_h (hot)	NA	0.63	0.14	NA	0.09	NA	0.09
TUF_{ww} (warm/warm)	NA	NA	*0.27	*0.27	*0.27	*0.27	*0.27
TUF_w (warm)	NA	NA	0.22	0.22	0.22	0.22	0.22
TUF_c (cold)	1.00	0.37	0.37	0.37	0.37	0.37	0.37

* Only applicable to machines offering a warm/warm cycle. For machines with no warm/warm cycle, this value should be zero and TUF_w (warm) should be 0.49.

4.1.2 *Total per-cycle hot water energy consumption for all maximum, average, and minimum water fill levels tested.* Calculate the total per-cycle hot water energy consumption for the maximum water fill level, HE_{max}, the minimum water fill level, HE_{min}, and the average water fill level, HE_{avg}, expressed in kilowatt-hours per cycle and defined as:

(a) $HE_{max} = [Vh_x \times T \times K]$ = Total energy when a maximum load is tested.

(b) $HE_{avg} = [Vh_a \times T \times K]$ = Total energy when an average load is tested.

(c) $HE_{min} = [Vh_n \times T \times K]$ = Total energy when a minimum load is tested.

Where:

T = Temperature rise = 75 °F (41.7 °C).

K = Water specific heat in kilowatt-hours per gallon degree F = 0.00240 (0.00114 kWh/L-°C).

Vh_x, Vh_a, and Vh_n are as defined in section 4.1.1 of this Appendix.

4.1.3 *Total weighted per-cycle hot water energy consumption.* Calculate the total weighted per-cycle hot water energy consumption, HE_T, expressed in kilowatt-hours per cycle and defined as:

$HE_T = [HE_{max} \times F_{max}] + [HE_{avg} \times F_{avg}] + HE_{min} \times F_{min}]$

Where:

HE_{max}, HE_{avg}, and HE_{min} are as defined in section 4.1.2 of this Appendix.

F_{max}, F_{avg}, and F_{min} are the load usage factors for the maximum, average, and minimum test loads based on the size and type of the control system on the washer being tested. The values are as shown in Table 4.1.3 of this Appendix.

TABLE 4.1.3—LOAD USAGE FACTORS

Water fill control system	Manual	Adaptive
F_{max} = ...	[1] 0.72	[2] 0.12
F_{avg} = ...	.....	[2] 0.74
F_{min} = ...	[1] 0.28	[2] 0.14

[1] Reference 3.2.3.3.
[2] Reference 3.2.3.2.

4.1.4 *Total per-cycle hot water energy consumption using gas-heated or oil-heated water.* Calculate for the energy test cycle the per-cycle hot water consumption, HE_{TG}, using gas-heated or oil-heated water, expressed in Btu per cycle (or megajoules per cycle) and defined as:

$HE_{TG} = HE_T \times 1/e \times 3412$ Btu/kWh or $HE_{TG} = HE_T \times 1/e \times 3.6$ MJ/kWh

Where:

e = Nominal gas or oil water heater efficiency = 0.75.

HE_T = As defined in section 4.1.3 of this Appendix.

4.1.5 *Per-cycle machine electrical energy consumption for all maximum, average, and minimum test load sizes.* Calculate the total per-cycle machine electrical energy consumption for the maximum water fill level, ME_{max}, the average water fill level, ME_{avg}, and the minimum water fill level, ME_{min}, expressed in kilowatt-hours per cycle and defined as:

(a) $ME_{max} = [Es_x \times TUF_s] + [Em_x \times TUF_m] + [Eh_x \times TUF_h] + [Ew_x \times TUF_w] + [Eww_x \times TUF_{ww}] + [Ec_x \times TUF_c]$

(b) $ME_{avg} = [Es_a \times TUF_s] + [Em_a \times TUF_m] + [Eh_a \times TUF_h] + [Ew_a \times TUF_w] + [Eww_a \times TUF_{ww}] + [Ec_a \times TUF_c]$

(c) $ME_{min} = [Es_n \times TUF_s] + [Em_n \times TUF_m] + [Eh_n \times TUF_h] + [Ew_n \times TUF_w] + [Eww_n \times TUF_{ww}] + [Ec_n \times TUF_c]$

Where:

Es_x, Es_a, and Es_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the steam cycle.

Em_x, Em_a, and Em_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the extra hot wash cycle.

Eh_x, Eh_a, and Eh_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the hot wash cycle.

Ew_x, Ew_a, and Ew_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the warm wash cycle.

Eww_x, Eww_a, and Eww_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the warm wash/warm rinse cycle.

Ec_x, Ec_a, and Ec_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the cold wash cycle.

TUF_s, TUF_m, TUF_h, TUF_w, TUF_{ww}, and TUF_c are as defined in Table 4.1.1 of this Appendix.

4.1.6 *Total weighted per-cycle machine electrical energy consumption.* Calculate the total per-cycle load size weighted energy consumption, ME_T, expressed in kilowatt-hours per cycle and defined as:

$ME_T = [ME_{max} \times F_{max}] + [ME_{avg} \times F_{avg}] + [ME_{min} \times F_{min}]$

Where:

ME_{max}, ME_{avg}, and ME_{min} are as defined in section 4.1.5 of this Appendix.

F_{max}, F_{avg}, and F_{min} are as defined in Table 4.1.3 of this Appendix.

4.1.7 *Total per-cycle energy consumption when electrically heated water is used.* Calculate for the energy test cycle the total per-cycle energy consumption, E_{TE}, using electrically heated water, expressed in kilowatt-hours per cycle and defined as:

$E_{TE} = HE_T + ME_T$

Where:

ME_T = As defined in section 4.1.6 of this Appendix.

HE_T = As defined in section 4.1.3 of this Appendix.

4.1.8 *Per-cycle self-clean hot water energy consumption when electrically heated water is used.* Calculate the per-cycle self-clean hot water energy consumption, HE_{sc}, expressed in kilowatt-hours per cycle, and defined as:

$HE_{sc} = [H_{sc} \times T \times K] \times 12/295$

Where:

H_{sc} = reported hot water consumption value, in gallons per-cycle, for the self-clean cycle as defined in section 3.10 of this Appendix.

T = Temperature rise = 75 °F (41.7 °C).

K = Water specific heat in kilowatt-hours per gallon degree F = 0.00240 (0.00114 kWh/L-°C).

12 = Representative average number of clothes washer self-clean cycles in a year.

295 = Representative average number of clothes washer cycles in a year.

4.1.9 *Per-cycle self-clean hot water energy consumption using gas-heated or oil-heated water.* Calculate the per-cycle self-clean hot water energy consumption, HE_{SCG}, using gas-heated or oil-heated water, expressed in Btu per cycle (or megajoules per cycle) and defined as:

$HE_{SCG} = [HE_{SC} \times 1/e \times 3412$ Btu/kWh$] \times 12/295$ or $HE_{SCG} = [HE_T \times 1/e \times 3.6$ MJ/kWh$] \times 12/295$

Where:

e = Nominal gas or oil water heater efficiency = 0.75.

HE_{sc} = As defined in section 4.1.8 of this Appendix.

12 = Representative average number of clothes washer self-clean cycles in a year.

295 = Representative average number of clothes washer cycles in a year.

4.1.10 *Per-cycle self-clean machine electrical energy consumption.* Calculate the per-cycle self-clean machine electrical energy consumption, ME_{sc}, expressed in kilowatt-hours per cycle, and defined as:

$ME_{sc} = E_{sc} \times 12/295$

Where:

E_{sc} = Reported electrical energy consumption value, in gallons per-cycle, for the self-clean cycle as defined in section 3.10 of this Appendix.

12 = Representative average number of clothes washer self-clean cycles in a year.

295 = Representative average number of clothes washer cycles in a year.

4.2 *Water consumption of clothes washers.*

4.2.1 *Per-cycle water consumption for steam wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the steam cycle and defined as:

$Qs_{max} = [Hs_x + Cs_x]$
$Qs_{avg} = [Hs_a + Cs_a]$
$Qs_{min} = [Hs_n + Cs_n]$

Where:

Hs_x, Cs_x, Hs_a, Cs_a, Hs_n, and Cs_n are defined in section 3.9 of this Appendix.

4.2.2 *Per-cycle water consumption for extra hot wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the extra hot wash cycle and defined as:

$Qm_{max} = [Hm_x + Cm_x]$
$Qm_{avg} = [Hm_a + Cm_a]$
$Qm_{min} = [Hm_n + Cm_n]$

Where:

Hm_x, Cm_x, Hm_a, Cm_a, Hm_n, and Cm_n are defined in section 3.3 of this Appendix.

4.2.3 *Per-cycle water consumption for hot wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the hot wash cycle and defined as:

$Qh_{max} = [Hh_x + Ch_x]$
$Qh_{avg} = [Hh_a + Ch_a]$
$Qh_{min} = [Hh_n + Ch_n]$

Where:

Hh_x, Ch_x, Hh_a, Ch_a, Hh_n, and Ch_n are defined in section 3.4 of this Appendix.

4.2.4 *Per-cycle water consumption for warm wash with cold rinse.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the warm wash/cold rinse cycle and defined as:

$Qw_{max} = [Hw_x + Cw_x]$
$Qw_{avg} = [Hw_a + Cw_a]$
$Qw_{min} = [Hw_n + Cw_n]$

Where:

Hw_x, Cw_x, Hw_a, Cw_a, Hw_n, and Cw_n are defined in section 3.5 of this Appendix.

4.2.5 *Per-cycle water consumption for warm wash with warm rinse.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the warm wash/warm rinse cycle and defined as:

$Qww_{max} = [Hww_x + Cww_x]$
$Qww_{avg} = [Hww_a + Cww_a]$
$Qww_{min} = [Hww_n + Cww_n]$

Where:

Hww_x, Cww_x, Hww_a, Cww_a, Hww_n, and Cww_n are defined in section 3.7 of this Appendix.

4.2.6 *Per-cycle water consumption for cold wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the cold wash cycle and defined as:

$Qc_{max} = [Hc_x + Cc_x]$
$Qc_{avg} = [Hc_a + Cc_a]$
$Qc_{min} = [Hc_n + Cc_n]$

Where:

Hc_x, Cc_x, Hc_a, Cc_a, Hc_n, and Cc_n are defined in section 3.6 of this Appendix.

4.2.7 *Total weighted per-cycle water consumption for steam wash.* Calculate the total weighted per cycle consumption, Qs_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qs_T = [Qs_{max} \times F_{max}] + [Qs_{avg} \times F_{avg}] + [Qs_{min} \times F_{min}]$

Where:

Qs_{max}, Qs_{avg}, Qs_{min} are defined in section 4.2.1 of this Appendix.

F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this Appendix.

4.2.8 *Total weighted per-cycle water consumption for extra hot wash.* Calculate the total weighted per cycle consumption, Qm_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qm_T = [Qm_{max} \times F_{max}] + [Qm_{avg} \times F_{avg}] + [Qm_{min} \times F_{min}]$

Where:

Qm_{max}, Qm_{avg}, Qm_{min} are defined in section 4.2.2 of this Appendix.

F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this Appendix.

4.2.9 *Total weighted per-cycle water consumption for hot wash.* Calculate the total weighted per cycle consumption, Qh_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qh_T = [Qh_{max} \times F_{max}] + [Qh_{avg} \times F_{avg}] + [Qh_{min} \times F_{min}]$

Where:

Qh_{max}, Qh_{avg}, Qh_{min} are defined in section 4.2.3 of this Appendix.

F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this Appendix.

4.2.10 *Total weighted per-cycle water consumption for warm wash with cold rinse.* Calculate the total weighted per cycle consumption, Qw_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qw_T = [Qw_{max} \times F_{max}] + [Qw_{avg} \times F_{avg}] + [Qw_{min} \times F_{min}]$

Where:

Qw_{max}, Qw_{avg}, Qw_{min} are defined in section 4.2.4 of this Appendix.

F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this Appendix.

4.2.11 *Total weighted per-cycle water consumption for warm wash with warm rinse.* Calculate the total weighted per cycle consumption, Qw_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qww_T = [Qww_{max} \times F_{max}] + [Qww_{avg} \times F_{avg}] + [Qww_{min} \times F_{min}]$

Where:

Qww_{max}, Qww_{avg}, Qww_{min} are defined in section 4.2.5 of this Appendix.

F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this Appendix.

4.2.12 *Total weighted per-cycle water consumption for cold wash.* Calculate the total weighted per cycle consumption, Qc_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qc_T = [Qc_{max} \times F_{max}] + [Qc_{avg} \times F_{avg}] + [Qc_{min} \times F_{min}]$

Where:

Qc_{max}, Qc_{avg}, Qc_{min} are defined in section 4.2.6 of this Appendix.

F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this Appendix.

4.2.13 *Total weighted per-cycle water consumption for all wash cycles.* Calculate the total weighted per cycle consumption, Q_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Q_T = [Qs_T \times TUF_s] + [Qm_T \times TUF_m] + [Qh_T \times TUF_h] + [Qw_T \times TUF_w] + [Qww_T \times TUF_{ww}] + [Qc_T \times TUF_c]$

Where:

Qs_T, Qm_T, Qh_T, Qw_T, Qww_T, and Qc_T are defined in sections 4.2.7 through 4.2.12 of this Appendix.

TUF_s, TUF_m, TUF_h, TUF_w, TUF_{ww}, and TUF_c are defined in Table 4.1.1 of this Appendix.

4.2.14 *Per-cycle self-clean water consumption.* Calculate the total per-cycle self-clean water consumption, Q_{sc}, in gallons per cycle (or liters per cycle) and defined as:

$Q_{sc} = [H_{sc} + C_{sc}] \times 12/295$

Where:

H_{sc} = As defined in section 3.10 of this Appendix.

C_{sc} = As defined in 3.10 of this Appendix.

12 = Representative average number of clothes washer self-clean cycles in a year.

295 = Representative average number of clothes washer cycles in a year.

4.2.15 *Water consumption factor.* Calculate the water consumption factor, WCF, expressed in gallons per cycle per cubic feet (or liter per cycle per liter), as:

$WCF = Qc_T/C$

Where:

Qc_T = As defined in section 4.2.12 of this Appendix.

C = As defined in section 3.1.5 of this Appendix.

4.2.16 *Integrated water consumption factor.* Calculate the integrated water consumption factor, IWF, expressed in gallons per cycle per cubic feet (or liter per cycle per liter), as:

$IWF = [Q_T + Q_{sc}]/C$

Where:

Q_T = As defined in section 4.2.13 of this Appendix.

Q_{sc} = As defined in section 4.2.14 of this Appendix.

C = As defined in section 3.1.5 of this Appendix.

4.3 *Per-cycle energy consumption for removal of moisture from test load.* Calculate the per-cycle energy required to remove the moisture of the test load, D_E, expressed in kilowatt-hours per cycle and defined as:

$D_E = [(F_{max} \times \text{Maximum test load weight}) + (F_{avg} \times \text{Average test load weight}) + (F_{min} \times \text{Minimum test load weight})] \times (RMC - 4\%) \times (DEF) \times (DUF)$

Where:

F_{max}, F_{avg}, and F_{min} are as defined in Table 4.1.3 of this Appendix.

Maximum, average, and minimum test load weights are as defined in Table 5.1 of this Appendix.

RMC = As defined in section 3.8.2.5, 3.8.3.3, or 3.8.4 of this Appendix.

DEF = Nominal energy required for a clothes dryer to remove moisture from clothes = 0.5 kWh/lb (1.1 kWh/kg).

DUF = Dryer usage factor, percentage of washer loads dried in a clothes dryer = 0.91.

4.4 *Per-cycle combined low-power mode energy consumption.* Calculate the clothes washer combined low-power mode energy consumption per cycle, E_{TLP}, expressed in kilowatt-hours per cycle and defined as:

$E_{TLP} = [(P_{ia} \times S_{ia}) + (P_o \times S_o)] \times K_p/295$

Where:

P_{ia} = Washer inactive mode power, in watts, as defined in section 3.11.1 of this Appendix for clothes washers capable of operating in inactive mode; otherwise, $P_{ia} = 0$.

P_o = Washer off mode power, in watts, as defined in section 3.11.2 of this Appendix for clothes washers capable of operating in off mode; otherwise, $P_o = 0$.

S_{ia} = Annual hours in inactive mode as defined as S_{oi} if no off mode is possible, $[S_{oi}/2]$ if both inactive mode and off mode are possible, and 0 if no inactive mode is possible.

S_o = Annual hours in off mode as defined as S_{oi} if no inactive mode is possible, $[S_{oi}/2]$ if both inactive mode and off mode are possible, and 0 if no off mode is possible.

S_{oi} = Combined annual hours for off and inactive mode = 8,465.

K_p = Conversion factor of watt-hours to kilowatt-hours = 0.001.

295 = Representative average number of clothes washer cycles in a year.

4.5 *Per-cycle self-clean energy consumption.* Calculate the clothes washer self-clean energy per cycle, E_{TSC}, expressed in kilowatt-hours per cycle and defined as:

$E_{TSC} = HE_{sc} + ME_{sc}$

Where:

HE_{sc} = As defined in section 4.1.8 of this Appendix.

ME_{sc} = As defined in section 4.1.10 of this Appendix.

4.6 *Modified energy factor.* Calculate the modified energy factor, MEF, expressed in cubic feet per kilowatt-hour per cycle (or liters per kilowatt-hour per cycle) and defined as:

$MEF = C/(E_{TE} + D_E)$

Where:

C = As defined in section 3.1.5 of this Appendix.

E_{TE} = As defined in section 4.1.7 of this Appendix.

D_E = As defined in section 4.3 of this Appendix.

4.7 *Integrated modified energy factor.* Calculate the integrated modified energy factor, IMEF, expressed in cubic feet per kilowatt-hour per cycle (or liters per kilowatt-hour per cycle) and defined as:

$IMEF = C/(E_{TE} + D_E + E_{TLP} + E_{TSC})$

Where:

C = As defined in section 3.1.5 of this Appendix.

E_{TE} = As defined in section 4.1.7 of this Appendix.

D_E = As defined in section 4.3 of this Appendix.

E_{TLP} = As defined in section 4.4 of this Appendix.

E_{TSC} = As defined in section 4.5 of this Appendix.

5. Test Loads

TABLE 5.1—TEST LOAD SIZES

Container volume		Minimum load		Maximum load		Average load	
Cu. ft.	Liter	lb	kg	Lb	kg	lb	Kg
≥ <	≥ <						
0–0.8	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.4
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
Cu. ft.	Liter	lb	kg	Lb	kg	lb	Kg
≥ <	≥ <						
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.7
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.85	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.05	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.25	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.45	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.65	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.85	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.05	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.25	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.45	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.65	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21

Notes: (1) All test load weights are bone dry weights.
(2) Allowable tolerance on the test load weights are ±0.10 lbs (0.05 kg).

6. Waivers and Field Testing

6.1 *Waivers and Field Testing for Nonconventional Clothes Washers.* Manufacturers of nonconventional clothes washers, such as clothes washers with adaptive control systems, must submit a petition for waiver pursuant to 10 CFR 430.27 to establish an acceptable test procedure for that clothes washer if the washer cannot be tested pursuant to the DOE test procedure or the DOE test procedure yields results that are so unrepresentative of the clothes washer's true energy consumption characteristics as to provide materially inaccurate comparative data. In such cases, field testing may be appropriate for establishing an acceptable test procedure. The following are guidelines for field testing which may be used by manufacturers in support of petitions for waiver. These guidelines are not mandatory and the Department may determine that they do not apply to a particular model. Depending upon a manufacturer's approach for conducting field testing, additional data may be required. Manufacturers are encouraged to communicate with the Department prior to the commencement of field tests which may be used to support a petition for waiver. Section 6.3 of this Appendix provides an example of field testing for a clothes washer with an adaptive water fill control system. Other features, such as the use of various spin speed selections, could be the subject of field tests.

6.2 *Nonconventional Wash System Energy Consumption Test.* (1) The field test may consist of a minimum of 10 of the nonconventional clothes washers (''test clothes washers'') and 10 clothes washers already being distributed in commerce (''base clothes washers''). The tests should include a minimum of 50 energy test cycles per clothes washer. The test clothes washers and base clothes washers should be identical in construction except for the controls or systems being tested. Equal numbers of both the test clothes washer and the base clothes washer should be tested simultaneously in comparable settings to minimize seasonal or consumer laundering conditions or variations. The clothes washers should be monitored in such a way as to accurately record the total energy consumption per cycle. At a minimum, the following should be measured and recorded throughout the test period for each clothes washer: Hot water usage in gallons (or liters), electrical energy usage in kilowatt-hours, and the cycles of usage.

(2) The field test results would be used to determine the best method to correlate the rating of the test clothes washer to the rating of the base clothes washer. If the base clothes washer is rated at A kWh per year, but field tests at B kWh per year, and the test clothes washer field tests at D kWh per year, the test unit would be rated as follows:

$A \times (D/B) = G$ kWh per year

6.3 *Adaptive water fill control system field test.* (1) Section 3.2.3.1 of this Appendix defines the test method for measuring energy consumption for clothes washers which incorporate control systems having both adaptive and alternate cycle selections. Energy consumption calculated by the method defined in section 3.2.3.1 of this Appendix assumes the adaptive cycle will be used 50 percent of the time. This section can be used to develop field test data in support of a petition for waiver when it is believed that the adaptive cycle will be used more than 50 percent of the time. The field test sample size should be a minimum of 10 test clothes washers. The test clothes washers should be representative of the design, construction, and control system that will be placed in commerce. The duration of field testing in the user's house should be a minimum of 50 energy test cycles, for each unit. No special instructions as to cycle selection or product usage should be given to the field test participants, other than inclusion of the product literature pack which would be shipped with all units, and instructions regarding filling out data collection forms, use of data collection equipment, or basic procedural methods. Prior to the test clothes washers being installed in the field test locations, baseline data should be developed for all field test units by conducting laboratory tests as defined by section 1 through section 5 of this Appendix to determine the energy consumption, water consumption, and remaining moisture content values. The following data should be measured and recorded for each wash load during the test period: Wash cycle selected, the mode of the clothes washer (adaptive or manual), clothes load dry weight (measured after the clothes washer and clothes dryer cycles are completed) in pounds, and type of articles in the clothes load (*e.g.,* cottons, linens, permanent press). The wash loads used in calculating the in-home percentage split between adaptive and manual cycle usage should be only those wash loads which conform to the definition of the energy test cycle.

Calculate:

T = The total number of energy test cycles run during the field test.

T_a = The total number of adaptive control energy test cycles.

T_m = The total number of manual control energy test cycles.

The percentage weighting factors:

$P_a = (T_a/T) \times 100$ (the percentage weighting for adaptive control selection)

$P_m = (T_m/T) \times 100$ (the percentage weighting for manual control selection)

(2) Energy consumption (HE_T, ME_T, and D_E) and water consumption (Q_T), values calculated in section 4 of this Appendix for the manual and adaptive modes, should be combined using P_a and P_m as the weighting factors.

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Part V

The President

Proclamation 8697—Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses

Federal Register
Vol. 76, No. 153
Tuesday, August 9, 2011

Presidential Documents

Title 3—

The President

Proclamation 8697 of August 4, 2011

Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses

By the President of the United States of America

A Proclamation

The United States enduring commitment to respect for human rights and humanitarian law requires that its Government be able to ensure that the United States does not become a safe haven for serious violators of human rights and humanitarian law and those who engage in other related abuses. Universal respect for human rights and humanitarian law and the prevention of atrocities internationally promotes U.S. values and fundamental U.S. interests in helping secure peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises around the globe. I therefore have determined that it is in the interests of the United States to take action to restrict the international travel and to suspend the entry into the United States, as immigrants or nonimmigrants, of certain persons who have engaged in the acts outlined in section 1 of this proclamation.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of persons described in section 1 of this proclamation would be detrimental to the interests of the United States. I therefore hereby proclaim that:

Section 1. The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:

(a) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.

(b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.

Sec. 2. Section 1 of this proclamation shall not apply with respect to any person otherwise covered by section 1 where the entry of such person would not harm the foreign relations interests of the United States.

Sec. 3. The Secretary of State, or the Secretary's designee, in his or her sole discretion, shall identify persons covered by section 1 of this proclamation, pursuant to such standards and procedures as the Secretary may establish.

Sec. 4. The Secretary of State shall have responsibility for implementing this proclamation pursuant to such procedures as the Secretary, in consultation with the Secretary of Homeland Security, may establish.

Sec. 5. For any person whose entry is otherwise suspended under this proclamation entry will be denied, unless the Secretary of State determines that the particular entry of such person would be in the interests of the United States. In exercising such authority, the Secretary of State shall consult the Secretary of Homeland Security on matters related to admissibility or inadmissibility within the authority of the Secretary of Homeland Security.

Sec. 6. Nothing in this proclamation shall be construed to derogate from United States Government obligations under applicable international agreements, or to suspend entry based solely on an alien's ideology, opinions, or beliefs, or based solely on expression that would be considered protected under U.S. interpretations of international agreements to which the United States is a party. Nothing in this proclamation shall be construed to limit the authority of the United States to admit or to suspend entry of particular individuals into the United States under the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) or under any other provision of U.S. law.

Sec. 7. This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 8. This proclamation is effective immediately and shall remain in effect until such time as the Secretary of State determines that it is no longer necessary and should be terminated, either in whole or in part. Any such termination shall become effective upon publication in the *Federal Register*.

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of August, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

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